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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL C. SEEVER, Plaintiff and Appellant, v. COPLEY PRESS, INC., et al., Defendants and Respondents.	B180062 (Los Angeles County Super. Ct. No. BC277459)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Judgment affirmed; post-judgment orders affirmed in part and reversed and remanded in part.

Mark Weidmann and Scott O. Cummings for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton, Tara Wilcox and Mary P. Snyder; The Copley Press, Inc. and Harold W. Fuson for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, only the Introduction, Factual and Procedural Background, part VIII of the Discussion, and the Disposition are certified for publication.

INTRODUCTION

Plaintiff/appellant, Michael C. Seever ("Seever"), appeals from an adverse judgment following a jury trial and from post judgment orders awarding costs of suit to defendant/respondent, Copley Press, Inc. ("Copley").[1] Seever contended at trial that Copley's termination of his 18 year employment was motivated by age (50 yrs.) and disability (shoulder injury) discrimination and further Copley failed to provide a reasonable accommodation. Copley defended on the basis that Seever's termination, with 17 other people, was dictated by business necessity because the Daily Breeze was losing money as demonstrated by a projected loss of more than $2 million in 2001 alone.

For the reasons hereafter given, we affirm the judgment but reverse the post-judgment orders in part and remand for further proceedings.

FACTUAL AND PROCEDURAL SYNOPSIS

Seever's employment at the Daily Breeze.

The Daily Breeze is a daily newspaper located in Torrance, California, and serves the south bay area of the County of Los Angeles. Seever worked in the maintenance department and was responsible for facilities maintenance, air conditioning, minor electrical and remodeling jobs, painting and equipment monitoring. Seever advanced from maintenance mechanic to supervisor to building superintendent which was a salaried position with exempt status. During Seever's last position, his manager, one Tom Hellems concluded Seever should not be doing any maintenance work himself in

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[1] Seever was employed by the Daily Breeze, a daily newspaper owned and operated by Copley.

view of his salaried, exempt position, and he should delegate the hands-on work to employees hired on an hourly basis. By a series of performance memos directed to Seever from 1990 to 1993, Seever was directed to cease doing hands-on work and to delegate such work to other employees. Hellems thereafter no longer saw Seever doing hands-on work and had no reason to suspect Seever of disobeying his directives to be a desk manager only.

Financial losses of the Daily Breeze.

The Daily Breeze was in competition with the Los Angeles Times whose circulation was 14 times as large. By 2001, the Daily Breeze lost $1.296 million in the first quarter of the year with a projected loss of $2 million by year's end. In order to cut expenses, Art Wible, the Daily News publisher, gave a directive to his executive team to look carefully at their respective departments and to eliminate any unnecessary positions. Two sister papers owned by Copley had been closed down in the late 1990s and Wible felt the Daily Breeze's management ranks had been bloated ever since. As part of the elimination process, Wible made the decision to eliminate the position of general manager and to assume those duties himself.

Following the analysis of the department that Hellems supervised, he noted that Seever was not actively working but had been out of work since February 27, 2001, after tripping over his cat and injuring his shoulder. Seever had been away from work for over 16 weeks in 2000 to care for his ailing wife. During Seever's absence, Hellems had asked Seever's subordinate, one Kevin McCarthy, the maintenance leadman, to handle day to day management duties in the department in addition to his regular hands-on maintenance duties. In spite of being without a building maintenance superintendent for eight of the last 17 months, Hellems concluded that the department was functioning adequately and capably. As a result, Hellems recommended eliminating the building superintendant's position which would result in annual savings of Seever's position in the amount of $47,000. Hellems was required to justify his recommendation in writing by

human resources director Caryn Ratcliff. Ratcliff prepared a matrix comparing Seever's and McCarty's tenure, evaluations and Equal Employment Opportunity ("EEO") data to ensure there were no red flags in eliminating Seever's position.

The Daily Breeze eliminated 18 positions including four senior level managers and the job of building superintendent. Contrary to a loss projection of $2 million in 2001, Copley ended up showing a loss of $4.3 million for the year.

Seever's Superior Court action.

On July 11, 2002, Seever filed an action in the Los Angeles County Superior Court against Copley Press, Inc., Daily Breeze, and 100 fictitious defendants, alleging causes of action as follows: "Complaint for damages for: [¶] (1) Disability discrimination in violation of FEHA; [¶] (2) Disability discrimination in violation of public policy; [¶] (3) Family and medical leave discrimination in violation of FEHA; [¶] (4) Family and medical leave discrimination in violation of public policy; [¶] (5) Age discrimination in violation of FEHA; [¶] [and] (6) Age discrimination in violation of public policy."

On August 26, 2002, Copley filed its "Answer of Defendant The Copley Press, Inc. to Complaint" (unverified) alleging 24 affirmative defenses on behalf of Copley alone contending that the Daily Breeze was erroneously sued as the Daily Breeze which is an operative division of Copley and not a separate legal entity.

Discovery and trial subpoena.

Seever noticed and took 20 depositions. Seever also propounded 780 document demands on Copley. After close of formal discovery, Seever served a trial subpoena on Copley for every single financial document relating to Copley and its divisions over the preceding five years.

Copley responded to the subpoena by making a motion to quash on the ground the subpoena was overbroad. The trial court ordered instead that Copley produce the Daily

Breeze profit and loss statements and balance sheets for the two years prior to termination of Seever, and any financial documents on which Copley planned to rely at time of trial. In response, Copley produced the Daily Breeze profit and loss statements and balance sheets called for in full. Copley also produced an annual income statement showing 2001 year end totals for the Daily Breeze.

In the face of Seever's accusation that Copley was withholding audited financial records, Copley explained that the only audited records it had were compilations of financial data for all Copley divisions, which were never ordered produced, and that a stand alone audited statement for just the Daily Breeze did not exist. Copley offered to produce its audited statements in camera in light of the fact the statements contained confidential financial information relating to a privately held entity. Seever did not object and the court conducted an in camera review and determined that Copley had complied with the order of the court.

Jury trial, verdict, cost order, motion for new trial and motion to tax costs.

The matter took three weeks to try. Verdict was in favor of Copley on all counts. The defense verdict was unanimous on the causes of action for failure to accommodate and medical leave discrimination. Seever made a motion for new trial, to tax costs or to strike Copley's claimed costs, which were all denied.

Seever filed a timely notice of appeal.

DISCUSSION

An analysis of Seever's opening brief on appeal, reveals numerous claims of reversible error by the trial court. The purported errors are as follows: "(1) the court held an improper hearing during trial with only one party present in order to discover whether Respondent had complied with its discovery orders; (2) the court partially quashed Appellant's subpoena for evidence to be produced at trial that was necessary to rebut

Respondent's primary defense; (3) the court continually refused to remedy prejudice caused by Respondent for concealing evidence the court had ordered produced; (4) the court dismissed the jury before nine jurors agreed as to one of the questions on the special verdict form; (5) and the court read instructions to the jury that were incorrect as a matter of law, misleading, and argumentative; . . . (6) in spite of Respondent admitting at trial that it regarded Appellant as disabled, a juror presented evidence of his own injuries in jury deliberations to argue that Appellant's injuries were not disabilities, and [(7)] then despite the uncontroverted evidence the juror voted on the special verdict form that Appellant was not regarded as disabled."

Seever claims to have made continuing objections and requests that the court remedy the prejudice being caused appellant and the court refused.

Seever claims that the court continued to make errors after entry of judgment in the following particulars: The court abused its discretion in awarding costs to Copley in the amount of $85,494. Seever claims that at least $68,134 of the award was not warranted as a matter of law because the court abused its discretion in allowing costs for videotaping depositions which were never used at time of trial, routine travel costs of attorneys to depositions, photocopying costs for exhibits that were never used at trial, and expert witness fees as a penalty under Code of Civil Procedure section 998.[2]

I. Substantial evidence supports the jury verdict Seever was terminated for business reasons.

In reviewing whether the jury verdict was proper and whether the motion for new trial was properly denied, the appellate court is bound by the substantial evidence rule. This court is obligated to affirm the denial of the motion for new trial even though there is *some* evidence in Seever's favor. Otherwise a jury verdict would be meaningless. The appellate court must determine whether on the entire record there is substantial evidence,

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[2] Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

contradicted or uncontradicted, which will support the determination. (*Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1132.) As stated by Copley, under this standard of review the reviewing court must start with the presumption that the record contains evidence to sustain every finding of fact. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 908.) The appellate court must review the evidence in the light most favorable to the prevailing party and indulge all reasonable inferences possible to uphold the jury's verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.)

We focus now on Seever's claim that he was let go because of his disability and leave status and his age. As asserted by Copley, Daily Breeze policy provides its employees nine months of family/medical leave time in a rolling 12-month period, far more than the 12 weeks required by law. In 2000 Seever was permitted to take 16 weeks and three days of paid leave, even though he did not have that much time accrued. In 2001 Seever took 15 weeks of leave even though he only had three weeks available by federal standards. Copley paid Seever his full salary during the entire time he was on leave to care for his wife, even though its policy provides that such leaves are supposed to be unpaid.

Further, as contended by Copley, after the Daily Breeze had lost half a million dollars in December 2000 and was projected to lose $2 million in 2001, Publisher Art Wible decided to try to reduce payroll costs. Because he felt management had remained top heavy since the Daily Breeze's two sister papers were shut down in 1998, he focused on reducing salary costs among managers in particular. He reduced the salary grades of various senior managers at the Daily Breeze and gave his executive team the directive to eliminate unnecessary management positions. Wible personally made the decision to eliminate the number two person at the Daily Breeze and four of the eleven directors and managers on his executive team. In all, the Breeze laid off 18 people in 2001. There was uncontradicted evidence that the Daily Breeze was suffering hard times financially and laid people off for financial reasons.

Copley opines that Hellems, Seever's supervisor, observed that although the maintenance department had been operating without a building superintendent for the four months Seever had been out, the department in his view was nonetheless running smoothly and efficiently. Hellems realized the maintenance department could operate capably with Hellems absorbing some of the superintendent's higher-level managerial functions and with the maintenance leadman absorbing the superintendent's routine functions on top of his usual hands-on maintenance responsibilities. Accordingly, Hellems recommended that Seever's building superintendent position be eliminated. Before Hellems' recommendation was approved, he was first required by the human resources department to write a business justification for his recommendation. Ms. Ratcliff prepared a matrix comparing Seever's and maintenance leadman Kevin McCarthy's EEO status, tenure and performance review information to ensure there were no red flags.

Copley further points out Hellems, Ratcliff and Wible all testified they did not base their decision to eliminate Seever's position on any disability he may have had or on his having taken leave. Wible, who approved the decision to terminate Seever, was unaware of Seever's condition or injury and did not know Seever had ever taken leave.

Substantial evidence supports the jury verdict in favor of Copley pertaining to disability and leave status and age discrimination.

Turning now to Seever's claim that he was denied reasonable accommodation, we find the record to be supportive that denial of reasonable accommodation did not occur. The testimony of Hellems was to the effect that he viewed Seever's building superintendent position to be a desk job which did not and was not supposed to require Seever to perform hands-on work. Hellems in fact had personally directed Seever several years ago to cease responding to maintenance calls himself, and "to stop doing and start managing." Hellems had no reason in 2001 to believe that Seever had violated that directive or was performing any physical work. Substantial evidence supported the view that Seever had a sedentary desk job rather than a physical one. When Seever returned to work in 2001 with lifting restrictions, no one at Copley believed the restrictions had any impact on Seever's ability to perform his managerial job. Seever confirmed this belief by

never suggesting to anyone that he needed any kind of accommodation and never expressed to anyone that he had difficulty doing any aspect of his job due to his shoulder. In short, Seever did not need an accommodation at work because his job did not require him to do anything in violation of his work lifting restriction.

The verdict in favor of Copley on the reasonable accommodation issue is supported by substantial evidence.

II. Propriety of in camera review of Copley's consolidated financial statement.

We initially note that Seever did not object before the in camera hearing occurred, in spite of discussing the subject matter with the court and we further note that Seever did not submit any questions to the court for consideration. Having failed to object, the issue has been waived for purposes of appeal. (See *People v. Price* (1991) 1 Cal.4th 324, 368; *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757, 785 declaring that failure to object to an in camera proceeding constitutes waiver.)

Putting aside the waiver issue for failure to object, we find no error in this instance. As alleged by Copley, in camera review of documents to protect privileged and financially private information from unwarranted disclosure is not only commonplace, but encouraged. Evidence Code section 915, subdivision (b) provides that courts may review documents in chambers to test a privilege or trade secret claim with only the privilege claimant being present. *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 667-668 provides that courts are obliged to examine protected information in camera and exclude from disclosure information that is not necessary to a fair resolution of the case. (See also *People v. Glen Arms Estate, Inc.* (1964) 230 Cal.App.2d 841, 846, fn. 1; *Wells Fargo Bank, N.A. v. Superior Court* (2000) 22 Cal.4th 201, 215; Gov. Code, § 6259, subd. (a) which requires an in camera proceeding where government resists disclosure of public records.)

We find nothing unethical in the trial court's conduct of an in camera review of financial documents in this instance to review privileged documents. No error occurred.

It would have been an abuse of discretion for the trial court to refuse to conduct an in camera review as requested by Copley.

III. Propriety of partial quashing of Seever's trial subpoena.

Seever's trial subpoena of documents was extensive. Pursuant to the subpoena, Copley was required to produce every financial document relating to Copley and all of its divisions over the preceding five years. The court responded to Copley's motion to quash on grounds of overbreadth by requiring Copley to produce Daily Breeze profit and loss statements and balance sheets for the two years prior to the termination of Seever and any financial documents that Copley intended to rely at time of trial. Copley responded to the order of court by producing Daily Breeze profit and loss statements and balance sheets called for in the order in full. As to the documents Copley intended to rely on at time of trial, the annual income statement of the Daily Breeze indicating year end totals for 2001 was produced. The court eventually ruled that Copley had complied with the orders of the court.

The abuse of discretion standard applies when reviewing discovery decisions by the trial courts. (See *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1019; *2,002 Ranch, L.L.C. v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387.) Several reasons exist for determining that the trial court's decision was sound and well within its discretion.

Initially, the trial court was correct in holding that the post-2001 financial documents were irrelevant. Whether and how much Copley eventually saved after the 2001 layoffs was not probative on the issue of whether Copley was motivated by a desire to save money when it laid off Seever and 17 other employees. An employer is not obligated to be right in making a business decision. Even if the layoff strategy failed to yield the savings anticipated by Copley, that would not be evidence of discrimination. The California Supreme Court has emphatically held that it is not proper for the court or jury to second guess an employer's business judgment in a discrimination case. (See *Guz*

v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 358 holding an employer's true reasons need not necessarily have been wise or correct; the issue is whether the employer had discriminatory animus, not whether its decision was wrong or mistaken, and arguments bearing on an employer's business judgment are insufficient to permit a finding of pretext in a discrimination case; see also *Gonzales v. MetPath, Inc.* (1989) 214 Cal.App.3d 422, 428 stating that the employment discrimination laws were never intended to turn the private-sector workforce into a new form of civil service, nor to commission our courts to sit as personnel review boards to oversee business judgments made by private enterprise.) Employers must be given wide latitude to make independent, good-faith personnel decisions without the threat of a jury second-guessing their business judgments. Further, the United States Supreme Court has held in *Reeves v. Sanderson Plumbing Prod., Inc.* (2000) 530 U.S. 133, 147, that in order to show pretext, a plaintiff employee must do more than demonstrate that the employer made a mistake or the employer's reason is not good enough to support its decision. Seever will not be permitted to prevail on an argument that the Daily Breeze failed to make the savings hoped for as reflected in the post-2001 financial documents.

IV. Copley's purported concealment of evidence ordered to be produced at trial.

Seever asserts that the trial court continually refused to remedy prejudice caused by Copley in concealing evidence the trial court ordered produced. The contention is tenuous and worthy of summary treatment. The trial court did make a determination that Copley had complied with the subpoena. We find no breach of discretion by the trial court in this regard. Copley rightfully maintains that a close look at the evidence of what was ordered, produced and testified to demonstrates that Copley complied in full.

In response to the modified trial subpoena, Copley produced profit and loss statements and balance sheets for the Daily Breeze for the two years prior to Seever's layoff in July 2001. Copley also produced an income statement for December 2001 which reflected 2001 year end information and totals.

Seever's counsel complained that he had not been given audited financial statements. However, Copley explained it did not have audited financial statements showing just the financial condition of the Daily Breeze and that its only audited statements were consolidated financials for Copley and its divisions presented as a whole without a breakdown by specific division which had not been ordered produced in any event. After the in camera review the court noted that nowhere was the Daily Breeze mentioned as a separate line item. Copley's controller explained that the corporate office used data set forth in exhibits examined at time of trial to prepare a consolidated income statement and balance sheet organized by expense which were given to the auditors to prepare Copley's audited statements. Specifically for this trial Copley prepared a spreadsheet the day before the in camera review extracting Daily Breeze data from the income and balance sheets so the court could see the format in which Copley provided Daily Breeze data to its auditors. The court ordered Copley to produce this specially prepared extraction but not the consolidated audited statement, which nowhere referenced the Daily Breeze. The controller confirmed there were no additional audited documents.

First, it is to be noted that Seever's counsel offered to accept statements redacted for everything but Daily Breeze data. This court is hard pressed to find the relevance of documents dealing with data from entities other than the Daily Breeze.

Second, Copley's controller testified at trial that the Copley corporate office prepared balance sheets and financial statements for the Daily Breeze. In spite of the fact that counsel would have this court believe that this was an admission by the controller that she was referring to separate, stand-alone financials showing just the Daily Breeze, we do not place such an interpretation on the controller's testimony. Our conclusion is buttressed by the fact that Seever's counsel did not ask any follow up questions to clarify whether reference was being made to stand alone statements or a consolidated statement. In finding that the controller's testimony was consistent with her in camera testimony, no abuse of discretion is found in concluding that the controller was alluding to anything new.

V. Purported dismissal of the jury before nine jurors agreed on one of the questions on the special verdict form.

Because juror number 10, one Mr. Bolton, responded to some of the special verdict questions with the words "not applicable," as revealed at the time the jury was individually polled post verdict, Seever maintains that the jurors were prematurely released by the trial court before a complete verdict had been taken from the jury. The trial court concluded otherwise and we find no abuse of discretion.

The jury was requested and did answer seven questions submitted to it by the court. The composite questions and answers were filed on September 21, 2004. The seven questions and jury response to each question is as follows:

"Claim for Failure to Reasonably Accommodate

"1. Did Michael Seever have a physical condition that limited his ability to perform a major life activity including but not limited to caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working?

"_X_ Yes ___ No

"If your answer to question 1 is yes, then answer question 2. If you answered no, go to question 4.

"2. Did The Copley Press know or think Michael Seever had a physical condition that limited his ability to perform a major life activity including but not limited to caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working?

"_X_ Yes ___ No

"If your answer to question 2 is yes, then answer question 3. If you answered no, go to question 4.

"3. Did The Copley Press fail to provide reasonable accommodation for Michael Seever's physical condition?

"___ Yes _X_ No

"Go to question 4.

"Claim for Disability Discrimination

"4. Did The Copley Press know or think that Michael Seever had a physical condition or a history of a physical condition that limited his ability to perform a major life activity including but not limited to caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working?

"_X_ Yes ___ No

"If your answer to question 4 is yes, then answer question 5. If you answered no, go to question 7.

"5. Was Michael Seever able to perform essential job duties with or without reasonable accommodation for his condition?

"_X_ Yes ___ No

"If your answer to question 5 is yes, then answer question 6. If you answered no, go to question 7.

"6. Was Michael Seever's physical disability a motivating reason for The Copley Press' decision to discharge Michael Seever?

"___ Yes _X_ No

"Go to question 7.

"Claim for California Family Rights Act

"7. Was Michael Seever's taking family care or medical leave a motivating reason for The Copley Press' decision to discharge Michael Seever?

"___ Yes _X_ No"

Each juror was given his own copy of the special verdict form in the jury room, and the jury was instructed that at least nine jurors had to agree on each question to reach a verdict.

After the verdict form was submitted to the clerk, individual polling of the jury took place. A summary of the poll of the jury is as follows: Eleven jurors responded "yes" to questions numbered 1, 2, 3, 4 and 5; eight responded "yes" to question 6; twelve responded "yes" to question 7; three responded "no" to question 6; juror 10 responded

"not applicable" to question 6; and the jury was unanimous in voting "yes" as to question 7.

The court then indicated for the record as follows:

"THE COURT: Before I release the jury, I'm concerned about the response of the juror on not applicable. It would not skew any of the vote. It would not change a verdict on behalf of the plaintiff in terms of the numbers. I just want to verify that.

"MS. WILCOX: I think that makes sense, though, because he sounds like he responded no to the threshold questions and then, accordingly, then that's one lacking element of that claim. So I think that's right, that he would not then keep going.

"THE COURT: Before I release them, I want to put this on the table that it would appear that even though he did not respond to some of the questions, the response was nine—at least nine as to the questions even without considering him answering. [¶] Do you disagree with that, Mr. Cummings?

"MR. CUMMINGS: The response was at least nine?

"THE COURT: There was at least nine responses to each question asked, to form a verdict.

"MR. CUMMINGS: Even a disability—I wouldn't disagree with the counting, no.

"THE COURT: Right. Okay, with that, there is a verdict because nine or more jurors have agreed to a response."

We find no internal inconsistency in the verdict as contended by Seever. Bolton's "no" response to question number 4 is an implied agreement with the jury verdict of "no" to question 6. If Bolton had answered "yes" to question 6, then the verdict surely would have been inconsistent and would have required further inquiry by the court to resolve the inconsistency, but that was not the case. As contended by Copley, it is axiomatic that there can be no disability discrimination where the employer does not know of the disability: "Unless there is some evidence an employer knows an employee is suffering from a disability, it is impossible for an employee to claim he or she was discharged because of it." (*Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 719,

disapproved of on other grounds by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019.)

We find no abuse of discretion by the trial court in finding a valid verdict by at least nine of the twelve jurors in favor of Copley.

VI. Purported instructions to the jury that were misleading, argumentative and incorrect as a matter of law.

The standard of review pertaining to jury instructions is actual prejudice. In *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 577-578 our high court analyzed whether the erroneous inclusion of one instruction and the erroneous omission of another warranted reversal of the judgment and a new trial and came to the conclusion that neither did because neither caused actual prejudice on the record. In reliance on the California Constitution the *Soule* court held at page 574 "A judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice." (Cal. Const., art. VI, § 13.)

Before proceeding to look for prejudice as a result of the trial court's giving of specific jury instructions, we focus on Seever's general complaint that instructions taken from one or more appellate opinions is disfavored. We find such assertion to be incorrect. Seever relies on two cases for the proposition, i.e. *Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479,487[3] and *Tait v. City & County of San Francisco* (1956) 143 Cal.App.2d 787,792. We are not convinced. Our reading of *Williams* and *Tait* is to the effect that trial courts are to use *caution* to insure that instructions tailored from appellate decisions are accurate statements of the law and fit

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[3] We note that *Williams v. Carl Karcher Enterprises, Inc., supra,* 182 Cal.App.3d 479, was overruled and disapproved of in *Soule, supra,* to the extent that decision implied an automatic reversal was required in a civil case where jury instruction error occurred. Instead, the Supreme Court cautioned courts to analyze and determine whether a miscarriage of justice was extant in making a determination of prejudicial error.

the particular case at hand. We find no general statement of disfavor in either opinion, only words of caution.

Seever maintains that he is entitled to a new trial by reason of the prejudice caused when the jury was given instructions 9, 11, 13, 14, 15 and 16. We examine each instruction seriatim for prejudicial error.

1. *Instruction No. 9.*

Instruction No. 9 told the jury: "The purpose of the duty to engage in the interactive process is to make sure the parties take reasonable steps to arrive at a reasonable accommodation. The interactive process is not an end in itself -- it is a means to the end of forging reasonable accommodation."

Seever's argument pertaining to jury instruction No. 9 is cryptic. He maintains that Copley's failure to enter into an interactive process following his presentation of a doctor's note requesting modified duty was mandatory. The instruction is misleading and confusing on its face, according to Seever, because it obfuscates the fact Copley had a duty to enter into an interactive process. This failure to enter into an interactive process may be seen by the jury as a failure to reasonably accommodate in and of itself, contrary to what the instruction suggests.

We agree with Copley that the instruction was directly on point and clarified for the jury that the interactive process is not an end in itself but rather a device to arrive at an accommodation if one is necessary. The record is replete with evidence no accommodation was necessary in view of the fact that Seever's shoulder restriction did not interfere with his desk job and his ability to delegate hands-on work to others. No prejudice is shown in the giving of this instruction. As pointed out by Copley, the jury unanimously found Copley did not deny Seever a reasonable accommodation.

2. *Instruction No. 11.*

Instruction No. 11 told the jury: "The term 'reasonable accommodation' as used in these instructions means making modifications to the work place which allows a person with a disability to perform the essential functions of the job as an employee without a disability. [¶] An employer shall make reasonable accommodation to the disability of any individual with a disability if the employer knows of the disability. As part of its duty to make reasonable accommodations, an employer is not required to do any of the following: [¶] 1. Create a new job position or bump an existing employee from his or her job; [¶] 2. Change the structure of its business; [¶] 3. Make the other employees work harder or longer hours in order to accommodate the disabled employee; [¶] 4. Give the disabled employee the same pay or benefits for less work or less hours; [¶] 5. Eliminate essential functions of the position which the employee held or sought; [¶] 6. Put the disabled employee in a job that he/she is not qualified to do or is unable to do; or [¶] 7. Promote the employee."

Seever's main complaint with jury instruction No. 11 is that it is made up from a patch work of cases, which Seever previously argued was disfavored and which we held to require caution in application only. Seever further contends the instruction constitutes having the judge argue Copley's case for it through the device of jury instructions. It is true that the instruction sets forth examples of accommodations that have been held unreasonable under the circumstances of a particular case. But Copley is quick to point out that the jury was also given CACI No. 2542 entitled "Disability Discrimination -- 'Reasonable Accommodation' Explained," listing examples of reasonable accommodations as follows: "A reasonable accommodation is a reasonable change to the workplace that [redaction] allows an employee with a disability to perform the essential duties of the job [redaction]; [¶] Reasonable accommodations may include the following: [¶] a. Making the workplace readily accessible to and usable by employees with disabilities; [¶] b. Changing job responsibilities or work schedules; [¶] c. Reassigning the employee to a vacant position; [¶] d. Modifying or providing equipment or devices; [¶] e.

Modifying tests or training materials; [¶] f. Providing qualified interpreters or readers; or [¶] g. Providing other similar accommodations for an individual with a disability. [¶] If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith."

We agree with Copley that the duty to provide accommodation is not limitless, but is bound by the requirement that it be reasonable. As contended by Copley, the jury was entitled to be instructed on both sides of what does and what does not constitute reasonable accommodation. The fact that the jury heard both sides of the issue does not work an unlawful prejudice against Seever.

3. *Instruction No. 13.*

Instruction No. 13 told the jury: "Employers are not required to transfer individuals whose positions have been eliminated or to bump employees with less seniority, simply because the individual whose position is being eliminated belongs to a protected class. Employers who reduce their work force for economic reasons incur no duty to transfer an employee to another position within the company."

Seever's dissatisfaction with instruction No. 13 stems from the fact that his subordinate, Kevin McCarthy, was given his position on a fill in basis during Seever's extended absence from work because of his disability. We note that eventually the job was eliminated in its entirety when Hellums determined that downsizing was a viable alternative to stop the constant losses occurring at the Daily Breeze and made a recommendation to that effect to management. A new category of employment was then created in the nature of a *working* supervisor which was given to McCarthy. Seever maintains that as a matter of right he was entitled to a transfer or to an assumption of the new position by virtue of his alleged disability. Seever maintains that instruction No. 13 prejudiced him by giving an erroneous statement of the law on his claim.

We do not agree. As maintained by Copley, the instruction was essential and a correct statement of the law. As contended by Copley, employers are required to transfer

disabled employees who are unable to perform the essential functions of their jobs even with accommodation, but they are not required to give disabled employees super seniority and permit them to bump other employees where the reason the disabled employee is taken out of his or her position is for an unrelated but legitimate reason such as a reorganization or business downsizing. Copley correctly relies on *Rose v. Wells Fargo & Company* (9th Cir. 1990) 902 F.2d 1417, 1422, disapproved of on other grounds in *DiBiase v. Smithkline Beecham Corp.* (1995) 48 F.3d 719, 733. It should be accentuated at this point that Copley was engaged in a company wide lay off, which included the Daily Breeze, in an attempt to stop the hemorrhaging of considerable losses within the company. Under the circumstances we conclude that instruction no. 13 was proper and in effect essential to a fair resolution of the issues faced by the trial court and the jury.

Instruction No. 13 was not prejudicial to Seever for another reason. The jury heard evidence that Copley wanted to avoid demoting employees for morale and efficiency reasons.

When Arthur Wible, chief executive officer and publisher of the Daily Breeze, testified, the jury heard the following examination and testimony on redirect:

"Q. Did you say anything to your managers about the fact that what you really thought ought to be done was to try to move people down in their positions?

"A. No, I did not.

"Q. Why not?

"A. Well, because I don't believe it's a policy that works. My experience has told me in some other places that when you move people back or do bumping issues, that you create other difficulties down through the organization; that you don't know where to stop it as you begin a bump back position. You could literally bump from the top person all the way down to the most entry level position. So I don't believe that works. [¶] I believe it creates a lot of frustration then for not just the tough decisions in this case, the 15 or 20 that would have to be made. But we create difficult situations for numerous

employees throughout the company. And I believe that the majority of the staff had taken their hit. We shouldn't go further down. . . ."

We agree with Copley's contention that Seever's alleged disability by itself did not entitle him to a position he otherwise would not have been given.

Even if instruction No. 13 was erroneous, which it was not, the jury was clearly subjected to testimony alleviating any prejudice to Seever because Copely succinctly demonstrated it wanted to avoid demoting employees for morale and efficiency reasons in anticipation that the Daily Breeze would become profitable.

4. *Instruction No. 14.*

Instruction No. 14 told the jury: "Employees who require a reasonable accommodation for their disability from their employer have a duty to inform their employer of this need. This notice then triggers the employer's burden to take positive steps to accommodate the employee's limitations. Where an employee fails to inform the employer that an accommodation is needed, the employer is under no duty to provide a reasonable accommodation."

Seever contends that instruction No. 14 was an incorrect statement of the law of California because employers who are aware of an employee's disability have an affirmative duty to make reasonable accommodations for such disability. Seever maintains that this duty arises even if the employee has not requested any reasonable accommodation citing *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 949-950 as authority for the proposition. Seever argues that the duty to find reasonable accommodation was triggered when Seever presented Copley with his doctor's notes stating his work restrictions.

We find this argument to be disingenuous for several reasons, the primary of which is to note there is no evidence in the record that the doctor's notes addressed any needed accommodation by Seever to enable him to perform a *non-physical* desk job. Second, we do not interpret our opinion in *Prilliman*, *supra*, to do away with the

requirement that the employer must be aware of the need before the duty to accommodate arises. To the contrary, we held just the opposite. At pages 949 and 950 this court stated: "The Supreme Court of Washington, in interpreting a statute and regulation similar to California Government Code section 12940, subdivision (k),[Fn. 3 in original] held that 'The duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is "aware of respondent's disability and physical limitations." [Citations.] The employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions.' (*Goodman v. Boeing Co.* (1995) 127 Wn.2d 401 [899 P.2d 1265, 1269-1270].)" [Footnote 3 in *Prilliman* reads: "A Washington statute, Wash Rev. Code section 49.60.010, provides that discrimination on the basis of any sensory, mental, or physical handicap is prohibited. 'Liberal construction of RCW 49.60.010 is mandated to accomplish the purpose of eliminating and preventing discrimination. [Citations.] It is an unfair practice for an employer "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . the presence of any . . . handicap". RCW 49.60.180(3). [¶] WAC 162-22 implements RCW 49.60.180. . . . Failure to reasonably accommodate an employee's handicap is an unfair or discriminatory act.' (*Curtis v. Security Bank of Washington* (1993) 69 Wn.App. 12 [847 P.2d 507, 510].) 'WAC 162-22-080(1) provides: [¶] "It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business."' (*Curtis v. Security Bank, supra,* 847 P.2d at p. 510, fn. 3.)".]

Copley convincingly contends in its respondent's brief that the employer cannot be held liable for failing to provide accommodation when indeed it was unaware of a need for accommodation, relying on *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376. We agree with Copley that Copley was not required to mind read even assuming that Seever actually needed some accommodation for a *non-physical desk job* in the first place. No prejudice was suffered by Seever in the giving of instruction No. 14.

5. *Instruction No. 15.*

Instruction No. 15 told the jury: "An employee who is disabled as the term is defined under the Fair Employment and Housing Act is entitled to a 'reasonable' accommodation, not necessarily the perfect accommodation, his preferred accommodation, or the specific accommodation that the employee chooses."

Seever claims that the instruction is simply argument and irrelevant to the facts of this case and contrived to merely enable respondent to argue through the device of a jury instruction. The argument is devoid of any purported prejudice to Seever. Indeed instruction No. 15 is a correct statement of the law as stated in *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228-229. We find no error in the giving of this instruction and even if it contained an erroneous statement of the law, which it does not, we are compelled to find no miscarriage of justice occurred as cautioned by our Supreme Court in *Soule, supra*, 8 Cal.4th at pages 577-578.

6. *Instruction No. 16.*

Instruction No. 16 told the jury: "An employer is not required to offer a choice of reasonable accommodations. The employer has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the one which is easier for it to provide."

Seever's complaint about instruction No. 16 appears to this court to be repetitive of his complaint with respect to instruction No. 15, namely it provides respondent with a base for argument to the jury. Seever maintains the instruction is argumentative, irrelevant, and biased, particularly in view of the fact that there is no dispute that Seever was not given accommodation.

Seever's contention merely states a conclusion and does not reach the issue of whether the instruction is a correct statement of the law. Additionally, Seever's contention does not address the issue of miscarriage of justice as cautioned by our Supreme Court in *Soule, supra,* 8 Cal.4th at pages 577-578. We find, however, the instruction embodies a correct statement of the law as set forth in *Hanson, supra,* 74 Cal.App.4th at pages 228-229. Seever's argument pertaining to instruction No. 16 has no merit and we so hold.

VII. Purported jury misconduct.

Following the jury verdict, Seever filed a motion for new trial, contending, among other things, that the jury committed misconduct in considering extrinsic evidence in arriving at its verdict. The motion for new trial was made pursuant to Code of Civil Procedure section 657, subdivision (2) providing that "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party : . . . [¶] 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. . . ."

The essence of Seever's claim of juror misconduct centers on juror Sean Bolton. Seever's argument is summarized as follows: Bolton voted "not applicable" on special verdict form questions 2, 3, 5, and 6; Bolton presented evidence of his own injuries to

persuade his fellow jurors that Seever was not disabled and did not have serious injuries; Bolton made statements during deliberation that he played sports and sustained many injuries; Bolton told his fellow jurors that he was a soccer player and had more injuries than a professional football player; Bolton argued that based upon his knowledge of his own injuries, Seever wasn't really seriously injured or disabled; Bolton stated that when he sustained similar injuries he was able to manage in his daily life with no problem; and he had injured his arm and that it was not hard for him to deal with only using one arm. In support of his motion for new trial, Seever submitted the declarations of three jurors for the court's consideration in ruling on the motion for new trial, namely, jurors Joseph A. Longo, Marc Maiman and Debra Sullivan.

In relevant part, juror Joseph Longo declared: "Sean Bolton was a Juror in the trial of the above entitled action which started on or about September 1, 2004, and was the individual who voted not applicable as to some of the issues on the special verdict form. . . . [¶] During deliberations Sean Bolton spoke about his own personal injuries and based upon his experience with his own injuries he argued that Mike Seever did not have any serious injuries or disabilitites. . . . [¶] On one particular occasion Sean Bolton stated that he was a soccer player and an athlete and had more injuries than a professional football player. Based on that statement Mr. Bolton was arguing that Michael Seever wasn't really hurt that bad and that he did not have any disabilities. . . . [¶] Mr. Bolton stated that he had sustained similar injuries and that he was able to manage his daily activities with no problem."

In relevant part, juror Marc Maiman declared: "Sean Bolton was a Juror in the trial of the above entitled action which started on or about September 1, 2004, and was the individual who voted not applicable on some of the issues on the special verdicts form. . . . [¶] Sean Bolton made a statement during jury deliberations that he played sports and had sustained many injuries. . . . [¶] During jury deliberations Sean Bolton made a statement regarding his own personal injuries when discussing whether or not Mike Seever had any serious injuries or disabilities."

In relevant part, juror Debra Sullivan declared: "Sean Bolton was a Juror in the trial of the above entitled action which started on or about September 1, 2004, and was the individual who voted not applicable as to some of the issues on the special verdict form. . . . [¶] Sean Bolton made a statement during jury deliberations that something happened to him and he injured his upper torso. Mr. Bolton stated that even though he had this sports injury it wasn't hard for him to deal with personal hygiene or major life activities and based on that he did not believe Mike Seever had any disabilities[.] . . . [¶] During jury deliberations Sean Bolton made statements regarding his own personal injuries when discussing whether or not Michael Seever had any disabilities."

Seever maintains that the aforementioned comments by Bolton as contained in the three juror declarations led to juror misconduct because they considered evidence which was not admitted in the trial before them and Bolton's comments directly infer that Seever was faking his injuries thereby impeaching the credibility of Seever and infecting all issues in the case.

Copley opposed Seever's motion for new trial by filing the declaration of juror Sean Bolton which is summarized in relevant part as follows:[4] "During breaks in the trial I engaged in casual conversation about sports. I mentioned to several of the jurors about the fact I had played sports and had sustained some injuries. I never said this to the jurors in conjunction with Michael Seever or his claim of disability. These conversations took place before the case was submitted to us and we began deliberating. . . . [¶] During the

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[4] Seever contends that the entire declaration of Sean Bolton is composed of his subjective thoughts and conclusions and therefore not eligible for consideration by the trial court under Evidence Code section 1150 which provides in relevant part: "(a) Upon an inquiry as to the validity of the verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to asset to or dissent from the verdict or *concerning the mental processes by which it was determined*." (Italics added.) Only those portions of juror Bolton's declaration which do not run afoul of Evidence Code section 1150, subdivision (a) are considered in this opinion.

second week of trial, while I was listening to a witness being questioned, I developed a bloody nose. Judge House excused me, and I went into the jury room to take care of it. After my nose stopped bleeding, I went into the hallway where other jurors were standing and sitting. One of the jurors asked me what had happened, and I responded that I had played collegiate soccer, had broken my nose several times, and periodically get nose bleeds. I said this in the presence of several jurors. . . . [¶] I also mentioned to other jurors during a break that I had once injured my throwing hand while playing baseball. I believe I mentioned this in conjunction with a conversation about the San Diego Padres. I did not make these remarks in any conversation having to do with Mr. Seever. I never discussed Michael Seever, his injuries or his disability claim with other jurors outside of deliberations. . . . [¶] I never told any of the jurors that I had suffered any kind of rotator cuff or shoulder injury because I never have. . . . [¶] During deliberations, while we were discussing whether Mr. Seever was legally disabled, one of the jurors asked me if I though Mr. Seever was lying about being in pain. I responded to the effect 'No, I don't think he's lying. I played soccer, I had experienced some injuries, and I know what it's like to be in pain.' I never said I believed Mr. Seever was lying or faking about being in pain."

Copley goes to considerable lengths to explain why the declarations submitted by Seever in support of his motion for new trial on grounds of jury misconduct are vague, ambiguous and conjectural. We will not go there. Instead we look to the leadership of our high court for guidance. In *People v. Steele* (2002) 27 Cal.4th 1230, 1265-1266 our Supreme Court taught us that jurors are permitted to rely on their own experiences in considering the evidence by stating: "[I]f we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors . . . never refer to their background during deliberations. 'Jurors are not automatons. . . .'"

We find no jury misconduct in this case and further find that the trial court was correct in denying the motion of Seever for new trial under section 657, subdivision (2).

VIII. Purported post judgment errors in awarding $85,494 in costs to Copley.

Seever contends that the trial court committed error by awarding $85,494 in costs to Copley after the judgment was entered. Seever maintains that at least $68,134 in costs was improper and an abuse of trial court discretion for the following reasons: videotaping expense for depositions never used in trial was improper; routine travel costs for attorneys to attend depositions is unwarranted; exhibit copying costs never used at trial was likewise improper; and allowance for expert witness fees pursuant to section 998 was erroneous in that the 998 offer was not in compliance with the requirement that the offer be definite and certain.

Standard of review.

Both sides are in agreement that the general standard of review for a cost award is *generally* whether the trial court abused its discretion in making the award. Both sides agree and cite *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298 for the proposition. Seever, however, maintains that in this case the general proposition does not govern for the reason that the facts are essentially not in dispute and a de novo standard should be applied. In our view, Copley is correct in urging this court to apply an abuse of discretion standard because this court is not called upon to interpret the statute allowing costs, but only to determine what is "reasonably necessary" and "reasonable in amount" under the statute. We would be hard pressed to find that the abuse of discretion standard is supplanted by a de novo standard in this instance, and we decline to do so.

As pointed out by Copley, the prevailing party in a lawsuit is entitled as a matter of right to recover allowable costs under section 1032, subdivision (b) which provides ". . . (b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." In *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 the California Supreme Court stated "If the items on a

verified cost bill appear proper charges, they are prima facie evidence that the costs, expenses and services therein listed were necessarily incurred. In *Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 266 the court indicated that it is not enough for the losing party to attack submitted costs by arguing that he thinks the costs were not necessary or reasonable. Rather, the losing party has the burden to present evidence and prove that the claimed costs are not recoverable. Copley maintains that Seever has not made a sufficient showing that the following items of costs were unnecessary.

Deposition costs.

Seever's argument against an award for the costs for videotaping depositions is based on the fact that the depositions were not used at time of trial. We note that Seever also videotaped numerous depositions which were not used at time of trial. Pertaining to the videotaping of Seever's deposition, Copley maintains that it was necessary for its trial preparation to prepare its strategy for cross-examination of the most important witness in the case. Copley additionally argues that the videotaping proved to be necessary because counsel who took the depositions was not trial counsel, thereby allowing trial counsel to review the demeanor of the witness in advance of trial. We do not find that the videotaping of depositions in this instance were unnecessary and unreasonable.

Unused exhibits.

Seever's argument against an allowance for the costs of preparing unused trial exhibits has merit. Section 1033.5, subdivision (a)(12), provides, "Models and blowups of exhibits and photocopies of exhibits may be allowed [as costs to the prevailing party under section 1032] if they were reasonably helpful to aid the trier of fact." On its face this statutory language excludes as a permissible item of costs exhibits not used at trial, which obviously could not have assisted the trier of fact. (*Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 775 [under § 1033.5, subd. (a)(12), "fees are not authorized for exhibits not used at trial"]; see *County of Riverside v. City of Murrieta* (1998) 65 Cal.App.4th 616, 629 [request for recovery of costs for blowups and photocopies properly denied when items not reasonably helpful to trial court].)

Although acknowledging costs for exhibits not used at trial are not allowable under section 1033.5, subdivision (a)(12), in *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 363-364, the Court of Appeal affirmed the trial court's award of exhibit costs to the defendants following the plaintiff's dismissal of the underlying action on the day of trial under section 1033.5, subdivision (c)(4), which provides, "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." The *Applegate* court explained, "Items not specifically allowable under [section 1033.5,] subdivision (a) and not prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.' (§ 1033.5, subd. (c)(2).)" (*Applegate*, at pp. 363-364.) The court then cited a number of cases in which costs were allowed in the discretion of the trial court that were "neither specifically authorized nor disallowed by section 1033.5," including legislative history materials and the fees of a special master. (*Applegate*, at p. 364; see also *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1103 ["Reading the two subparts of subdivision (c) together with the rest of the cost statute, we conclude, if an expense is neither expressly allowable under subdivision (a) nor expressly prohibited under subdivision (b), it may nevertheless be recovered if, in the court's discretion, it is 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.' [Citations.]"].)

We agree with the general principle articulated in *Applegate v. St. Francis Lutheran Church*, *supra*, 23 Cal.App.4th at pages 363-364 and *Science Applications Internat. Corp. v. Superior Court*, *supra*, 39 Cal.App.4th at page 1103: If a specific cost item is not identified in either section 1033.5, subdivision (a), or subdivision (b), it may be awarded in the trial court's discretion under section 1033.5, subdivision (c)(4), provided it satisfies the further requirement of section 1033.5, subdivision (c)(2), that it

was reasonably necessary to the conduct of the litigation.[5] However, we respectfully disagree with the *Applegate* court's further assertion that only those costs items expressly prohibited by section 1033.5, subdivision (b),[6] are outside the scope of this discretionary authority. In fact, section 1033.5, subdivision (c)(4), does not refer to subdivision (b), but rather permits a discretionary award only as to "[i]tems not mentioned in this section." While in general items set forth in section 1033.5, subdivision (a), are "expressly allowable" (*Science Applications Internat. Corp*., at p. 1103), subdivision (a) also contains specific limitations that, in our view, circumscribe the court's discretionary authority under section 1033.5, subdivision (c)(4).

Perhaps most obviously, section 1033.5, subdivision (a)(10), provides attorney fees are allowable as costs when authorized by contract, statute or law. Although section 1033.5, subdivision (b), does not address attorney fees, no one would contend the trial court has discretion under section 1033.5, subdivision (c)(4), to award attorney fees as costs in a case not included within one of the three subdivision (a)(10) categories, based on a showing the fees incurred were "reasonably necessary to the conduct of the litigation." Similarly, section 1033.5, subdivision (a)(3), authorizes the recovery of costs for taking, videotaping and transcribing necessary depositions (whether or not actually used at trial), including an original and one copy of depositions taken by the claimant and

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[5] Section 1033.5, subdivision (c)(2)'s requirement that the cost item be reasonably necessary to the conduct of the litigation is applicable to all items allowable as costs, whether awarded under section 1033.5, subdivision (a), or section 1033.5, subdivision (c)(4), as is the requirement that "[a]llowable costs shall be reasonable in amounts." (§ 1033.5, subd. (c)(3).) Subdivision (c)(2), in other words, is a *limitation* on recoverable costs, not an *authorization* for an award of costs not otherwise permitted by statute. (See *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1623 [§ 1033.5 "provides general conditions to which costs are subject"].)

[6] Section 1033.5, subdivision (b), provides, "The following items are not allowable as costs, except when expressly authorized by law: [¶] (1) Fees of experts not ordered by the court. [¶] (2) Investigation expenses in preparing the case for trial. [¶] (3) Postage, telephone, and photocopying charges, except for exhibits. [¶] (4) Costs in investigation of jurors or in preparation for voir dire. [¶] (5) Transcripts of court proceedings not ordered by the court."

one copy of depositions taken by the party against whom costs are allowed. Deposition copies, therefore, are plainly not one of those "[i]tems not mentioned in this section": The Legislature has expressly stated how many copies may be included as recoverable costs; and, in our view, the trial court has no discretion under section 1033.5, subdivision (c)(4), to permit recovery for additional copies even if the prevailing party is able to demonstrate those copies were reasonably necessary to the conduct of the litigation.

Section 1033.5, subdivision (a)(12), is no different: This provision allows the recovery of the cost of photocopies of exhibits, but only if they were reasonably helpful to aid the trier of fact. Because the Legislature has expressly stated in subdivision (a)(12) what is allowable (exhibits used at trial that are reasonably helpful) and implicitly what is not, the discretion granted in section 1033.5, subdivision (c)(4), to award costs for items not mentioned in section 1033.5 is simply inapplicable. Accordingly, we reverse the award of costs in favor of Copley Press, Inc. as to this item.

Travel costs to attend depositions.

The gravamen of Seever's argument against the award of costs for mileage for the use of counsel's private car to attend depositions in Los Angeles is based on the following: an allowance of 37 cents per mile is more than a witness is entitled to under section 1033.5, subdivision (a)(3) in the amount of 20 cents per mile; and the statute does not state that an attorney's mileage is a recoverable cost.

Copley argues that the only cost claimed in this category was mileage lower than the IRS reimbursement rate of 37.5 cents per mile in effect at the time. Copley further contends that the office of Copley's counsel was located in San Diego from the inception of the controversy with Seever. Thus Copley's counsel was required to travel to Los Angeles on many occasions to attend no less than 30 deposition sessions. Copley is quick to point out that no claim was submitted for hotel or meal expenses.

Copley further maintains that the very issue was decided in *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, where the losing party challenged the prevailing party's claim for airfare, hotel and travel expenses incurred by Bakersfield-based counsel to attend depositions in San Diego where the action was filed. The *Thon* court held at page

1548 that "Section 1035.5, subdivision (a)(3) does not limit reimbursement for deposition travel to travel by attorneys practicing in the court's jurisdiction" and refused to read into the statute any such restriction. This court agrees with Copley that the trial court was well within its discretion in awarding travel costs to depositions.

Expert fees under section 998.

Seever maintains Copley's section 998 offer was invalid, thus rendering the cost award for $62,131 erroneous. Copley's offer stated: "Copley will pay plaintiff statutory costs, including attorneys' fees, incurred to the date of this offer in the amount determined by the Court according to proof. This amount is in addition to the $200,001.00 Copley agrees to pay plaintiff as stated above."

Seever relies on *Berg v. Darden* (2004) 120 Cal.App.4th 721, 727 for the general proposition "There 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." We do not take issue with this general proposition. In this case, however, can it be said that the future attorneys' fees and statutory costs in an amount to be determined by the court according to proof in *this* action renders the 998 offer uncertain and invalid in spite of the sum certain set forth in the specific amount of $200,001? We think not. If such were the case, as a matter of logic, no statutory offer under section 998 would dare venture into the murky water of stating a sum certain for future expenses which would be virtually beyond calculation or estimation by reason of the vagaries of the litigation process.

Copley, on the other hand cites to the case of *Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 269 for the proposition that "a sum equal to the amount of reasonable attorneys' fees and taxable costs" contained in a 998 offer, without mentioning a specific amount does not render the 998 offer invalid should the offeree fail to obtain a more favorable award at time of trial. The appellate court reasoned at pages

269-270 that "[A] settlement offer that includes an agreement to pay reasonable attorney fees is analogous to the inclusion of an award of unspecified costs in a judgment, a very commonplace occurrence. The fact that the amount of reasonable costs (in this case, fees) must be determined thereafter does not render the offer fatally uncertain."

We agree with the holding of the appellate court in *Elite, supra,* and find no error in the trial court's award pursuant to section 998. However, assuming Copley's 998 offer nevertheless is deemed "reasonable" and a cost award against Sever appropriate, there remains the issue of the amount of that award. Section 998 requires the amount to be "reasonable." Given the purpose of the statute, reasonableness must be measured by considerations beyond whether it was reasonable for the offering party to have incurred the expense. In our view, the trial court also must take account of the offeree's economic resources in determining what is a "reasonable" cost award.

If the goal of 998 is to encourage fair and reasonable settlements – and not settlements at any cost – trial courts in exercising their discretion must ensure the incentives to settle are balanced between the two parties. Otherwise less affluent parties will be pressured into accepting unreasonable offers just to avoid the risk of a financial penalty they can't afford. Thus, when two competing parties possess vastly disparate economic resources this may require the trial courts to "scale" the financial incentives (in this instance the 998 cost awards) to the parties' respective resources.

This is especially important in the context of litigation under FEHA and similar laws. In those cases, the U.S. Supreme Court in *Christianburg Garment Co. v. EEOC*[7] and California courts as well[8] already have demonstrated sensitivity to the imbalance inherent in allowing equal cost-shifting between unequal parties. Those federal and California decisions deny defendants their attorney fees and discretionary costs in such cases out of concern shifting these litigation expenses to what ordinarily are modest or

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[7] *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 422.

[8] *Rosenmann v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 865, and cases cited therein.

low income individuals would unduly discourage these plaintiffs from litigating legitimate claims.

It is true 998 introduces a new factor into the equation. This code section is designed to create economic incentives on both parties to settle rather than try their lawsuits. To do so, both sides must face some economic consequences if it turns out they miscalculate and lose. Thus, seldom would a court properly deny a successful defendant its entire 998 cost award, even in a FEHA case. But consistent with the rationale of *Christianburg* and like California decisions, it is entirely appropriate and indeed necessary for trial courts to "scale" those awards downward to a figure that will not unduly pressure modest or low income plaintiffs into accepting unreasonable offers.

Because the court here made no inquiry about Seever's financial situation, we do not know whether the cost award allowed here represents an unduly powerful settlement incentive to a litigant of Seever's means. But it could well be the case, given what the record does reveal about Seever's occupation and employment situation. Accordingly, we reverse and remand for a hearing on this issue.

DISPOSITION

The judgment is affirmed. Post-judgment orders are reversed as to the award of costs of exhibits not used at trial and as to costs awarded under section 998 as expert witness fees. The matter is remanded for further evidentiary hearing in accordance with the views expressed herein. Each side to bear its own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

WOODS, J.

We concur:

PERLUSS, P.J. **JOHNSON, J.**