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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NADIA TAPIA et al., Plaintiffs and Appellants, v. JOENATHAN JONES, JR., Defendant and Appellant.	B234511 (Los Angeles County Super. Ct. No. PC043544)

APPEAL from a judgment of the Superior Court of Los Angeles County. Randy Rhodes, Judge. Affirmed.

Snyder Dorenfeld, Bradley A. Snyder and Rodger S. Greiner; Hager & Dowling, John V. Hager and Michael L. Bean, for Defendant and Appellant.

Rice & Bloomfield, Linda Fermoyle Rice and Todd J. Bloomfield, for Plaintiffs and Appellants.

Defendant and appellant Joenathan Jones, Jr., appeals from the judgment entered against him and in favor of plaintiffs and respondents Nadia and Daisy Tapia, following a jury trial on their complaint for personal injury damages suffered in a car accident.[1] Jones contends Nadia's and Daisy's testimony about certain medical bills should have been excluded. Nadia and Daisy cross-appeal from the order taxing their costs. They contend it was error to invalidate their Code of Civil Procedure section 998 offer. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Collision*

On October 21, 2007, Nadia was driving a Honda Civic on San Fernando Mission Boulevard toward Reseda Boulevard with Daisy as a passenger. After Nadia turned left into the number one lane of Reseda Boulevard, Nadia and Daisy were broadsided by Jones, who was driving a Suburban. The Honda Civic was totaled. Nadia told a police officer at the scene that the only way the collision could have happened was if Jones was trying to make a U-turn.[2] Nadia and Daisy did not immediately seek medical treatment, but when they awoke in severe pain the next day their father took them to the emergency room at Holy Providence Cross Hospital. For several months, Nadia and Daisy received medical treatment for physical and emotional injuries they suffered in the collision.

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[1] To avoid confusion, we refer to sisters Nadia and Daisy Tapia by their first names, or occasionally as plaintiffs.

[2] Jones had a different recollection of how the collision occurred. In Jones's version, as he prepared to pull out of his parking space on southbound Reseda Boulevard, he checked his mirror for oncoming traffic. Seeing none, he drove in the curb lane for a few feet before pulling into the number two lane. After Jones had traveled in the number two lane for about 30 seconds, a Honda Civic moved into his lane. Jones first saw the Honda Civic as he was about to hit it.

B. *Code of Civil Procedure Section 998 Offers*

In August 2008, Nadia and Daisy filed the present action against Jones. On December 29, 2008, plaintiffs served Jones with identical Code of Civil Procedure section 998 offers to compromise. Those offers read: "Plaintiff offers to have judgment taken against Defendant Joenathan Jones, Jr. and for Plaintiff [Nadia/Daisy] pursuant to Code of Civil Procedure [section] 998 for the sum of NINETY NINE THOUSAND NINE HUNDRED NINETY NINE DOLLARS ($99,9999.00) *plus taxable costs incurred to date of judgment* . . . ." (Italics added.)

The Notice of Acceptance which appeared at the bottom of both offers with a blank signature line read: "Defendant Joenathan Jones, Jr. hereby accepts Plaintiff's offer to allow judgment to be taken and entered in Plaintiff [Nadia/Daisy]'s favor and against this Defendant in the amount of Ninety Nine Thousand Nine Hundred Ninety Nine Dollars ($99,999.00), *each side to bear its own costs of litigation*." (Italics added.)

Thus, the body of the section 998 offer and the acceptance form were inconsistent: the offer was for $99,999.00 "plus costs" while the acceptance stated that each side would bear its own costs. Jones did not accept the offers.

C. *Evidence of Medical Expenses and Special Verdict*

Jury trial commenced on March 7, 2011. Evidence of the sisters' medical expenses included testimony of orthopedic surgeon Dr. Gill Tepper, marriage and family therapist Judith Lion, clinical psychologist Jose Cardenas, and Nadia's and Daisy's own testimony. Dr. Tepper testified he billed Nadia a total of $3,680 and Daisy a total of $14,325. Lion testified she billed Nadia $355 for 15 sessions. Cardenas testified he billed Daisy for 10 sessions at $150 per session ($1,500), plus $125 for reviewing records prior to his deposition.

Nadia testified that other medical providers had billed her the following amounts for diagnoses and treatment of injuries she suffered in the collision: $307 from the emergency room trauma surgeon; $67 for a follow-up visit with the trauma surgeon;

$20,031.65 from Holy Providence Cross Hospital; $297 from the pathology department at Holy Providence Cross Hospital; an unspecified amount from Dr. Mulliken at Laguna Physical Therapy; and $655 from physical therapist Mark Rizby.

Daisy testified that she was billed $3,233.24 by Holy Providence Cross Hospital and $3,805 by Sylmar Physicians Group.

There was no evidence that Nadia or Daisy paid the medical bills about which they had testified nor was there evidence from the healthcare providers themselves or any experts that the medical services described in those bills were reasonably necessary or even attributable to the accident. Accordingly, the trial court sustained Jones's lack of foundation objection to the admission of the actual medical bills to which Nadia and Daisy had referred.

The jury returned a special verdict that found Jones's negligence was 95 percent responsible for Nadia's and Daisy's damages and found Nadia 5 percent responsible. The jury awarded $164,242 to Nadia and $244,550 to Daisy. The special verdict included past medical expenses of $31,742 for Nadia and $39,550 for Daisy. The parties *subsequently* stipulated to reduce Nadia's medical expenses by $21,358 to $10,384 and to reduce Daisy's medical expenses by $7,138 to $32,412.[3] Referencing that stipulation, the judgment entered on April 12, 2011, awarded Nadia $135,740 and Daisy $225,541. Notice of Entry of Judgment was mailed on April 15, 2011. The trial court subsequently denied Jones's motion for new trial which was based in part on excessive damages.

D. *The Motion to Tax Costs*

Nadia and Daisy filed a cost memorandum seeking a total of $140,652 in recoverable costs. Jones filed a motion to tax on the ground plaintiffs were not entitled to their post 998 offer costs as the offers were ineffective. Jones pointed to the ambiguity

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[3] While the jury was deliberating, counsel for Nadia and Daisy declined Jones's counsel's offer to notify the jury that the parties had stipulated to medical expenses in these amounts.

between the offer and the acceptance, the terms of which were drafted by plaintiffs. The trial court agreed. It taxed costs by $129,701, resulting in a cost award to plaintiffs of $10,951.

Jones timely appealed from the April 12th judgment, and Nadia and Daisy timely appealed from the order taxing costs.

DISCUSSION

A. **Jones's Appeal:** *The Trial Court's Evidentiary Rulings on Medical Evidence Were Correct; in Any Event Jones's Failure to Object Forfeits His Claim of Error*

Jones contends the trial court abused its discretion when it allowed Nadia and Daisy to testify about certain medical bills. He argues that absent testimony from a medical expert that the services reflected in the bills were reasonably necessary and attributable to the accident, Nadia's and Daisy's testimony lacked foundation. Jones confuses the foundational requirements for admissibility of evidence with other aspects of a plaintiff's burden of proving past medical expenses as damages. The record does not support Jones's argument.

We begin, as usual, with the standard of review. On appeal, a trial court's evidentiary rulings are reviewed for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) It is the appellant's burden to " ' "establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815.)

With exceptions not relevant here, all relevant evidence is admissible. (Evid. Code, § 351.) Evidence is relevant if it has a tendency to prove a disputed fact that is of consequence to determination of the action. (Evid. Code, § 210.) Nadia's and Daisy's damages arising out of the collision were disputed issues in this case.

The normal measure of damages for a person injured by another's tortious conduct is the reasonable value of medical care and services reasonably required and attributable

to the tort. (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294.) A plaintiff's testimony that he received medical services and that he was billed a specified amount for those services is admissible to prove that he received the services and the amount he was billed for them, even though it may not be sufficient to establish the "reasonably required and attributable to the tort" element of recoverable damages. For example, in *McAllister v. George* (1977) 73 Cal.App.3d 258, the plaintiff brought an action against the defendants for injuries the plaintiff sustained when the defendants hit him in the head. The trial court excluded from evidence for lack of foundation a dentist's bill, which the plaintiff testified was the bill he received from a dentist he consulted after the incident. The appellate court found exclusion of the bill from evidence was an abuse of discretion. It reasoned that the plaintiff's testimony that the dental services were performed and that the bill was for those services was sufficient to authenticate the bill and to make it admissible for the limited purpose of corroborating the plaintiff's testimony. (*Id*. at p. 263.) But the court found the error was not prejudicial because the plaintiff was allowed to testify as to his dental expenses and had not proffered the required evidence that the dental work was reasonably related to the battery. (*Id*. at pp. 263-264.)

Under the reasoning of *McAllister*, Nadia's and Daisy's testimony was relevant to prove that, after the collision, they sought and received the medical services for which they were billed. Recognizing that this evidence was not sufficient to establish that the medical services were reasonably necessary or attributable to injuries sustained in the collision, plaintiffs' counsel eventually agreed to a reduced award for past medical expenses. That the challenged evidence was insufficient to prove recoverable damages does not mean it was inadmissible.

Jones's reliance on *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, for a contrary result is misplaced. In that case, the trial court excluded from evidence two unpaid bills from the plaintiff's treating physician and from a radiologist for an X-ray; neither doctor testified and the X-ray was not introduced into evidence. The appellate court affirmed, reasoning that the plaintiff had been treated by the doctor for other things and she did not establish that the services represented by the bills were attributable to the

accident, were necessary, or that the charges were reasonable. (*Id*. at p. 73.) *Calhoun* is inapposite to this case because the issue here is not the admissibility of the bills – which were excluded from evidence – but of Nadia's and Daisy's testimony. We conclude the trial court properly allowed plaintiffs' testimony on the medical bills even though subsequent events showed they had not satisfied all the elements to recover the cost of those bills.

Aside from the correctness of the court's ruling, we observe that counsel for Jones waived any error by expressly agreeing to the admissibility of Nadia's testimony about the bills. (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 999.) When Nadia was asked the amount of her hospital bills, counsel for Jones objected on hearsay, relevance and under "*Kennemur*."[4] After discussion among the court and counsel, the court framed the issue this way: Nadia could testify that she received the bills and their amounts but she could not lay the foundation for the documents or testify that the bills were reasonable. Jones's counsel said, "Fair enough." That acquiescence bars Jones from arguing the court erred in its ruling.

Towards the close of plaintiffs' case, the trial court asked for objections to any of the exhibits. Jones's counsel objected to most of the medical records, asserting "lacking foundation, calling for speculation, hearsay and insufficient medical testimony to correlate reasonableness and necessity of a great many of the bills." (Counsel acknowledged there was adequate foundation for certain bills.) Jones's counsel did not move to strike any of Nadia's or Daisy's testimony about those bills. Plaintiffs' counsel suggested that the court delay ruling on the objections to the exhibits until after Jones's expert, Dr. Moldawer, testified, floating the idea that plaintiffs' counsel might fill in the evidentiary gaps with her opponent's expert. The trial court, understandably dubious about this strategy, sustained the objections to the exhibits "without prejudice" to

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[4] By *Kennemur* we understand counsel was invoking *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 918–919, which deals with disclosure of expert information.

plaintiffs' counsel seeking their admission after the defense had put on its case. At that point, the doctor bills had not been admitted but Nadia's and Daisy's limited testimony on the subject was still before the jury.[5]

Plaintiffs' counsel did not establish the foundation for the admissibility of the disputed medical bills during the testimony of defense expert Moldawer or at any time during Jones's case. A single effort in this area was rebuffed by the defense. Jones's counsel objected when plaintiffs asked Dr. Moldawer a question about an exhibit that had a breakdown of total charges for medical care. The court sustained the objection apparently on the ground that the question was beyond the scope of direct-examination and also because Dr. Moldawer had not testified to the charges at his deposition. In any event, Jones's counsel was successful in keeping out that testimony so he can complain of no error.

The next time the subject came up was after the defense had rested. Jones's counsel expressed concern that plaintiffs would be arguing for economic damages based on all the medical bills, even those as to which no foundation had been laid. And he pointed out that the amounts of all the bills had been placed before the jury on the sheet of butcher paper. Plaintiffs' counsel said that she would not be seeking damages based on bills that lacked foundation, and would explain to the jury why there was a discrepancy between the amounts recorded on the butcher paper and the amounts she was seeking in damages. There ensued the following colloquy:

"THE COURT: What you can all say is there's – 'We don't have the evidence on the record to allow it to come in.'

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5 Jones argues in his opening brief that "by this time, all of [plaintiffs'] medical bills had already been presented to the jury through oral testimony and visually with the butcher paper display." As noted, Jones had agreed to the oral testimony earlier in the trial. The butcher paper was apparently an aid to the oral testimony. In any event other than the statement quoted in the first sentence of this footnote, Jones makes no substantive argument about this point and it is deemed waived. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

"[PLAINTIFFS COUNSEL]: I'm going to take total responsibility for – I mean, it's just obvious we needed to lay a foundation. That the witness was unavailable or didn't come in to lay that foundation. So the amount that you award is limited to these figures.

"THE COURT: I think that is fair.

"JONES'S COUNSEL: That's more than --."

We read into the truncated Reporter's Transcript that Jones's counsel said, "That's more than fair." In any event, he voiced no further objection.

The jury was then instructed and plaintiffs' counsel made her opening argument. When it came time to discuss damages, plaintiffs' counsel said, in part: "The medical bills, this is the area I kind of mucked up, and we'll talk about that a little bit later." But later never came for the medical bills, and counsel completed her opening statement without mentioning the subject again. Nor did defense counsel raise the point in his argument to the jury. When plaintiffs' counsel started to address damages in her rebuttal argument, the defense objection to beyond the scope of his argument was sustained. The subject did not come up again in front of the jury.

Damages next surfaced while the jury was deliberating. Jones's counsel expressed concern that the jury might award more economic damages than the limited amount as to which foundation was laid. Counsel mentioned again the butcher paper chart which was created in front of the jury but not received in evidence. Counsel appeared to be saying he was alerting the court to possible post trial motions. The court stated plainly to the parties that they could enter into a stipulation if they wished on the maximum amount of damages, and they had the right to make post trial motions. Later, Jones's counsel asked that the butcher paper be marked for identification – it apparently had been kept by plaintiffs' counsel – and the court agreed. Shortly thereafter, Jones's counsel stated that he had the figures which in his view there had been adequate foundation for the jury to award as damages. The court essentially advised the parties that there was nothing presented to it for a ruling. Jones's counsel said the parties could stipulate to the amount of economic damages and then said: "And my concern at this point in time is that

without the correct amount of economic damages, then the *non-economic* damage award if there would be one would be tarnished." (Italics added.) He did not make a motion or seek a ruling on anything, and concluded: "And that's all I need to say. Thank you, Your Honor."

The final time Jones raised the admissibility of plaintiffs' testimony on the bills they had received was in his motion for new trial. By that time, the parties had stipulated to reduce the amount of economic damages based on medical expenses to the amounts supported by properly authenticated medical bills. (See Discussion, Part C, *ante*.) As it relates to this issue before us, Jones moved for a new trial on irregularity of the proceedings, error in law, and excessive damages. (Code Civ. Proc., § 653, subds. (1), (5) & (7).) Jones argued that that stipulation did nothing to alter the fact that the noneconomic damages were obviously based on the amount of the unreduced economic damages. Plaintiffs' medical bill testimony was thus an irregularity in the proceeding, the court's rulings on the matters were errors in law, and the noneconomic damages were excessive. On appeal he claims the denial of his motion for a new trial was an additional error.

The short answer to Jones's argument that the trial court erred in allowing plaintiffs to testify about unauthenticated medical bills is that, as we have already explained, Jones's counsel acquiesced in the approach suggested by the trial court. Counsel agreed that plaintiffs could testify to the bills they received but could not lay the foundation for the bills' admissibility. When it became apparent that the foundation for many of the bills was not forthcoming, he did not move to strike any of plaintiffs' testimony, and although there were discussions about a possible stipulation on the amount of the recoverable medical bills, no stipulation was ever presented to the court. We realize that the promises made by plaintiffs' counsel to authenticate the bills through the defense expert, and her promise to set the record straight in her argument to the jury were, charitably, overlooked. But that does not change the fact that the court's initial ruling on the scope of plaintiffs' testimony was correct and when further foundation was not offered no motion to strike that testimony was made.

Finally, we agree with Jones that there is often a correlation between economic and noneconomic damages. (*Helfend v. Southern California Rapid Transit District* (1970) 2 Cal.3d 1, 11; *Smock v. State of California* (2006) 138 Cal.App.4th 883, 887.) However in the absence of demonstrable error in the admissibility of economic damages, which we find did not occur and was in any event waived, Jones's point fails. Nor can we say that the amount of noneconomic damages in this case is excessive as a matter of law. The amount of general damages is left to the sound discretion of the jury and then to the trial court on a motion for new trial; no magic formula exists for setting those damages. Here, the ratio of noneconomic to economic damages was 13:1 for Nadia and 6:1 for Daisy. We cannot say that the noneconomic damages were so excessive that it "shocks the conscience." (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1077, 1080 [19:1 ratio of noneconomic damages to economic damages affirmed].)[6]

B. Nadia's and Daisy's Cross-Appeal: Motion to Tax Costs

1. Denial of Costs Pursuant to Code of Civil Procedure section 998 Was Not Error

Nadia and Daisy contend it was error to deny them costs pursuant to Code of Civil Procedure section 998 (§ 998) based on a finding that their section 998 offers were uncertain. We disagree.

Once again, we begin with the standard of review. On appeal, the trial court's denial of an award of costs and fees pursuant to section 998 is reviewed for abuse of discretion. (*Najera v. Huerta* (2011) 191 Cal.App.4th 872, 879.) But the issue of whether a settlement agreement is sufficiently certain to be enforceable involves a question of law, which the appellate court reviews de novo. (*Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal.App.4th 263, 268 [section 998 offer was not uncertain for failing to quantify "reasonable" attorney fees].)

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[6] Jones does not make the excessive as a matter of law point explicitly in his appellate briefs but it can be inferred from other arguments and from his motion for new trial. It is for this reason that we have briefly addressed it.

" 'A prevailing party who has made a valid pretrial offer pursuant to [Code of Civil Procedure] section 998 is eligible for specified costs, so long as the offer was reasonable and made in good faith. [Citation.]' [Citation.]"[7] (*Najera, supra,* 191 Cal.App.4th at p. 879.) The offeror has the burden of establishing that the offer was sufficiently certain to comply with the requirements of section 998. (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 505.) "[T]he 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 expense. [Citation.]" (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.)

That a section 998 offer does not specify the manner by which the litigation would be resolved (e.g. dismissal with prejudice or entry of judgment) does not render it too uncertain to be a valid section 998 offer. (*Berg, supra,* 120 Cal.App.4th at pp. 725-726.) By contrast, a lump-sum section 998 offer made to multiple defendants without any indication of how the settlement amount is to be allocated among the defendants is too uncertain to be a valid section 998 offer. (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 583.)

A section 998 offer excludes costs and fees only if the offer expressly states that costs and fees are excluded. (*Engle v. Copenbarger and Copenbarger* (2007) 157 Cal.App.4th 165, 169 [a section 998 offer that is silent on fees does not preclude a

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[7] In relevant part, 998 provides that an offer under that section "shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (§ 998, subd. (b).) If a plaintiff's section 998 offer is not accepted and the defendant fails to obtain a more favorable judgment, the trial court "in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs." (§ 998, subd. (d).)

fee motion].) Therefore, a section 998 offer that expressly includes fees in one paragraph and expressly includes fees in another paragraph is ambiguous. *Bias v. Wright* (2002) 103 Cal.App.4th 811, is instructive. Insofar as it is relevant to this case, the issue in *Bias* was whether the trial court erred in enforcing an acceptance of a section 998 offer where the offer was silent as to costs but the acceptance added a condition that each party bear their own costs.[8] The court concluded that the trial court erred because the acceptance was not absolute and unqualified. (*Id*. at p. 820.) The *Bias* court explained that trial courts cannot adjudicate disputes over the meaning of an offer and acceptance of a section 998 offer because entry of judgment pursuant to section 998 is a ministerial act which may be performed by the clerk of the court and the clerk could not resolve a dispute as to the terms of the settlement. (*Id*. at p. 821, citing *Saba v. Crater* (1998) 62 Cal.App.4th 150, 153.)

Here, had Jones signed the section 998 offer, the parties would likely have disputed whether the "plus costs" or "each side to bear their own costs" provisions controlled. Under the reasoning of *Taing* and *Bias*, the settlement offer was therefore too uncertain to qualify as a section 998.

Nadia's and Daisy's reliance on *Engle* and similar cases for a contrary result is misplaced. Those cases involved section 998 offers which were silent on the issue of costs and fees, not offers which had conflicting cost provisions. As such, those cases do not support the proposition urged by Nadia and Daisy that conflicting provisions in a section 998 offer regarding costs and fees do not invalidate the section 998 offer.

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8 In *Bias*, the court first concluded that a section 998 offer could be accepted orally where the offer itself does not specify a mode of acceptance, but must be followed by a written acceptance to comply with the statutory requirement that the acceptance be filed with the court. (*Id*. at pp. 818-819.) The *Bias* court went on to consider whether the defendant's oral acceptance of the section 998 offer could be enforced when its written confirmation of the oral acceptance imposed the added condition that the parties bear their own costs. (*Id*. at p. 814.) The court concluded that the written "notice of acceptance" was actually a counter-offer, not an acceptance at all, and the trial court therefore erred in entering judgment under section 998. (*Id.* at p. 820.) Since the plaintiff drafted both the purported offer and acceptance in this case, the acceptance could not have been a counter-offer.

DISPOSITION

The judgment is affirmed. Each side shall bear their own costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.