

Be Careful As To What You Offer: Court of Appeal Rules That Defendant's Statutory Offer To Compromise Which Provides For A Dismissal In Lieu Of A Judgment In The Defendant's Favor With Defendant To Waive Costs Does Not Bar A Later Claim For Attorney's Fees By The Plaintiff Which Accepted The Offer

By: Edward F. Morrison, Jr., Esq.
Christina S. Karayan, Esq.

In a case which will certainly impact how Statutory Offers to Compromise are worded under California's statutory offer to compromise statute, the California Court of Appeal, Second District, ruled that an accepted statutory offer to compromise from a defendant may permit a plaintiff to later claim contractual attorney's fees as a prevailing party under contract pursuant to Code of Civil Procedure section 1717 even though the dismissal was entered in lieu of a judgment in favor of the defendant and the offering defendant agreed to waive costs. The decision also provides that the payment of monies by way of a statutory offer, by itself, will not permit the accepting plaintiff to claim that it received a net monetary recovery for purposes of being declared a prevailing party for purposes of the recovery of costs statute found in Code of Civil Procedure section 1032.

The Court of Appeal decision occurred in the case of Chinn v. KMR Property Management (2008) Westlaw 3877464 ("Chinn Case"), a routine premises liability personal injury case which, by virtue of the rulings from the Court of Appeal, will have more than a pedestrian impact on California civil litigation.

The facts of the Chinn Case are routine enough: Issa Chinn and her boyfriend Glenn Jett had an altercation with the manager of their apartment complex, Kenneth Grimes ("Grimes"). In December 2004, Chinn and Jett filed an action for assault, battery, and negligence against Grimes, property management company KMR Property Management ("KMR") and property owner CPLP ("CPLP"). The prayer for relief requested general damages of \$100,000, noneconomic damages in excess of \$1,000,000, punitive damages, attorney's fees, and costs.

KMR and CPLP timely moved to strike the request for attorney's fees on the ground that the complaint failed to allege any statutory or contractual basis for attorney's fees. The trial court granted the motion to strike and allowed leave to amend the complaint. Chinn and Jett filed an amended complaint that requested costs of suit, but not attorney's fees.

In March 2006, Chinn served KMR and CPLP each with Statutory Offers to Compromise under Code of Civil Procedure section 998. The Offers provided that Chinn would enter judgment in her favor in the amount of \$10,000, including costs. Chinn also served Grimes with a Code of Civil Procedure section 998 offer for \$17,000. Both offers expired without acceptance.

In June 2006, KMR and CPLP served Chinn with a Code of Civil Procedure section 998 offer whereby Chinn could "dismiss with prejudice her entire lawsuit" against Grimes, KMR, and CPLP. In return, KMR and CPLP would pay her \$23,500 and waive all costs. The dismissal was to be filed with the trial court in lieu of a judgment in favor of CPLP and KMR.

Chinn accepted the offer, agreeing to enter a dismissal of the entire lawsuit. She filed a notice of settlement stating that, pursuant to the Code of Civil Procedure section 998 offer, Chinn's action had been settled according to the terms and conditions between the parties. Chinn filed a request for dismissal of her action with prejudice which was entered on August 30, 2006.

On September 7, 2006, Chinn, taking the position that she had not waived costs (and only the offering defendants had waived costs...) filed a Memorandum of Costs totaling \$30,279.42, including service of process costs of \$1,117, witness fees of \$15,840, and investigation costs of \$9,880. Chinn, asserting that she was now the "prevailing party" in a contract dispute, also moved for an order finding she was entitled to attorney's fees and costs as a prevailing party under Code of Civil Procedure section 1021 based on an attorney's fees provision in her lease agreement with CPLP. Chinn attached a copy of the lease agreement between Chinn and CPLP, which provided:

"If any legal action or proceeding be brought by either party to this agreement, the prevailing party shall be reimbursed for all reasonable attorney's fees and costs in addition to other damages awarded."

Not surprisingly, KMR and CPLP opposed the motion for attorney's fees and costs on the grounds that: (1) the operative complaint did not contain a cause of action for breach of contract or request for attorney's fees; (2) Chinn's tort claims were unrelated to the lease agreement; and (3) Chinn was not the prevailing party under the terms of the compromise agreement, the statutory definition in Code of Civil Procedure section 1032, or as a practical matter, because she settled for an amount far less than she had been seeking in the lawsuit.

Chinn then filed additional briefing arguing that: (1) she was the prevailing party in a contract dispute; and (2) under Code of Civil Procedure section 998, she received a more favorable award from KMR and CPLP than the Code of Civil Procedure section 998 offers she had made for \$10,000 each.

At a hearing which took place on November 9, 2006, the trial court granted KMR's and CPLP's joinder in a motion to strike filed by Grimes and found the amount claimed for service of process was unreasonable and reduced the amount for service of process to \$300. The trial court also taxed the amounts claimed for expert witness fees and investigative costs, finding that Chinn was not entitled to recover expert witness fees under Code of Civil Procedure section 998 and investigative costs were not authorized by statute. The trial court denied Chinn's motion for attorney's fees as to KMR because KMR was a party to the lease. The trial court further denied Chinn's motion for attorney's fees as to CPLP, finding no sufficient relationship between the tort claim and the lease agreement. In addition, the trial court noted that the motion failed to state the amount of attorney's fees requested or provide competent evidence of the attorney's fees incurred in the prosecution of the case.

Thereafter, the trial court entered a judgment stating that Chinn was awarded her costs as prevailing party with a net monetary recovery, but no amount was stated. Chinn filed a motion for clarification of the judgment. KMR and CPLP filed a motion for reconsideration. After a hearing on January 10, 2007, the trial court granted Chinn's motion and amended the judgment to include costs of \$4,036.58. The trial court deemed the reconsideration motion to be a motion for clarification as well. The trial court stated that Chinn was the prevailing party for purposes of costs as against KMR and CPLP because she obtained a net monetary recovery of \$23,500 and the dismissal of the action was pursuant to the acceptance of a Code of Civil Procedure section 998 offer. An amended judgment was filed on January 10, 2007, awarding Chinn costs of \$4,036.58.

Chinn filed a timely notice of appeal.

On appeal, Chinn contended the attorney's fee provision of her lease agreement allowed her as a prevailing party to recover attorney's fees. The Court of Appeal agreed.

In its ruling, the Court of Appeal noted that the attorney's fees provision in Chinn's lease agreement with CPLP was exceptionally broad, providing for attorney's fees to the prevailing party in "any legal action or proceeding brought by either party to this agreement" and noted that the attorney's fees provision did not require that the action be related to or arise out of the lease agreement (it also found that the negligence cause of action alleged in the complaint, based on CPLP's duty to protect its tenant from foreseeable harm, clearly related to her tenancy citing Castaneda v. Olsher (2007) 41 Cal.4th 1205, 1213-1223 and Andrews v. Mobile Aire Estates (2005) 125 Cal.App.4th 578, 588-590).

As for the Statutory Offer to Compromise, the Court of Appeal examined the parties' Code of Civil Procedure section 998 agreement for the allocation of costs and fees. It noted that KMR and CPLP contended that a Code of Civil Procedure section 998 offer requiring plaintiff to dismiss her action with prejudice "implicitly" provided for an award of costs to defendants, because under Code of Civil Procedure section 1032, a defendant is entitled to

an award of costs as a matter of right after a dismissal and that their right to recover costs is also reflected in their offer to waive their costs.

The Court of Appeal disagreed and held that it could not “agree” that Chinn was precluded from recovering her costs under the defendants' Code of Civil Procedure section 998 offer given that it did not provide for any waiver by the settling plaintiff.

The Court of Appeal noted that a judgment entered pursuant to the acceptance of a Code of Civil Procedure section 998 offer is “a stipulated or consent judgment” that is regarded as a contract between the parties and “must be construed as any other contract” citing Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal.App.3d 256, 263 and Ritzenthaler v. Fireside Thrift Co. (2001) 93 Cal.App.4th 986, 990. The Court of Appeal further noted that Code of Civil Procedure section 998 permits the parties to determine the nature of the judgment to be entered and to resolve collateral matters, including costs, and that the parties may agree that judgment will be entered in favor of plaintiff or that the action will be dismissed voluntarily and that the parties may stipulate to procedures for resolving the matter of costs citing Goodstein v. Bank of San Pedro (1994) 27 Cal.App.4th 899, 905-906.

The Court of Appeal then ruled that a Code of Civil Procedure section 998 offer that is silent on the issue of attorney's fees and costs cannot reasonably be interpreted to exclude recovery of fees and costs by the prevailing party citing Ritzenthaler v. Fireside Thrift Co., *supra*, 93 Cal.App.4th at 990-991, Lanyi v. Goldblum (1986) 177 Cal.App.3d 181, 192-193 and Rappenecker v. Sea-Land Service, Inc., *supra*, 93 Cal.App.3d at 262-265, and noted that a party intending an offer to compromise under section 998 to encompass attorney's fees and costs can “easily provide in the offer” that each side is to bear its own attorney's fees and costs.

Chinn also contended that the trial court correctly awarded her costs as the prevailing party under Code of Civil Procedure section 1032, because she was the party with the net monetary recovery based on the parties' section 998 compromise agreement and that the trial court abused its discretion by reducing the amount for service of process and further contended that she was entitled to recover nonstatutory costs under the lease provision; namely, investigative costs.

The Court of Appeal ruled that she should not be awarded any additional amount for costs because KMR and CPLP were the prevailing parties for the purposes of an award of costs under section 1032. In its ruling, the Court of Appeal acknowledged the ruling in Goodstein v. Bank of San Pedro, *supra*, 27 Cal.App.4th at 906-907, where the court, in dicta, stated that a compromise agreement providing for payment by the defendant and dismissal of the action by the plaintiff is the legal equivalent of a judgment in plaintiff's favor, but distinguished it and concluded that the definition of prevailing party provided

in section 1032 precludes consideration of settlement proceeds as a “net monetary recovery” when a dismissal is entered in favor of the defendant.

The Court then specifically dismissed Chinn’s contention that the common sense meaning of the isolated term “net monetary recovery” includes settlement proceeds and concluded that KMR and CPLP, as defendants with a dismissal entered in their favor, were the prevailing parties for the purposes of an award of costs as a matter of right under section 1032 and that Chinn was not entitled to recover any additional amount for service of process or investigative costs.

As for recovery of contractual attorney’s fees in a tort action, the Court of Appeal acknowledged decisional authority which provided that the prevailing party for the award of costs under section 1032 is necessarily the prevailing party for the award of attorney fees, Santisas v. Gooden (1998) 17 Cal.4th 599, 621-622 and McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn. (1991) 231 Cal.App.3d 1450, 1456, and examined whether Chinn could recover her attorney’s fees even though the defendants, as set forth above, were the prevailing parties.

In deciding this issue, the Court of Appeal acknowledged that attorney’s fees are not generally recoverable as costs unless authorized by statute or agreement. The Court noted the case law which provides there is to be no recovery of attorney’s fees based on contract when the plaintiff voluntarily dismisses prior to trial but further noted the 1987 amendment to Civil Code section 1717 whereby the definition of “prevailing party” as the party entitled to recover costs was deleted and was revised to provide that “the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract” and that the Legislature also added language providing that the trial court “may also determine that there is no party prevailing on the contract for purposes of this section” citing Hsu v. Abbara (1995) 9 Cal.4th 863, 873-874.

The Court of Appeal then held that the lease agreement between Chinn and CPLP permitted an award of attorney’s fees in the instant action and did not bar recovery of attorney’s fees in the event of a dismissal and remanded the issue to allow the trial court to determine whether there was a prevailing party for the purpose of an award of attorney fees based on a pragmatic assessment of the extent to which Chinn and CPLP realized their objectives through the settlement.

Chinn also contended she received a more favorable award from the settlement agreement than the unsuccessful section 998 offers she made in March 2006 to KMR and CPLP and that the trial court abused its discretion by denying her costs under section 998, including expert witness fees and prejudgment interest. The Court of Appeal disagreed finding that a voluntary dismissal with prejudice is a judgment for the purposes of section 998 citing Goodstein v. Bank of San Pedro, supra, 27 Cal.App.4th at pp. 905-906. The Court of Appeal further ruled that the trial court did not abuse its discretion by declining to

award costs to Chinn under section 998 noting that the payment of \$23,500 by KMR and CPLP in exchange for Chinn's dismissal of her entire action, which eliminated KMR's and CPLP's liability for indemnification as to Grimes, was arguably a more favorable judgment for KMR and CPLP than Chinn's 998 offers to accept \$10,000 from KMR, \$10,000 from CPLP, and \$17,000 from Grimes.

The Chinn Case has a number of important aspects, the most important of which is that a defendant serving a Statutory Offer to Compromise must state that, if accepted, the accepting plaintiff agrees that it is waiving recovery of any fees and costs which might be recoverable under statute or contract. Secondly, the Chinn Case also provides that the payment of money under a Statutory Offer to Compromise will not, by itself, provide the basis for the accepting plaintiff to be considered a prevailing party with respect to recoverable costs under the Costs Statute. While certainly routine in its facts, the case will have significant impacts on future civil litigated matters for some time to come.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Christina S. Karayan is a senior associate of The Morrison Law Group, a professional corporation. Their biographies can be viewed at www.morrisonlawgroup.com.

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