Supreme Court Case No. S200944
2nd Appellate District Civil No. B226665

SUPREME COURT
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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RAYMOND MARTINEZ AND GLORIA MARTINEZ,
Plaintiffs, Respondents, and Cross-Appellants,

vs.

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

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 for the State of California,
County of Los Angeles Superior Court Case No. KC 050128,
The Honorable Elihu Berle

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION AND STATEMENT OF CONTENTIONS

Section 998 has one purpose: to encourage parties to settle their disputes. The statutory procedure is designed in classic carrot and stick fashion. The Section encourages parties to extend the offers with the promise of possibly recovering enhanced costs, not otherwise recoverable. The Section encourages parties to accept the offers with the threat of paying enhanced costs, not otherwise recoverable. Since the enhanced costs can, depending on the circumstances, include prejudgment interest, attorneys' fees, and expert fees, the carrot and stick can be quite persuasive.

Section 998 is fairly lengthy and detailed. Nonetheless, it does not answer every possible procedural question that can arise and have arisen in applying the statute. While both this Court and the Courts of Appeal have decided a number of those issues, some complain, not unjustly, that the effect of multiple judicial interpretations has been to discourage settlements or at least discourage the use of the *section 998* procedure. *See* Bloom, "*Bad Compromises*", 27 Los Angeles Lawyer 8 (Nov. 2004), p. 29.

The specific question raised in this appeal is how *section 998* applies when a plaintiff makes two *section 998* offers, the second offer demanding less from the defendant than the first, both of which offers lapse after the statutory period expires, and both of which offers are equaled or surpassed

by the judgment or award in plaintiff's favor.

The more general question raised by this appeal is whether *section 998* imposes any limitation on the recovery of enhanced costs when multiple offers are made. Martinez believes that *section 998* means what it says, and if an offer is equaled or beaten by judgment or award, enhanced costs can be recovered from the date of that offer, whether or not is was a singular offer or one of multiple offers. Brownco believes later offers extinguish earlier ones and the recovery of enhanced costs is measured only from the last equaled or beaten offer. The Second District agreed with Martinez in *Martinez v. Brownco Const. Co.* (2012) 203 Cal.App.4th 507 (superceded by grant of this review).

In the decision below, the Second District reversed the trial court and held that, when a party makes two *section 998* offers more than 30 days apart, the offeror is entitled to cost shifting from the date of the earliest reasonable offer. *Martinez,* 203 Cal.App.4th at 523. The court explained that its result was consistent with, if not compelled by, the statute: "[T]he existing statutory rule, that a judgment will be measured against the earliest reasonable *section 998* offer regardless of later offers, seems clear enough and has the added benefit of having been installed by the Legislature itself." *Martinez,* 203 Cal.App.4th at 523. That rule advances the purpose of the

statute, which is to encourage settlement. "To deny her the benefit of making the first offer simply because she made a later offer would actually discourage her making the later offer, and thus discourage settlement." *Martinez*, 203 Cal. App.4th at 522.

Brownco argues that *Martinez* is inconsistent with a number of other California appellate decisions, and that the proper rule, as set forth in those cases, is that subsequent *section 998* offers extinguish earlier *section 998* offers.

This Court seemingly has three ways in which to decide this appeal. This Court can affirm *Martinez,* and rule that a party who makes two or more valid *section 998* offers, and equals or beats one or more of those offers at trial, is entitled to enhanced costs from the date of the earliest reasonable equaled or beaten offer; thereby disapproving the subsequent offer rule. Gloria Martinez would be entitled to enhanced costs from the date of her first offer.

Alternatively, this Court can reverse *Martinez* and rule that subsequent offers extinguish earlier ones, and therefore Gloria Martinez is only entitled to enhanced costs from the date of her second offer.

A third alternative, which Gloria Martinez advocated in the underlying appeal, is available. This Court can rule that a plaintiff who

makes multiple *declining* offers to compromise is entitled to enhanced costs from the date of the earliest equaled or beaten offer. The same would apply to a defendant making *increasing* offers to compromise. In those situations, the additional offers increase the prospects of settling by making settlement more appealing to the other side. Under that rule, Gloria Martinez would be entitled to enhanced costs from the date of her first offer.

Martinez should be affirmed. This Court should disapprove the subsequent offer rule and hold that enhanced costs are available from the date of the earliest reasonable offer equaled or beaten.

II. STATEMENT OF THE CASE

A. Factual Background

Raymond Martinez was injured in a 2005 electrical explosion at a factory owned and operated by his employer, Saint-Gobain Calmar. Raymond Martinez was seriously injured in the explosion and sued Brownco for personal injuries. Gloria Martinez sued for loss of consortium. [Appendix. Vol. I pp.1-9]

B. Procedural History

The Martinezes filed the lawsuit in March 2007. [App. Vol I, pp. 1-9] Brownco disputed the claim and asserted that the explosion was caused by the negligence of Martinez and his co-worker. Brownco answered the

complaint in May 2007. [App. Vol. I, pp. 10-15]

Saint-Gobain joined the action as plaintiff-in-intervention to protect its claim for reimbursement for the worker's compensation benefits it paid to Raymond Martinez.

The case went to trial before a jury in February 2010. Trial commenced on February 18, 2010 when counsel made their opening statements. On March 29, 2010, the jury returned a special verdict in favor of Raymond and Gloria Martinez for $3,714,832, finding that Brownco was responsible for 50% of the harm caused to Raymond, while Raymond was 10% responsible and Saint-Gobain was 40% responsible. [App. Vol. I, pp. 42-45] The net judgment in favor of Raymond Martinez was $1,646,674. In addition, judgment was entered in favor of Gloria Martinez on her loss of consortium claim for $250,000. [App. Vol. I, pp. 46-50]

This appeal is concerned solely with the effect of Gloria Martinez's two *section 998* offers to compromise made prior to trial. Gloria and Raymond both served *section 998* offers on August 30, 2007, five months after the case had been filed and more than two years before trial commenced. Raymond Martinez offered to settle his claim for $4,750,000. Gloria Martinez offered to settle her claim for $250,000. Brownco did not accept either offer, and the offers were thereby withdrawn by operation of

law after the statutory 30-day period passed. [App. Vol. III, p.348 ¶3; Vol III, pp. 388-390]; *CCP §998*(b)(2).

Raymond and Gloria Martinez served Brownco with their second offers on February 8, 2010, ten days before counsel made their opening statements. Raymond Martinez offered to settle his claim for $1,500,000. Gloria Martinez offered to settle her claim for $100,000. These second offers were deemed withdrawn by operation of law when they had not been accepted before plaintiffs' opening statement commenced on February 18. [App. Vol. III, p.348 ¶4; Vol. III, pp. 392-394]

The judgment in favor of Raymond Martinez ($1,646,674 plus costs) was greater than his second offer to compromise. The judgment in favor of Gloria Martinez ($250,000 plus costs) matched her first (August 30, 2007) offer and beat her second offer.

Following entry of judgment, the Martinezes timely filed a Memorandum of Costs seeking $561,257.14 in costs and expert fees. [App. Vol. I, pp. 51-62] Brownco timely filed a motion to tax costs. For purposes of this appeal, the relevant portion of Brownco's motion to tax sought an order disallowing Gloria Martinez's recovery of fees paid to experts ($188,536.86) incurred prior to her February 8, 2010 offer to compromise. [App. Vol. II, pp. 75-324, specifically, pp. 75-80] The Martinezes opposed

the motion to tax and submitted declarations of counsel in support of their cost claims. [App. Vol. II, pp. 325-346; Vol. III, pp. 347-579] Brownco replied. [App. Vol III, pp. 580-619]

On August 10, 2010, the court entered an order taxing certain costs and allowing the Martinezes' total costs of $348,571.98. [App. Vol. III. pp. 620-621][1] The court applied the subsequent offer rule and taxed (disallowed) the $188,536.86 Gloria Martinez sought to recover for expert fees incurred prior to her second offer to compromise.

Both Brownco and Martinez timely appealed the order on the motion to tax costs. Brownco appealed an issue not raised here (the order allowing plaintiffs to recover the costs of a Power Point presentation used during closing argument). Martinez cross-appealed the issue of the disallowed expert fees incurred after Gloria Martinez's first *section 998* offer but prior to her second *section 998* offer.

On February 10, 2012, the Second Appellate District reversed the trial court's order taxing the expert fees incurred prior to February 8, 2010 (but subsequent to August 30, 2007 – the date of the first offer to

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The Minute Order was later amended *nunc pro tunc* to correct mathematical errors in ways that do not affect the issues on appeal. [App. Vol. IV, pp. 635-636]. The parties also subsequently stipulated to correction of other mathematical errors. Those corrections do affect the issue on this appeal.

compromise). Brownco timely sought review from this Court.

III. DISCUSSION

Section 998 means exactly what it says: when a *section 998* offer is made and the offeree fails to obtain a more favorable result in judgment or award, the offeror is entitled to enhanced costs. A subsequent *section 998* offer does not extinguish an earlier one nor does it deprive the offeror of the benefits of having made an earlier offer. The costs incurred after the early *section 998* offer are real, often substantial, and could have been avoided had the offer been accepted. By making those costs recoverable, *section 998* encourages settlement.

The contrary rule, advanced by Brownco and adopted by several appellate courts, punishes a party for making more than one offer to compromise; thereby reducing the incentive to make the offers and reducing the prospects of settlement. This Court should affirm *Martinez* and disapprove the contrary appellate decisions.

A. Section 998 is Properly Interpreted to Offer Enhanced Costs to Any Party Who Makes a Valid Offer that is Equaled or Beaten by Judgment or Award

Section 998 provides, in pertinent part:

"(d) If an offer made by plaintiff is not accepted and the

defendant fails to obtain a more favorable judgment or award ... the court ..., in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses...actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs."[2]

Brownco wants this Court to impose an exception to that rule and graft onto the statute language akin to: "unless plaintiff makes a subsequent offer in which case costs are recoverable from the date of the last offer." Or to replace the phrase "postoffer costs" with "costs incurred from the date of the last offer." In fairness to Brownco, several appellate decisions have either done just that or have implicitly approved of such an exception. *See Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382; *Palmer v.*

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As for defense offers, the statute provides: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff may not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding..., the court..., in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses...actually incurred and reasonable necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant. *CCP §998(c)(1)*

Schindler Elevator Corp. (2003) 108 Cal.App.4th 154; *Distefano v. Hall* (1968) 263 Cal.App.2d 380; *One Star, Inc. v. Staar Surgical Company,* (2009) 179 Cal.App.4th 1082. Simplistically stated, those cases, using general contract law, conclude that each successive offer extinguishes all earlier offers.

Martinez disagreed and broadly held that "[w]here a party makes two *section 998* offers to compromise more than 30 days apart, the purpose of *section 998* is adequately served by the statute's existing language, which entitles an offeror to cost shifting from the date of the earliest reasonable offer." *Martinez,* 203 Cal.App.4th at 523.

Statutes are interpreted first by reading the statutory language. A clear and unambiguous statute is given its plain meaning so long as a literal interpretation is consistent with the statute's purpose. *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515-1516.

The primary purpose of *section 998* is to encourage settlement, thereby saving the expense and burden of trial. While general contract principles are useful in interpreting *section 998*, those principles should not be applied in a way that conflicts with or defeats the statute's purpose.

"[T]he clear purpose of *section 998* is to encourage the

settlement of lawsuits prior to trial [and] ... general contract law principles should apply to *section 998* offers and acceptances only where such principles neither conflict with nor defeat its purpose."

T.M. Cobb Co v. Sup. Ct. (1984) 36 Cal.3d 273, 280; *see Poster v. Southern California Rapid Transit District Wilson* (1990) 52 Cal.3d 266, 270 ("*Section* 998 clearly reflects this state's policy of encouraging settlements.").

Section 998 encourages settlement by holding out a carrot and stick. The "carrot" is the opportunity that the offeror may recover enhanced costs. The "stick" is the threat to the offeree of enhanced penalties. In *Bank of San Pedro v. Sup. Ct. (Goodstein)* (1992) 3 Cal.4th 797, 804, this Court explained:

> "[T]he policy behind *section 998* ... is plain. It is to encourage settlement by providing a strong financial disincentive to a party–whether it be plaintiff or a defendant–who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settlor the statute provides a

financial incentive to make reasonable settlement offers.)"

See also Bodell, 62 Cal.App.4th 1508, 1525 ("[T]he clear purpose of *section 998* is to encourage settlement of lawsuits prior to trial, and penalize litigants who fail to accept what, in retrospect, is determined to be a reasonable settlement."); *Culbertson v. R. D. Werner Co., Inc.*, (1987) 190 Cal. App. 3d 704, 711 ("It is well settled that the purpose of this section is to encourage the settlement of litigation without trial. Its effect is to punish the plaintiff who fails to accept a reasonable offer from a defendant." [and *visa versa*]).

The statute's purpose is not advanced by making the carrot a little less tasty and the stick less threatening. But that is what happens if each subsequent offer extinguishes previous offers: potentially recoverable costs get smaller and smaller as actual costs expended get larger and larger. Parties will think twice about making a later subsequent offer if, by doing so, they risk losing all of the enhanced costs accumulated from the date of the earlier offer.

Brownco argues that a party will make that subsequent offer even with the risk of losing earlier incurred costs if that party, in reevaluating its case, believes that it cannot equal or beat the earlier offer and wants any shot at recovering enhanced costs. After all, Brownco argues, that is what

the Martinezes did. True enough as far as it goes, but more often than not a party cannot predict the final outcome, and may still be interested in using the *section 998* procedure and its carrot and stick to prompt a late settlement. The subsequent offer rule acts as a deterrent to using the *section 998* procedure the second time around.

Wilson, 72 Cal.App.4th 382[3] and the other decisions that adopt the subsequent offer rule get there by applying contract law to *section 998.* Those decisions rely upon *T.M. Cobb Co v. Sup. Ct.* (1984) 36 Cal.3d 273, which applied contract rules applicable to offers and acceptances in a different *section 998* situation.

In *Cobb,* this Court held that *section 998* offers are not irrevocable. *Section 998* really is silent as to whether offers can be revoked so this is a question that cannot be answered by reading the statute's language. *Section 998* provides that offers are withdrawn after 30 days (or earlier if made shortly before trial) but simply does not address whether they can be revoked within that thirty day period.

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In *Wilson* plaintiff's second *section 998* offer was greater than the first offer and the plaintiff beat only the lesser and first offer. Plaintiff argued that, nonetheless, it should recover its section 998 costs because it beat the first offer. The court disagreed, and adopted the contract law reasoning set forth in *Distefano*, 263 Cal.App.2d 380 that the second offer extinguished the first.

Cobb applied the "well-established principle of contract law that an offer may be revoked by the offeror any time prior to acceptance." *Cobb,* 36 Cal.3d at 278. *Cobb* approvingly cites *Distefano v. Hall* (1968) 263 Cal.App.2d 380 for the proposition that contract law should be applied to *section 998*. *Distefano* is one of the decisions that adopts the subsequent offer rule.[4] *Cobb* further states that "[*Section 998*] does [not] address the effect of a subsequent statutory offer on a prior statutory offer. These questions can only be answered by turning to general principles of contract law." *Cobb,* 36 Cal.3d at 279.

Cobb also disapprovingly cites *Gallagher v. Heritage* (1983) 144 Cal.App.3d 546 insofar as that decision stated that "when an acceptance has not been effected [pursuant to *section 998*], contract law has no applicability." *Cobb* 36 Cal.3d at 279-280. In *Gallagher*, the court held that a subsequent non-statutory oral offer of settlement does not extinguish the statutory offers. *Gallagher* also stated that a second *section 998* offer

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> In *Distefano*, defendant made successive and declining offers of compromise, but the first was made prior to the first trial and the second was made after appeal and before retrial. Neither offer was accepted and plaintiff recovered an amount that was greater than the second offer but less than the first. The court held that the second offer revoked the first and that therefore plaintiff was not required to pay the augmented costs then available under predecessor statute, *section 997*.

"compels no different conclusion." *Gallagher* 144 Cal.App.3d at 550.

The language in *Cobb,* its approving citation to *Distefano,* and its disapproving citation to *Gallagher* can be read to support Brownco's position on this appeal. But *Cobb* was not deciding the issue raised here. *Cobb* clearly states that contract rules should only be applied if they do not conflict with the statutory purpose. *Cobb,* 36 Cal.3d at 280; *see Poster* 52 Cal.3d. at 271 ("[The] *Cobb* decision was careful to emphasize, however, that general contract principles should be invoked in applying *section 998* "only where such principles neither conflict with the statute nor defeat its purpose..."). *Cobb* explained that applying contract rules to the issue before that court – whether *section 998* offers are revocable --advanced the purposed of the statute.

> "[T]he policy of encouraging settlements is best promoted by making *section 998* offers revocable. A party is more likely to make an offer pursuant to *section 998* if that party knows that the offer may be revised if circumstances change or new evidence develops. ... If a party is more likely to make a revocable offer, and less likely to make an irrevocable offer, then more offers will be made if revocation is permitted. *The more offers that are made, the more likely the chance for*

settlement. Thus, it is apparent that the general contract law principle that offers are revocable until accepted serves rather than defeats the statutory purpose of encouraging settlements." *Cobb,* 36 Cal.3d at 281 (*italics* added)

Making offers revocable also serves the public policy of compensating injured parties. The plaintiff is not stuck with a demand that proves to be inadequate. *Cobb,* 36 Cal.3d at 281-282.

Six years after *Cobb,* this Court in *Poster,* 52 Cal.3d 266 declined to apply contract law in deciding that a counteroffer does not revoke a *section 998* offer. The court decided against applying contract law to that issue because to do so would "more likely discourage settlements and to confuse the determination regarding the imposition of costs..." *Poster*, 52 Cal.3d at 271-272.

In the case of multiple offers to compromise the statutory purpose of encouraging settlement is not served by extinguishing earlier offers. It could scarcely be more plain that the subsequent offer rule can only act as a deterrent to making a subsequent offer. The less offers that are made, the less likely the chance for settlement.

Secondarily, to the extent *Distefano et al.* believe that the application of contract law requires that subsequent statutory offers extinguish prior

ones, those decisions are mistaken. Contract rules of offers and acceptance do not apply to lapsed offers. *See Martinez*, 203 Cal.App.4th at 521-522.

The common law contract rules pertaining to offer and acceptance are designed to address different concerns than *section 998*. In the contract offer and acceptance scenario, the rule that a subsequent offer extinguishes a prior offer avoids the unintended consequence of enabling an offeree to pick and choose among multiple offers. When an offeror extends a second offer with different terms than the first, he is signaling that he no longer is willing to enter into a contract on the previous offer's terms. The bright-line subsequent offer rule in that situation avoids sticking a party with a deal that the party no longer is agreeable to making.

In the *section 998* multiple offer scenario, an earlier offer was made, it lapsed by statutory operation of law, and now a new offer is made. The other party can either accept, reject or ignore the new offer. But there is no reason in contract law why the first offer, which the offeree has previously rejected or ignored, should be deemed invalid for *section 998* purposes. There is no surprise or unintended consequence to be avoided – the offeree allowed the earlier offer to lapse with its statutory consequences intact.

Martinez is right. The first, lapsed offer retains no contractual significance (it is no longer open to be accepted); but that does not mean

that by making a second offer the offeror should lose the accrued *section 998* benefits.

Applying the subsequent offer rule undermines *section 998.* Allowing the recovery of enhanced costs from the date of the first offer allows parties to make that second offer without being penalized. *See One Star, Inc. v. Staar Surgical Company* (2009) (Second District) 179 Cal.App.4th 1082*; Ray v. Goodman* (2006) (First District) 142 Cal.App.4th 83.

One Star recognizes and seemingly endorses the "bright-line" subsequent offer rule and the application of contract law to *section 998* interpretation. Nonetheless, *One Star* distinguished itself from and did something very different than the two subsequent offer rule cases cited in *One Star*: *Wilson*, 72 Cal.App.4th 382 and *Palmer v. Schindler Elevator Corp.* (2003) 108 Cal.App.4th 154.[5] *One Star* declined to apply a mechanical application of the subsequent offer rule. In *One Star,* the defendant made successive offers of compromise in identical amounts. The

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In *Palmer,* plaintiff made successive and declining *section 998* offers. Neither offer was accepted and plaintiff recovered more than both offers. The court held that the second offer was invalid because it had been directed to all defendants jointly and severally. The court denied augmented costs to plaintiff because the second invalid offer extinguished the first offer.

first offer lapsed by operation of law prior to being accepted. The second offer was withdrawn by the defendant 13 days after it had been made, and was neither accepted nor rejected. The plaintiff won at trial but was awarded a judgment in an amount less than the offers to compromise.

One of the issues on appeal was whether the trial court had properly denied defendant's claim for *section 998* augmented costs incurred from the date of the first *section 998* offer. A mechanical application of the subsequent offer rule would require that the second offer evidenced an intent to no longer agree to the first offer, and that therefore the second offer extinguished the earlier offer. Withdrawal only evidences the party's intention that it no longer wished to enter into an agreement based on the second offer; not that it desired to revive the first.

The Court of Appeal, however, decided otherwise: "we conclude ... that if a *section 998* offer is withdrawn by a party prior to its statutory expiration ... then the withdrawing party's right to costs shifting under *section 998* is determined by the last rejected *section 998* offer." *One Star*, 179 Cal.App.4th at 1093-94.

> "As we have discussed, the 'very essence' of *section 998* is its encouragement of settlement. ... The court's reasoning in *T.M. Cobb* suggests that the result urged by [defendant] – that if a

> *section 998* offer is withdrawn by a party prior to its statutory expiration, then the withdrawing party's right to cost shifting under *section 998* is determined by the prior *section 998* offer – is most consistent with the legislative purpose of encouraging settlement. ...[I]f a party knows that it will not be penalized for withdrawing an offer to settle, then it will be more likely to make such an offer in the first instance. More offers thus will be made if revocation is permitted without penalty, and '[t]he more offers that are made the more likely the chance for settlement."

One Star, 179 Cal.App.4th at 1094.

One Star and *Martinez* address different *section 998* subsequent offer scenarios, but both conclude that a rote application of contract offer and acceptance rules can undermine *section 998's* purpose.

The only other case to consider these issues is *Ray v. Goodman* (2006) 142 Cal.App.4th 83. That court was presented with an issue of "first impression: when there are two successive unaccepted *section 998* offers tendered by a successful plaintiff in personal injury litigation, and that plaintiff subsequently recovers a judgment in excess of either offer, from the date of which offer does the prejudgment interest awarded pursuant to

section 3291 begin to run?" *Ray*, 142 Cal.App.4th at 87.

Ray is unlike this case and *Wilson, Palmer, Distefano* and *One Star* because the issue turned on the language of *section 3291*. *Section 3291* explicitly provides that prejudgment interest runs from the date of the first offer. In contrast, *section 998* contains no such language.

Ray, however, makes the very same points made in *One Star* and *Martinez*. *Section 998* (and *section 3291*) are designed to encourage settlement, and early settlement. Those statutes accomplish their purpose when they are interpreted in ways that encourage their use. The subsequent offer rule discourages successive offers.

> "Aside from the clear language of *section 3291*, the policy underlying both sections [*Sections 3291* and *998*], mandates this conclusion. As our Supreme Court has made clear, that policy is the encouragement of settlement of litigation, and one way those two statutes do that is to encourage the parties to make reasonable settlement offers as early as possible in personal injury litigation. If prejudgment interest was to run only from that party's *last section 998* offer, it would necessarily discourage that party from making successive, and lower, *section 998* offers, thus significantly reducing the

chances of pretrial settlement." *Ray* at 91-92.

Ray is right. *One Star* is right. *Martinez* is right. *Section 998* should be interpreted in ways that are consistent with its purpose: to encourage settlement. More offers are better than fewer offers. The more offers that are made, the greater the chance one might be accepted and the case settled.

Parties will think long and hard about making subsequent offers when they know they are cutting off their recovery for costs earlier incurred. And an approach that causes that hesitation is antithetical to *section 998*.

Nonetheless, Brownco argues that the *Wilson et al.* subsequent offer rule is superior rule because it is "bright-line" and avoids certain mischief. The rule adopted in *Martinez* and advocated here is quite bright-line: *section 998* means what it says and the offering party is entitled to enhanced costs from the date of that offer if that offer is met or exceeded by the judgment or award. As for finding a rule that prevents all forms of mischief - Brownco probably hopes for too much.

B. The Martinez Rule Does Not Create Mischief, and the Wilson et al. Rule Does Not Avoid Mischief

Brownco argues, citing to *Wilson et al.*, that any number of odd things might happen if a party can make multiple *section 998* offers and still

retain all the *section 998* benefits from the date of the first offer. Brownco argues that parties could make successive increasing or decreasing or alternatively higher and lower offers with the expectation that he/she will meet or beat one or more of those offers at trial. This is described as playing games or somehow undermining the respect for the system of justice.

It is true that, under a broad application of the *Martinez* rule, a party making any combination of multiple successive offers could be entitled to enhanced costs from the first reasonable offer met or beaten by the judgment or award. Other than apparent exasperation with the idea of dealing with multiple *section 998* offers, Brownco does not explain why any of that is necessarily a bad thing. Multiple settlement demands, offers, and counters can happen with or without *section 998. Section 998* is, however, designed to promote settlement, and the earlier the better. More offers mean more prospects for settlement. Making use of that procedure in the most aggressive way possible to find a sum and a point in time at which a party might settle is simply not abusive of anything.

Brownco also argues, citing *Wilson,* that the subsequent offer rule is justified because a party's evaluation of his or her case evolves, and litigants should be able to learn the facts about their cases before being

threatened with the consequences of refusing a settlement.

The subsequent offer rule is not well designed to address this concern. When a party makes an early *section 998* offer, the offeree is required to evaluate the case. If the offeree mis-evaluates the case at the point in time when the offer is made, then *section 998* potentially imposes a cost on that mis-evaluation. It is, in fact, designed to do just that--the stick part of the carrot and stick. Brownco argues that the subsequent offer rule can relieve an offeree of an early mis-evaluation *if the offeror makes a second offer*. It could, but by doing so the rule discourages that second offer. Brownco really needs a ban on early *section 998* offers; but the legislature did not provide a quiet period.

Brownco's concerns about multiple and confusing offers or offers being made before the case can be properly evaluated are better handled by other aspects of the law, and not by loading the subsequent offer rule into *section 998*. There are two less troublesome ways to address Brownco's concerns. First, *section 998* provides that expert fees are recoverable as a matter of discretion. Second, a court can avail itself of the requirement that *section 998* offers must be reasonable. *See Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152 (*Section 998* offers must be reasonable); *Culberston v. R.D. Werner Company* (1987) 190 Cal.App.3d 704, 710

(court has discretion in awarding expert witness fees under *section 998*); *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821 ("The pretrial offer of settlement required under *section 998* must be realistically reasonable under the circumstances of the particular case.").

This Court has declined to state whether *section 998* requires that the offer be reasonable. *See Regency Outdoors Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 531 ("Assuming, without deciding that *Code of Civil Procedure section 998* entails such a requirement, we conclude that the trial court did not abuse its discretion in awarding fees and costs."). Requiring that *section 998* offers must be reasonable is certainly less intrusive than a blanket subsequent offer rule that, without question, discourages subsequent offers from being made. But even without an explicit reasonableness requirement, Brownco's concerns can be appropriately handled under the statute. *See Bank of San Pedro v. Sup. Ct.* (1992) 3 Cal.4th 797, 803 ("[U]nder *section 998, subdivision (c)* an award of expert witness fees is always within the trial court's discretion.").[6]

Brownco makes another argument. Quoting *Wilson*, Brownco argues that in certain situations the *Martinez* rule might discourage

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6

The language of discretion is contained in both *section 998 (c)* [applicable to defendants recovering under the statute] *and (d)* [applicable to plaintiffs recovering under the statute].

settlement:

> "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 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 by true of the defendant. "Rolling the dice" then becomes somewhat less risky and we note that lawsuits are not often settled by *reducing* the risk of trial." *Wilson*, 72 Cal.App.4th at 390-391.

A rejected *section 998* offer gives the offeror the prospect of a better recovery after judgment or award. That incentive is designed to increase the prospect of the case settling at the time the offer is made. Anytime a *section 998* award is rejected or expires, the upside rewards of proceeding to trial are potentially increased. With a *section 998* offer in its pocket, the offeror's dice game, if that is what it is, looks better than it would have looked without the statute. If at times that reduces the risks of trial and

causes a case to be tried that might not otherwise be tried, then that is the natural consequence of having a *section 998* procedure.

As for the *Wilson* hypothetical plaintiff taking solace in having made an earlier offer and proceeding to trial, the subsequent offer rule does not solve that "problem," if indeed it is a problem. The rule just creates a new problem by making it less likely that the offeror will make use of the statutory procedure on the eve of trial.

Brownco also argues that, in this case, Gloria and Raymond Martinezes' offers were essentially two peas in a pod. Whether Brownco accepted Gloria Martinez's offer or not, the case still would have proceeded to trial because Brownco did not accept Raymond Martinez's offer. Brownco argues that no defendant would accept the wife's offer on a loss of consortium claim while proceeding to defend itself from the husband's injury claim. By doing so, the defendant would be creating a war chest for the husband. In short, Brownco argues that Gloria Martinez made a no risk offer, and that Brownco was right in refusing to settle Gloria Martinez's claim. Similarly, Brownco argues that, even if it had accepted Gloria Martinez's offer, nothing would have been gained to the system because trial on the husband's claim would have proceeded, requiring the same time and testimony, and imposing the same burden on the court system.

None of those concerns have much to do with whether *section 998* should be governed by the subsequent offer rule. Whether Gloria Martinez's offer was reasonable is an entirely separate issue that can be evaluated by the trial court under the case law cited above. *See Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152. (Typically,"[w]here ... the offeror obtains a judgment more favorable than its [*section 998*] offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in *section 998*.") But that prima facie showing can be overcome with a showing that the offer was unrealistic and unreasonable or made solely to gain a strategic advantage. *Carver,* 97 Cal.App.4th at 154.

Browneo made no effort to demonstrate on some sort of evidentiary basis that Gloria Martinez's offer was unreasonable. *See Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 (Prevailing party's *section 998* offer is presumed reasonable and it is losing party's burden to demonstrate otherwise). The Court of Appeal noted that "Gloria made two reasonable offers." *Martinez*, 203 Cal.App.4th at 522. There is no basis in the record from which this Court can rule that Gloria Martinez's early offer was unreasonable.[7]

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[7] The Court of Appeal remanded the case for the trial court to

Brownco made a conscious decision to treat husband and wife as one claim. That choice was not dictated by law. *See Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 742-743. (A spouse's loss of consortium claim is separate and distinct from the other spouse's primary injury claims and can be joined with the primary injury claim or pursued independently.) Brownco assumed whatever risks ensued from treating these separate claims as one. One of those risks was the risk on appeal here: Brownco faced *section 998* consequences from husband and wife's separate offers. If Brownco had settled Gloria Martinez's claim in September 2007, Gloria Martinez would not have been forced to go to trial and recount all her suffering over the previous five years. The loss of consortium claims would not have been tried. And this appeal would not have followed.

C. The California Legislature Has Not Endorsed the Subsequent Offer Rule

"*Section 998* has been part of California law since 1851, and although it has undergone some modifications over the years, it remains essentially unchanged in substance." *West America Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 128 (*quoting Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 585). It is true that legislative

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determine whether the expert fees were reasonably necessary to Gloria Martinez's claim. *Martinez,* 203 Cal.App.4th at 523.

action and history can shed light on legislative intention and that, when interpreting a statute, the courts are to find a meaning that is consistent with the legislative intent and purpose.

But it is improper for a court to "rewrite the statute to conform to an assumed intention which does not appear from its language." *Hutchins v. Waters* (1975) 51 Cal.App.3d 69, 73. The courts are not in the business of adopting approaches, sound or otherwise, that are not the choices adopted by the Legislature in writing the statute. *See Vallerga v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 313, 318 ("In construing a statutory provision, we are not authorized to insert qualifying provisions and we may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed." *quoting People v. One 1940 Ford V8 Coupe* (1950) 36 Cal.2d 471, 475; *accord Rowan v. City and County of San Francisco* (1966) 244 Cal.App.2d 308, 314.

Brownco's legislative history argument is premised on the legislature's inaction and silence. In Brownco's ten page argument on this issue, Brownco uses the words "suggest(s)(ing)," "infer(ence)(red)," "presumably," "indicat(es)(ion)," and "purportedly" nearly a dozen times. In fact, however, the legislature has never done anything about nor

discussed the multiple offer issue in the context of *section 998*.

Brownco is correct that, when *section 998* replaced the predecessor *section 997*, *Distefano* had been decided; but *Distefano* is a very odd factual case. In *Distefano*, the second *section 998* offer was made after appeal and before retrial. The first *section 998* offer had been made before the first trial. By 1994, the year Brownco argues *section 998* was amended to overrule *Encinitas Plaza Real v. Knight* (1989) 209 Cal.App.3d 996, the Fourth District had found *Distefano* to be factually inapposite. In *Gallagher*, 144 Cal.App.3d 546, the Fourth District stated that a second *section 998* offer would not extinguish an earlier one. This Court, in *Cobb*, then disapproved of language in *Gallagher* insofar as that decision distanced itself from the use of contract law in interpreting *section 998*. *Cobb* 36 Cal.3d at 279-280. But by 1990, this Court, in *Poster*, had declined to use contract law as an aid to interpreting *section 998* when such use would be inconsistent with the statute's purpose. *Poster*, 52 Cal.3d at 271-272.

All that is truly clear, is that this Court has not decided the multiple offer issue, and that the legislature has never expressed any opinion on the subject nor has it ever taken any action on anything related to the issue.[8]

8

Brownco is overreaching when it argues that because *Distefano* and *Wilson* were out there, the legislature has endorsed the rule adopted in those decisions.

Brownco relies on two cases in making that argument: *Palos Verdes Faculty Assoc. v. Palos Verdes Peninsula Unified School Dist.* (1978) 21 Cal.3d 650 and *People v. Hallner* (1954) 43 Cal.2d 715. In *Hallner*, the appellant argued that the statute under which he had been charged with bribery did not apply to him because he was not an "executive officer of the state." A forty-year old appellate decision had interpreted "executive officer of the state" to include executive officer in the state (not necessarily a state officer). That very issue had been decided the same way in five later

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Brownco does argue that, in 1981, the legislature enacted *section 3291* (prejudgment interest), which is explicitly triggered from the date of the first *section 998* offer. One could "infer" that this was in response to *Distefano*, which was the only published decision on the multiple offer issue at the time. But why should one "infer" that because the legislature took specific action in substantively addressing the law on prejudgment interest (described by Brownco as being a contentious piece of legislation), that it intended, by its silence, to endorse a contrary and inconsistent interpretation of a statute that was not then being considered and has never been substantively amended on the relevant issue? Why would the Legislature want one rule for *section 3291* and another for *section 998*? A perfectly rational interpretation of events is that the legislature dislikes the *Distefano* rule and simply has never taken the issue up as it applies to *section 998.*

cases, and in four of those cases the defendants filed petitions for hearing in this Court, which were denied. Given that history, this Court held that one could presume that the legislature was aware of and approved the judicial construction.

> "After the enactment of a statute, when a construction has been placed upon it by the highest court of the state, it will be steadily adhered to in subsequent cases, unless very plainly shown to have been wrong, and more especially where the construction so given is supported by a line of uniform decisions, and where it has been acquiesced in by the legislature for a succession of years. In that case, the construction becomes as much a part of the statute as it had been written into it originally." *People v. Hallner* (1954) 43 Cal.2d 715, 720 (*quoting* Black, Construction and Interpretation of the Laws, 2d ed , 1911, §93).

The issue here is not so much the meaning of certain words in a statute. Instead, Brownco (as supported by *Wilson et al.*) is arguing that the absence of words is an invitation to insert words into the statute. And whatever can be said of the appellate treatment of multiple *section 998* offers, this Court, as "the highest court in the state" has not definitively

decided the issue. As for the appellate landscape: the history has been muddled. *Wilson, Distefano* and *Palmer* say one thing. *Gallagher and Martinez* say another. *One Star* does something entirely different.

In short, while Brownco's recitation of *section 998's* history is reasonably accurate, that history says nothing definitive, if anything at all, as to how the legislature intends the statute to apply in the multiple offer scenario. From that absence of legislative guidance, this Court should not adopt a rule that can be shown to be plainly wrong. The subsequent offer rule discourages subsequent offers, discourages settlement, and dilutes *section 998's* benefits.

D. This Court Could Resolve this Issue by Choosing a Middle Ground: the Third Alternative

In the appeal below, Martinez argued that a plaintiff who makes successive and declining *section 998* offers should be given the opportunity to recover augmented costs from the date of the earliest offer equaled or beaten by the judgment or award. Similarly, a defendant who makes successive and increasing *section 998* offers should be given that same opportunity.

By rewarding parties who make offers increasingly favorable to his or her opponent, this rule encourages settlement and rewards behavior that

moves parties toward settlement. The rule also can be factually reconciled with most of the various multiple offer cases. It avoids most of the hypothetical mischief Brownco believes might arise under the *Martinez* rule.

The disadvantage of the rule is that it adds complexity to *section 998* procedure. On reflection in preparing this brief, Martinez has come to believe that *Martinez* is right. The appropriate bright-line rule is the rule that is in the statute currently: "[w]here a party makes two *section 998* offers to compromise more than 30 days apart, the purpose of *section 998* is adequately served by the statute's existing language, which entitles an offeror to cost shifting from the date of the earliest reasonable offer." *Martinez,* 203 Cal.App.4th at 523.

IV. CONCLUSION

The purpose of *section 998* is to encourage settlement. The statute does that by (a) encouraging parties to make reasonable offers by rewarding them with the prospect of recovering enhanced costs; and (b) threatening parties who do not accept those offers with the prospect of paying those costs. The subsequent offer rule offers less encouragement and reduces the threat. It takes some of the teeth out of section 998. The subsequent offer rule does not further the statute's purpose: it frustrates the statute's purpose.

This Court should affirm *Martinez* and disapprove of the contrary appellate cases.

Dated: June 27, 2012

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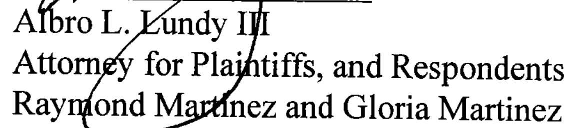
By: 

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CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 7,864 words, including footnotes and this certification. I have relied on the word count feature in WordPerfect in making this certification.

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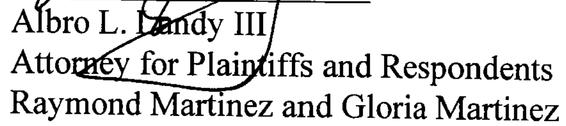
By: 

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Attorney for Plaintiffs and Respondents
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PROOF OF SERVICE
(Non-attorney -- State and Federal)

I am over age 18 and not a party to this cause. I am employed at, and my business address is, 515 Pier Avenue, Hermosa Beach, Los Angeles County, California 90254, in the office of a member of the bar of this court at whose direction service was made.

On June 27, 2012 I served the foregoing document: **RESPONDENTS' ANSWER BRIEF ON THE MERITS** on the interested parties in this action:

X By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Clerk of the Court
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(original + 13 copies)

__ By FACSIMILE TRANSMISSION: I caused all pages of the above-entitled document to be sent to the recipients by facsimile at the respective telephone numbers as indicated.

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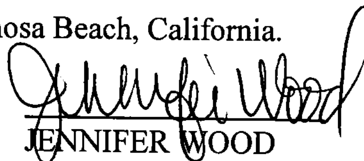
X (BY OVERNIGHT DELIVERY) By: Federal Express, to be delivered on next business day.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 27, 2012 at Hermosa Beach, California.



JENNIFER WOOD

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I am over age 18 and not a party to this cause. I am employed at, and my business address is, 515 Pier Avenue, Hermosa Beach, Los Angeles County, California 90254, in the office of a member of the bar of this court at whose direction service was made.

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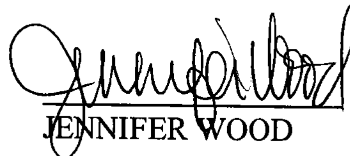

JENNIFER WOOD

Raymond Martinez and Gloria Martinez v. Brownco Construction Company, et al.
Supreme Court Case No. S200944
2nd Appellate District Civil No. B226665
LASC Case No: KC050128 G

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