Filed 8/28/08

**CERTIFIED FOR PARTIAL PUBLICATION***

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(San Joaquin)**

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| ANTONIO BARBA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LUPE PEREZ,<br><br>Defendant and Appellant. | C053428<br><br>(Super. Ct. No. CV025582) |

APPEAL from a judgment of the Superior Court of San Joaquin County, Lauren P. Thomasson, Judge. Affirmed.

Cavazos Law Firm and Hector A. Cavazos, Jr., for Defendant and Appellant.

Aaron O. Anguiano for Plaintiff and Respondent.

Following a special verdict by the jury, the trial court entered judgment in favor of plaintiff and respondent Antonio Barba for $117,053.42 against defendant and appellant Lupe

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication, with the exception of parts I., II., III., IV.A., and IV.B. of the Discussion. Publication shall include the Procedural Background of part IV. and part IV.C. of the Discussion.



(***SEE CONCURRING & DISSENTING OPINION***)

Perez. Following judgment, Perez moved to tax certain costs Barba had claimed under Code of Civil Procedure section 998.[1] Perez's motion was denied in part and granted in part.

Perez appeals from the judgment and the order denying his motion to tax costs, contending that (1) the jury's verdict is not supported by substantial evidence; (2) the trial court erred in denying his motion for nonsuit based on an agency theory of liability; (3) the trial court erred in rejecting his proposed special jury instruction; and (4) the trial court erred in allowing Barba to recover section 998 costs against him. We shall affirm the judgment and order denying the motion to tax costs.

## FACTUAL BACKGROUND

Viewing the evidence most favorable to respondent (Barba), as we must (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52), the record discloses the following facts.

On May 18, 2004, Perez was the owner of the Tropical Club in Lodi, which included a rental housing unit above the club. At the time of the events at issue, Perez was 82 years old, blind, and confined to a wheelchair. Because of his infirmities, his wife Leticia Perez (Leticia)[2] was managing Perez's businesses for

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[1] Undesignated statutory references are to the Code of Civil Procedure.

[2] To avoid confusion between Lupe Perez and his wife Leticia, we will refer to Leticia Perez by her first name. No disrespect is intended.

him, as she had been since May 2003. As part of her managerial duties, Leticia collected rent for the housing unit, hired staff and musicians for the club, paid the employees, and coordinated with vendors for the club's supplies.

On May 18, 2004, Barba and his wife visited Leticia at the apartment above the Tropical Club. Juan Mendoza, a musician at the club and occasional aide to Perez, was also there, preparing to move into the apartment with his wife. Earlier that day, Leticia had asked Mendoza to move an old refrigerator out of the apartment to make room for the new one. When Barba and his wife arrived at the apartment to visit, she asked Barba to help Mendoza move the refrigerator.

The record contains conflicting testimony of the incident, however, it appears that Barba and Mendoza put the refrigerator on a dolly and together began moving it down the stairwell, with Mendoza holding the dolly handles at the top of the stairs and Barba holding the refrigerator from the bottom. After moving the refrigerator a short distance, Mendoza suddenly let go of the dolly handles and the refrigerator fell towards Barba. Barba attempted to hold up the refrigerator by himself but it was too heavy. Barba tried to move out of the way as the refrigerator fell, but it landed on his left foot.

Barba was taken to Lodi Memorial Hospital, and then transferred to UC Davis Medical Center, where he underwent surgery for a broken ankle. As a result of the injuries, Barba

incurred more than $70,000 in medical expenses and lost time from work.

## PROCEDURAL HISTORY

On January 11, 2005, Barba filed a complaint against Perez, alleging Perez was vicariously liable for his injuries due to the negligence of "[his] employee and/or agent[, Juan Mendoza]." On January 20, 2005, Barba served Perez with a summons and complaint, along with an offer to settle the case for $99,999.99 pursuant to section 998.

The case was tried to a jury. The jury answered questions posed on a special verdict form, as follows:

"1. Was JUAN MENDOZA negligent?

"[**ANSWER: Yes**.] . . .

"2. Was JUAN MENDOZA'S negligence a substantial factor in causing harm to ANTONIO BARBA?

"[**ANSWER: Yes**.] . . .

"3. Was JUAN MENDOZA the agent of LETICIA PEREZ or LUPE PEREZ?

"[**ANSWER: Yes**.] . . .

"4. Was JUAN MENDOZA requested to move the refrigerator by LETICIA PEREZ?

"[**ANSWER: Yes**.] . . .

"5. Was LETICIA PEREZ authorized to ask JUAN MENDOZA for assistance in moving the refrigerator?

"[**ANSWER: Yes**.] . . .

"6. Was ANTONIO BARBA negligent?

"[**ANSWER: No.**] . . .

"[¶] . . . [¶]

"8. What are ANTONIO BARBA'S damages?

"a. Medical expenses: **$ 75,053.42**

"b. Loss of Income: **$ 42,000.00**

"c. Non-economic loss, including physical [p]ain/mental suffering: **$ 0.00**

"Total: **$117,053.42**

"9. What percentage of responsibility for ANTONIO BARBA'S harm do you assign to:

"ANTONIO BARBA: [**0**]%

"LUPE PEREZ: **100%**." (Boldface added.)

Based on these answers, the trial court entered judgment in favor of Barba against Perez for $117,053.42.

## DISCUSSION

### I. Substantial Evidence*

Perez argues that the judgment must be reversed because "the verdict was not supported by any evidence of an agency relationship" since "[a]bsent from the record is any indication that [Perez or Leticia] had any right of control over the services of Juan Mendoza." Perez contends that the evidence shows at most that there was an "independent contractor relationship" between the parties. We disagree.

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* See footnote, *ante*, page 1.

The evidence showed conclusively that at all times pertinent, Leticia was fully authorized to act on behalf of her husband. The only contested issue is the sufficiency of the evidence that Mendoza was acting as Leticia's agent at the time he helped Barba move the refrigerator.

A principal is vicariously liable for the acts of an agent committed in the course of the agency relationship, even though the principal may be innocent. (*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1421; *Stokes v. California Horse Racing Bd.* (2002) 98 Cal.App.4th 477, 482.) The principal is held liable as a matter of public policy, in order to promote safety for third persons (*Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 663) and to distribute the loss to the principal who appointed the agent rather than to the innocent third party (*Monteleone v. Southern California Vending Corp.* (1968) 264 Cal.App.2d 798, 808).

Agency is "'"the [bilateral] relationship which results from [(1)] the manifestation of consent by one person to another that the other shall act on his behalf and [(2)] subject to his control, and [(3)] consent by the other so to act."'" (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) "'Proof of an agency relationship may be established by "evidence of the acts of the parties and their oral and written communications."'" (*Id.* at p. 573.)

The existence of an agency relationship is a factual question for the trier of fact whose determination must be

affirmed on appeal if supported by substantial evidence. (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965.) Where findings of fact are challenged on appeal, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below; the court must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

The major characteristic of an agency relationship, as distinguished from that of an independent contractor, is the right to control the agent. (*Dorsic v. Kurtin* (1971) 19 Cal.App.3d 226, 238.) By contrast, an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other, nor subject to the other's right to control. (Rest.2d Agency, § 2, subd. (3).) "'The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. "The right to immediately discharge involves the right of control." [Citations.] *It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent.* The existence of the right of control and supervision establishes the existence of an agency relationship.'" (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566,

1580 (*Michelson*), quoting *Malloy v. Fong* (1951) 37 Cal.2d 356, 370, italics added.)

The factors to be considered in determining if an agency or independent contractor relationship exists include: "(a) whether services performed are a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required; (d) who supplies the instrumentalities, tools and the place of work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; [and] (g) whether the work is a part of the regular business of the principal." (*Stilson v. Moulton-Niguel Water Dist.* (1971) 21 Cal.App.3d 928, 936-937.)

As manager of the Tropical Club, Leticia was responsible for hiring the workers and choosing the musical groups who played there. She also managed the rental unit above the bar. Mendoza was a tenant of the unit and also worked at the club as a musician, receiving a discount on his rent when he played there. Mendoza also occasionally worked at the couple's house in Lodi as a companion to the blind, disabled Perez.

On the day of the accident, Mendoza was moving the refrigerator in furtherance of Leticia's business of renting out the apartment unit. Barba recognized Mendoza as someone who worked for Perez and Leticia asked him to "help us [] move the refrigerator."

From the above evidence, a reasonable jury could find that Mendoza was subject to Leticia's control and supervision and was therefore acting as her agent at the time of the accident. (*Michelson, supra,* 29 Cal.App.4th at p. 1580.)

**II. Motion for Nonsuit***

At the conclusion of Barba's case-in-chief, Perez moved for nonsuit, claiming there was no evidence that Mendoza was either his or Leticia's agent. The trial court denied the motion. Perez now claims that the trial court erred in denying his motion for nonsuit because there was no evidence that he or Leticia exercised control over Mendoza as an agent.

Nonsuit is proper when, "'as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.'" (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 262.) "In reviewing the denial of a motion for nonsuit or directed verdict, appellate courts, like trial courts, must evaluate the evidence in the light most favorable to the plaintiff. [Citation.] Reversal of the denial of a motion for nonsuit or directed verdict is only proper when no substantial evidence exists tending to prove each element of the plaintiff's case." (*Id.* at p. 263.)

The evidence we have noted above that supported the jury's finding of agency was presented entirely during Barba's case-in-chief. Because we find substantial evidence to support this

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* See footnote, *ante*, page 1.

finding, it necessarily follows that the trial court's denial of Perez's motion for nonsuit was proper.

### III. Proposed Special Jury Instruction*

During an in-chambers discussion, Perez requested a special jury instruction that stated something to the effect that he could not be held responsible for the negligence of a "non-servant agent." The trial court refused to give the proposed instruction. Perez now argues that this ruling was error because it deprived him of his right to argue that Mendoza was an independent contractor.

In general, a party is entitled to have the jury instructed on all theories presented that are supported by the evidence and pleadings. (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943.)

However, Perez's argument cannot be considered here, because the proposed jury instruction he claims was erroneously refused is not part of the record. The tendered instruction is not recited in the reporter's transcript, nor are any jury instructions (proposed or given) included in the appellant's appendix. Instead, Perez sets out what he *claims* to be the text of the proposed jury instruction as an exhibit to his opening brief. This is improper. Appellate courts are limited to review of the record on appeal. We cannot consider documents appended to an opening brief that have not been made part of the appellate record. (*Duggan v. Moss* (1979) 98 Cal.App.3d 735,

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* See footnote, *ante*, page 1.

739; see also Cal. Rules of Court, rule 8.204(d); *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451 [statements of facts in appellate briefs not supported by references to the record may be disregarded].)

In any event, the argument is forfeited. Perez does not offer a coherent explanation of how his proposed instruction discussing the conduct of a "non-servant agent" illuminated the distinction between an agent and an independent contractor. The only case cited in Perez's opening brief, *Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 905), analyzes the issue of *ostensible agency*, upon which the jury was not instructed. Perez's inchoate argument and inapposite citation of authority renders the point nonreviewable. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [when appellant asserts a point but fails to support it with reasoned argument and citations to authority, reviewing court may treat it as waived]; *Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007 [failure to cite apposite legal authority constitutes forfeiture of the argument].)

## IV. Section 998 Costs*

***Procedural background****

Along with the summons and complaint, Barba served Perez with an offer to settle the case pursuant to section 998 for

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* See footnote, *ante*, page 1.

$99,999.99.[3] Perez did not respond to the offer and filed an answer to the complaint almost four weeks later.

Following entry of judgment in the amount of $117,053.42, Barba filed a memorandum of costs, including prejudgment interest and expert witness fees, pursuant to section 998. Perez filed a motion to tax costs, contending that such fees and costs were not recoverable. The trial court denied this aspect of the motion.[4]

### *A. Effectiveness of Barba's Section 998 Offer*

Perez argues that "a [section] 998 offer is ineffective if it was served upon a defendant who had not yet entered a general appearance in the action since there was no jurisdiction over him." Thus, he contends, the trial court did not have jurisdiction over him until he filed his *answer*, subsequent to service of the section 998 offer.

This claim is without merit. A trial court has "jurisdiction over a party *from the time summons is served* on

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[3] Section 998 establishes a procedure to shift costs if a party fails to accept a reasonable settlement offer presented not less than 10 days before trial. It provides that if a defendant fails to accept a written offer to compromise by a plaintiff and fails to obtain a more favorable judgment, the defendant must pay the plaintiff's costs incurred after the offer, and may be ordered to pay the expert witness fees. (§ 998, subds. (b), (d).)

[4] The trial court granted the motion to tax costs with regard to a filing fee that had been reimbursed previously and a service of process fee because the court determined the method of service was neither reasonable nor necessary.

him." (§ 410.50, subd. (a), italics added.) A general appearance invokes jurisdiction only when there has been *no service*. (*Ibid.*) The trial court's jurisdiction over Perez commenced on the date he was served with the summons and complaint, along with the section 998 offer, on January 20, 2005. A section 998 offer that is served simultaneously with the summons and complaint in personal injury cases is timely. (See *Ward v. Superior Court* (1973) 35 Cal.App.3d 67, 68.)[5]

### *B. Validity of Service*

Perez also claims that Barba introduced "no competent evidence" that Perez was personally served. However, the reporter's transcript shows that Barba introduced a proof of service at the hearing on Perez's motion to tax costs. The trial court made an express finding that personal service had been made and that Perez waived the issue of service by failing to object until after trial.

Perez has chosen to proceed by way of appellant's appendix, and the proof of service that Barba introduced at the hearing is not part of the record before us.

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[5] Perez's reliance on *Moffett v. Barclay* (1995) 32 Cal.App.4th 980 is misplaced. The plaintiff in that case tendered the section 998 offer before it served the defendant with the summons and complaint. (*Id.* at p. 982.) Barba served the section 998 offer to Perez at the same time he served the summons and complaint. Contrary to Perez's assertions, the *Moffett* court repeatedly states that a person is a party to the action and subject to a court's jurisdiction upon service of the summons and complaint. (*Id.* at pp. 982-983.)

Appealed judgments and orders are presumed correct, and appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) If the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Because Perez has not produced a record sufficient to evaluate his claim that the proof of service was not "competent evidence" of personal service, his claim must be rejected. (See *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1143; *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102.)

**[THE REMAINDER OF THIS OPINION IS CERTIFIED FOR PUBLICATION TO & INCLUDING CONCURRING & DISSENTING OPINION OF SIMS, ACTING P.J.]***

### *C. Reasonableness of Section 998 Offer*

Perez contends that "[e]ven assuming, arguendo, that service of the [section] 998 [offer] was effected while the trial court had jurisdiction," "[i]t is unreasonable to expect that [he], when first faced with the service of summons and a complaint, would have a reasonable basis to believe an offer to compromise was fair." Perez therefore argues the trial court abused its discretion in denying his motion because at the time Barba served him with the section 998 offer, he "had absolutely no basis to determine if the offer was reasonable."

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* See footnote, *ante*, page 1.

Whether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court, and will not be reversed on appeal except for a clear abuse of discretion. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 135-136; cf. *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 502.)

One factor to be considered by the trial court as to the reasonableness of a section 998 offer is the amount offered as compared to the judgment ultimately recovered. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699-700 (*Elrod*).) Where the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable. (*Id.* at p. 700.) Perez points to nothing in the record rebutting this presumption. Indeed, the offer came remarkably close to the amount of damages ultimately awarded by the jury.

Perez uses language in *Elrod* stating, "[i]f the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer" (*Elrod, supra,* 195 Cal.App.3d at p. 699) to argue that he did not have "a reasonable basis to believe [the offer] was fair."

Perez's reliance on *Elrod* is misplaced. In *Elrod*, we upheld the trial court's determination that a *defendant's* low-ball settlement offer to a plaintiff was not reasonable, where the defendant possessed crucial information limiting its exposure

that was unknown to the plaintiff. (*Elrod, supra,* 195 Cal.App.3d at pp. 700-702.)

Here, Barba was not playing "hide the ball." The parties had a close, semi-familial relationship, and there was free flow of information between them. Barba waited eight months after the accident before filing the lawsuit. He wrote a letter before the suit was filed, informing defendant's agent that his medical bills were about $70,000 and requesting that they be paid. The letter fell on deaf ears. Finally, Barba's section 998 offer was served along with a complaint listing medical expenses in excess of $70,000 and seeking damages for lost wages.

The purpose of section 998 is to encourage pretrial settlements and avoid needless litigation. (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280; *Fassberg Construction Co. v. Housing Authority of Los Angeles* (2007) 152 Cal.App.4th 720, 764.) "[T]he trial judge who heard all of the evidence and presumably was in the best position to evaluate [Barba's] offer . . . concluded that it was reasonable." (*Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 117.) We cannot conclude, under the present facts, that the trial court abused its discretion in awarding Barba his fees and costs pursuant to section 998.

Our dissenting colleague advocates a far-reaching extension of *Elrod,* concluding that, absent an almost unheard-of fact scenario that he poses, any section 998 offer served by a plaintiff before the answer is due is per se unreasonable,

ostensibly because the defendant has not had an adequate opportunity to conduct discovery on the issue of damages. We disagree.

Because the Legislature has made an award of costs under section 998 discretionary, appellate decisions have held that trial courts may properly consider whether the subject offer was made in good faith and was reasonable under the existing circumstances. (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 548; *Elrod, supra,* 195 Cal.App.3d at pp. 699-700; *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821; *Pineda v. Los Angeles Turf Club, Inc*. (1980) 112 Cal.App.3d 53, 63.) Even assuming a situation (unlike the one presented here) where a defendant has no information about the plaintiff's damages when served with an early section 998 offer, defense counsel may request that plaintiff provide informal discovery on the damage issue and/or allow an extension of time to respond to the demand. If plaintiff's counsel refused to accord the defendant these courtesies and unyieldingly insisted that defendant respond without information, such conduct could then be presented to the trial court when it considered whether to award special fees and costs. Undoubtedly, such obstinacy would be viewed as potent evidence that plaintiff's offer was neither reasonable nor made in good faith.

This is exactly the way section 998 was designed to operate: to encourage the parties to consider the option of

settlement seriously, before significant fees are incurred and they become entrenched in their positions.

Section 998, subdivision (b) allows an offer of compromise to be served until 10 days prior to commencement of trial. Thus, while it purposely set a deadline beyond which the offer may not be served, the Legislature did not impose any *minimum* period that must elapse following commencement of suit for service of a valid section 998 offer. We respect the Legislature's choice in this area and refuse to impose a judicial "waiting period" for serving an offer to compromise.

## DISPOSITION

The judgment and order denying the motion to tax costs are each affirmed. Plaintiff is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).) **(*CERTIFIED FOR PARTIAL PUBLICATION*)**

BUTZ, J.

I concur:

ROBIE, J.

I concur in parts I, II and III of the majority opinion.

I respectfully dissent from part IV, which affirms the trial court's award of prejudgment interest and expert witness fees under Code of Civil Procedure section 998. (Undesignated statutory references are to the Code of Civil Procedure.) In my view, plaintiff's section 998 offer (998 offer), which was served at the same time as the summons and complaint, was invalid. The majority's contrary conclusion unfortunately adds another wicked slider to a plaintiff's arsenal of hardball litigation tactics: serving a 998 offer with the summons and complaint.

In *Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, this court stated: "[T]he section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Id*. at p. 699.)

In *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, this court recognized the importance of insuring that a party served with a 998 offer be given a reasonable opportunity to evaluate the offer. In *Wilson*, the plaintiff served a 998 offer, in the amount of $150,000, early in the litigation. (*Id.* at p. 387.) The offer was not accepted and was deemed rejected. (*Ibid.*) Closer to trial the plaintiff served a second 998 offer in the amount of $249,000, which was also deemed rejected. (*Ibid.*) The jury's verdict was for $175,000. (*Ibid*.)

The question before this court was whether the first 998 offer, for $150,000, remained valid. Applying traditional

contract principles, we concluded the second 998 offer served to revoke the first offer. (*Id.* at p. 390.) But we also reasoned that allowing the first 998 offer to remain valid would not further the purpose of section 998, which is to encourage settlements. We said, "[T]here 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 the opportunity 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.*" (*Wilson v. Wal-Mart Stores, Inc., supra,* 72 Cal.App.4th at p. 390; italics added.)

I do not think the defendant in this case was given a reasonable opportunity to evaluate plaintiff's 998 offer, which was served with the summons and complaint.

I think a defendant should be entitled to complete minimal discovery before being expected to evaluate and respond to a 998 offer. In the present case, for example, I should think that a defendant should be entitled, at a minimum, to take the plaintiff's deposition and to use formal discovery procedures to discover his medical specials from medical providers.

Yet, in this case, the defendant was required to respond to plaintiff's section 998 offer within 30 days of service of summons and complaint--the same period of time in which defendant was obligated to answer the complaint. Thus, section 998, subdivision (b)(2), provides, "If the offer is not accepted prior to trial or arbitration or *within 30 days after it is*

*made, whichever occurs first,* it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration." Thus, plaintiff's section 998 offer had to be accepted within 30 days of its service (at the same time as the summons and complaint) or else it was deemed withdrawn and could not thereafter have been accepted. (The period to respond to a complaint is 30 days; see § 412.20, subd. (a)(3).)

While it is technically true that a defendant can notice the deposition of the plaintiff as soon as the defendant is served with the summons and complaint (§ 2025.210, subd. (a)), I do not think it is a good idea to force defendants to jam basic discovery into the 30 days following service of the summons and complaint in order to respond to a 998 offer. As a practical matter, here is what typically has to happen within 30 days following service of a personal injury complaint upon a defendant: (1) The defendant has to deliver the summons and complaint to his insurance carrier; (2) A claims adjuster for the insurer has to review the allegations of the complaint with the insured; (3) The claims adjuster has to line up counsel for the defendant; (4) Defense counsel has to discuss the allegations of the complaint with the insured and prepare an answer.

Imagine, if you will, the litigation frenzy that will be produced if defense counsel must also take the plaintiff's deposition and obtain medical specials during this 30-day period. Not to mention the retention of experts and obtaining opinions from them.

Why on earth do we want to do this?

The majority proffer arguments why plaintiff's 998 offer was reasonable and valid in this case.

Thus, the majority assert "the parties had a close, semi-familial relationship, and there was free flow of information between them." However, the "free flow" of information from plaintiff as to his damages was contained in a letter from plaintiff to defendant, which is not a part of the record. With respect, I do not think a defendant should be obligated to evaluate a $99,000 offer based on damages information supplied informally (not under oath) by a plaintiff or his attorney. Although plaintiffs' attorneys are officers of the court, on rare occasions such attorneys have been known to inflate their client's damages in demand letters written prior to discovery. In my view, a 998 offer approaching $100,000 can be reasonably evaluated only after basic discovery procedures (requiring responses under oath) have been used.

The majority also argue that "defense counsel may request that plaintiff provide informal discovery on the damage issue and/or allow an extension of time to respond to the demand." As I have already explained, informal discovery is unsatisfactory. And section 998 provides no mechanism to obtain a court order extending the time to respond to a 998 offer. Defense counsel should not be at the mercy of plaintiff's counsel's charitable mood.

I can envision at least one scenario in which such service of a 998 offer would be reasonable. Imagine a scenario in which plaintiff files a lawsuit for personal injury; defendant answers; and discovery is conducted. But, on the eve of trial,

plaintiff's counsel, who is unprepared for trial, dismisses the lawsuit without prejudice. When plaintiff refiles that lawsuit, in my view, either plaintiff or defendant would act reasonably in serving a 998 offer as soon as defendant is served with the summons and complaint. The key is that the party receiving a 998 offer has had the opportunity for basic discovery.

In the instant case, I would conclude, following *Elrod, supra,* 195 Cal.App.3d, 692 and *Wilson, supra,* 72 Cal.App.4th 382, that the defendant did not have a reasonable opportunity to learn the facts and circumstances of plaintiff's claim and, therefore, the 998 offer was invalid.

I would modify the judgment by excising the section 998 costs awarded to plaintiff and otherwise affirm the judgment as modified.

SIMS, Acting P.J.