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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

RICHARD GUNTER et al., Plaintiffs and Appellants, v. MICHAEL SCHNEIER, Defendant and Respondent.	B271517, B277066 (Los Angeles County Super. Ct. No. BC518360)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Affirmed.

Law Offices of Craig S Steingberg, Craig S Steinberg for Plaintiffs and Appellants.

Reback, McAndrews, Kjar, Warford & Stockalper, James Kjar and Jon Schwalbach for Defendant and Respondent.

Richard Gunter, who suffered major back problems, and Cathy Gunter, his wife, sued Michael Schneier, Richard's neurosurgeon, for medical malpractice. After a jury trial, the jury found Schneier was not negligent and entered a defense verdict. The Gunters appeal from that judgment and from an order awarding Schneier costs. We affirm.

BACKGROUND

I. Gunter's Back Problems

In April 2012, Richard Gunter presented to Schneier with back pain and weakness in his right leg and foot. Schneier examined him, ordered an electromyogram to rule out amyotrophic lateral sclerosis (ALS), and then, after the test returned negative, performed a lumbar spine (L4-L5) fusion.

Gunter reported less pain after the surgery, worked a long workweek in June 2012, and could walk and use a stationary bicycle by mid-July with no significant pain.

Schneier then performed cervical fusion surgery on July 31, 2012, and ordered post-operative physical therapy.

Gunter saw Schneier for a single follow-up exam in August 2012. His spinal cord function had improved, and his balance, dexterity, and walking capabilities were better. However, because he had fallen down the stairs after the surgery, Schneier ordered an X-ray of his cervical spine and continued physical therapy, and planned to see Gunter after another physical therapy course, or earlier if circumstances changed.

In October 2012, Gunter reported ongoing weakness in his arm, and Schneier ordered a cervical magnetic resonance imaging (MRI) scan to detect or rule out ALS. The results showed improvement in spinal pathology and no evidence of a failed cervical fusion.

Gunter saw a different neurosurgeon in October 2012, who expressed concern about possible ALS.

In November 2012, Gunter "self-discharged" from physical therapy and saw Dr. Peter-Brian Andersson who diagnosed him with "clinically probable" ALS and ordered a lumbar MRI. (In July 2014, Gunter saw neurologist Richard Lewis, who diagnosed him as suffering from "clinically definite" ALS.)

In February 2013, Gunter saw Dr. Todd Lanman and reported moderate back pain that could be controlled with mild opiate use. Dr. Lanman diagnosed fusion failure and performed fusion revision surgery for Gunter's lumbar and cervical fusions. After this third surgery, Gunter's pain subsided.

II. Lawsuit

The Gunters sued Schneier for medical malpractice, alleging he failed to diagnose cervical spinal cord compression and failed lumbar fusion and failed to order a post-operative computed tomography (CT) scan, which would have revealed the failed spinal fusions.

At trial, Schneier testified Gunter's MRI's revealed no fusion failure, and Gunter never reported significant post-operative pain.

Dr. Robert Lieberson testified that the success or failure of spinal fusion surgery can be evaluated by X-ray, CT scan, or MRI beginning from six months and continuing up to a year after surgery. No images ordered in October or November 2012 showed a failed fusion.

Dr. Duncan McBride, a neurosurgeon, testified that a doctor normally waits from four to seven months after surgery to re-image a fused spine because it takes time for bone to grow around implanted hardware, and fusion success or failure cannot

be determined until roughly six months after surgery. He testified it was therefore within the standard of care for Schneier not to expect to see Gunter until November 2012, after his physical therapy would have concluded. Dr. McBride also testified that when Gunter complained in October 2012 about problems with his right arm, Schneier appropriately referred him to a neurologist because the likely diagnoses was ALS, a neurological rather than neuroskeletal condition. Afterward, Schneier never had an opportunity to re-image Gunter's spine because he left Schneier's care.

The jury returned a 10-2 verdict in Schneier's favor.

The Gunters moved for a new trial on the ground that Schneier failed to diagnose and treat the fusion failures. The trial court denied the motion on the ground that the testimony of Schneier and Dr. McBride supported the verdict.

The Gunters timely appealed from the verdict and also from a post-verdict award of litigation costs. We consolidated the appeals.

DISCUSSION

I. Substantial Evidence Supported the Verdict

The Gunters contend insufficient evidence supported the jury's finding that Schneier rendered nonnegligent post-operative care even though he failed to order a CT scan or X-ray to assess for failed fusions.

"Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the

light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) We review a trial court's ruling on a motion for new trial for abuse of discretion. (*Sherman v. Kinetic Concepts, Inc*. (1998) 67 Cal.App.4th 1152, 1161.)

To prevail on a cause of action for negligence, a plaintiff must prove the defendant breached a duty of care, resulting in damages. (*Mega RV Corp. v. HWH Corp*. (2014) 225 Cal.App.4th 1318, 1339.) "In the usual case of medical malpractice the duty of care springs from the physician-patient relationship which is basically one of contract." (*Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 543.) When a physician-patient relationship exists, "the patient has a right to expect the physician will care for and treat him with proper professional skills and will exercise reasonable and ordinary care and diligence toward the patient [citation]." (*Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 313.)

Here, Dr. McBride, testified that Schneier acted within the standard of care by waiting until Gunter completed physical therapy before re-imaging his spine, because fusion failure cannot be determined until roughly six months, and sometimes up to a year, after surgery. Dr. McBride testified Schneier had no opportunity to re-image Gunter's spine because he left Schneier's care in October 2012, before a repeat X-Ray was required. Finally, Dr. McBride testified that because in October 2012 the prevailing diagnoses was that Gunter likely suffered from ALS, a neurological rather than neurosurgical condition, Schneier appropriately referred Gunter to a neurologist.

Schneier testified that within six weeks of each surgery he obtained MRIs of Gunter's lumbar and cervical spines, which revealed no evidence of a failed fusion. Schneier testified that an MRI is an appropriate imaging method to discover a failed fusion, and he planned to reimage Gunter's spine after he completed physical therapy and was evaluated by a neurologist to rule out ALS.

Dr. Lieberman also testified that an MRI is an appropriate test to determine if a spinal fusion is successful.

This evidence alone sufficed to justify both the jury's verdict and the trial court's denial of the Gunter's motion for a new trial.

The Gunters argue Drs. McBride and Todd H. Lanman, a treating physician, testified that the standard of care required Schneier to image Gunter's spinal fusion with either an X-ray or CT scan, not an MRI, from three to four months after surgery, not six months. They are incorrect. Dr. McBride testified that the standard of care permitted re-imaging beginning from four to seven months after surgery. Although Dr. Lanman testified that he usually orders CT scans three months after surgery, he never stated the standard of care required such early reimaging.

The Gunters argue no expert testified that an MRI is an appropriate test to determine if a fusion has failed. They are incorrect. When Dr. Lieberman was asked, when discussing appropriate imaging techniques, "How about an MRI?" he responded, "MRI is okay too."

The Gunters argue that substantial evidence—their own testimony—indicated that Gunter complained of severe post-operative pain, which indicated a failed fusion, which Schneier should have discovered and addressed. But substantial evidence

also indicated that Gunter made no such complaints. Schneier testified Gunter improved after surgery and reported less pain. And no other healthcare provider in the relevant postoperative period documented any complaint of significant neck or back pain. It was for the jury, not an appellate court, to weigh the Gunters' evidence against Schneier's testimony and records.

II. Code of Civil Procedure Section 998 Offer

Two years into the litigation, and 20 days before trial, Schneier served the following offer to compromise on the Gunters: "Defendant MICHAEL SCHNEIER, M.D., hereby offers to waive costs and any potential claim it [*sic*] may have against plaintiffs for malicious prosecution or abuse of process in exchange for a dismissal with prejudice of the above-entitled action and the execution by plaintiffs of a Release of All Claims." No release of claims was attached to the offer.

The Gunters rejected the offer.

After trial, the court awarded Schneier $111,016.11 in costs, including expert fees under Code of Civil Procedure section 998 (section 998).[1]

The Gunters argue the costs award was improper because Schneier's offer to compromise was indefinite and made in bad faith, and was inappropriately addressed collectively to the Gunters jointly rather than individually.

A. Schneier's Offer was Unambiguous

Section 998 provides that "[n]ot less than 10 days prior to commencement of trial . . . , any party may serve an offer in writing upon any other party to the action to allow judgment to

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

be taken or an award to be entered in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).)

"If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff . . . shall pay the defendant's costs from the time of the offer. In addition, . . . the court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses . . . ." (§ 998, subd. (c)(1).)

The Legislature enacted section 998 to encourage pretrial settlement of litigation. (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 ["the clear purpose of section 998 and its predecessor, former section 997, is to encourage the settlement of lawsuits prior to trial"]; *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114 [the "very essence of section 998" is its encouragement of settlement].) In the absence of conflicting extrinsic evidence, interpretation of a section 998 offer is a question of law that we review de novo. (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 183.) "We apply general principles of contract law where those principles neither conflict with section 998 nor defeat its purpose." (*Ibid.*) We construe ambiguities in a section 998 offer against the offeror. (*Id.* at p. 185; see *Berg v. Darden* (2004) 120 Cal.App.4th 721, 727 ["a section 998 offer is construed strictly in favor of the party sought to be subjected to its operation"].) In reviewing an award of costs and fees under section 998, we examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of a section 998 offer or its refusal. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152.)

Here, Schneier offered to waive costs in exchange for a judgment in his favor and a release of "All Claims." The Gunters rejected the offer and failed to obtain a more favorable judgment. Therefore, pursuant to section 998, the trial court was within its discretion to order that they pay the reasonable postoffer costs of Schneier's expert witnesses.

The Gunters argue Schneier's offer was ambiguous because it failed to specify whether they would be required to release claims against a hospital in the instant lawsuit, which they had dismissed without prejudice, claims they might raise in the future against Schneier's insurer or his attorneys, or claims then pending in another lawsuit against another physician. We disagree.

"Costs cannot be shifted under section 998 where the statutory offer requires relinquishment of claims in addition to those contained in the complaint which is the basis of the litigation being settled." (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 696.)

But the trial court impliedly determined that Schneier's section 998 offer was clear and unambiguous and was intended to settle only the Gunters' claims against him. Substantial evidence in the record supports the court's determination.

A section 998 offer is governed by principles generally applicable to contracts. (*Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 907.) "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the

promisor believed, at the time of making it, that the promisee understood it.' " (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.)

A offer to compromise is ambiguous if it is capable of two or more reasonable constructions. (See *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.) The language must be construed in the context of the instrument as a whole, and in the circumstances of the case. If an ambiguity is not eliminated by the language and context, it is generally construed against the party that caused the uncertainty to exist. (*Id*. at p. 391.)

"Interpretation of a written document where extrinsic evidence is unnecessary is a question of law for the trial court to determine. [Citation.] When the meaning of contractual language is doubtful or uncertain and parol evidence is introduced to aid in its interpretation, the meaning of the contract is a question of fact" that may be left to a jury. (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1559.) In such a case, a "contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (Civ. Code, § 1647), and "evidence of consistent additional terms" may be admitted to explain or supplement the terms set forth in the writing (§ 1856, subd. (b)).

However, extrinsic evidence may not be admitted to give an instrument a meaning to which it is not reasonably susceptible. (*United States Leasing Corp. v. duPont* (1968) 69 Cal.2d 275, 284; see *LaCount v. Hensel Phelps Constr. Co*. (1978) 79 Cal.App.3d 754 [evidence of custom and usage of words in a certain trade is inadmissible to vary terms of a contract].) "Parol evidence is admitted where uncertainty exists as to the meaning of a

contract to show what the parties meant by what they said, but it is not admitted to show that they meant something other than what they said." (*Rilovich v. Raymond* (1937) 20 Cal.App.2d 630, 639-640; accord *United States Leasing Corp. v. duPont*, *supra*, 69 Cal.2d at p. 284; *Estate of Platt* (1942) 21 Cal.2d 343, 352.) The "test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 653.)

Here, the Schneier's section 998 offer cannot reasonably be construed as an offer to release speculative future claims the Gunters might raise, nor extant claims against another physician in another lawsuit. He offered to waive only his costs and his potential claims for malicious prosecution or abuse of process, not the costs or claims of any other litigant. And nothing in the record suggests the Gunters reasonably expected even to raise future claims against Schneier's attorneys or insurer, or against a hospital they had already dismissed, much less that Gunter would be interested in any such claims. Nor does the record suggest Schneier was interested in any other lawsuit the Gunters might maintain against another physician. The release therefore unambiguously pertained only to claims against Schneier himself.

The Gunters argue an identical release of "all claims" in a section 998 offer was held to be ambiguous in *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 120.) But *Chen* is distinguishable because when the offer was made there, the plaintiffs had raised not only claims

in litigation against an insurer defendant but also a separate claim under an insurance policy, one that was not yet the subject of any litigation. Here, no ambiguity exists as to the extent of the Gunters' claims against Schneier.

B. Substantial Evidence Indicates Schneier's Section 998 Offer was Made in Good Faith

The Gunters argue Schneier made his section 998 offer in bad faith because he could not reasonably expect them to accept it, given that none of his expert witnesses had yet been deposed. We disagree.

"To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . .' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance.' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.) Where an "offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The burden is therefore properly on plaintiff, as offeree, to prove otherwise." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.)

Here, the judgment in Schneier's favor is prima facie evidence that his section 998 offer was reasonable. (*Carver v. Chevron U.S.A., Inc.*, *supra*, 97 Cal.App.4th at p. 152.)

The Gunters argue Schneier could not reasonably expect them to accept his section 998 offer because none of his expert witnesses had yet been deposed. But they had ample opportunity in the two years since the inception of litigation—during which they conducted substantial discovery—to substantiate the merits and evaluate their chances of prevailing. By the time of the offer, no physician had indicated Schneier was negligent, Dr. Schneier himself had indicated he acted within the standard of care, and Dr. Lanman, the Gunters' own expert, was equivocal about Schneier's negligence. Further, several physicians had indicated Gunter's symptoms were caused by ALS, not a failed spinal fusion. The trial court was therefore well within its discretion to conclude that Schneier's offer was realistically reasonable under the circumstances.

C. Schneier's Joint Section 998 Offer was Valid

The Gunters argue Schneier's section 998 offer was invalid because it was addressed to them jointly rather than separately. We disagree.

As a general rule, "only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998." (*Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 791.) But "with certain exceptions not applicable here, a cause of action for damages is community property, as is any recovery on that cause of action. [Citations.] This is true whether the cause of action is for injury to real property or financial interests or for personal injuries. [Citation.] Thus, whether or not the injuries claimed in a lawsuit by a husband and wife are 'indivisible' or 'separate,' there is no reason to require a settlement offer to be made separately to each spouse to be valid under section 998. '[U]nlike an offer expressly

conditioned on acceptance by all plaintiffs, the offer in this case did not have to be accepted by both [spouses] to be effective. . . . [E]ither [spouse] could have accepted [the defendant's] offer on behalf of the community.' [Citation.] Moreover, a 'joint' settlement offer made to husband and wife need not be allocated between them; the spouses have equal interests in all the proceeds." (*Barnett v. First National Ins. Co. of America* (2010) 184 Cal.App.4th 1454, 1460, fn. omitted; see *Farag v. ArvinMeritor, Inc*. (2012) 205 Cal.App.4th 372, 380-382 [same].)

A single joint settlement offer made to a husband and wife bringing personal injury and loss of consortium claims, as here, is valid.

The Gunters argue *Menees v. Andrews* (2004) 122 Cal.App.4th 1540 held that a section 998 offer made jointly to spouses was invalid. But there, the spouses were legally separated at the time of the section 998 offer and raised potentially independent claims.

DISPOSITION

The judgment is affirmed. Defendant is to recover his costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J. BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.