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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

DANIELLE MARISSA O'GREEN, Plaintiff and Appellant, v. KIA MOTORS AMERICA, INC., Defendant and Respondent.	2d Civil No. B282366 (Super. Ct. No. 56-2014-00455603-CU-BC-VTA) (Ventura County)

A Code of Civil Procedure section 998 offer to compromise is a valid cost-shifting mechanism to settle an action brought under the Song-Beverly Consumer Warranty Act (Song-Beverly Act; Civ. Code, § 1790 et seq.), commonly known as California's "lemon law." (*Department of Consumer Affairs v. Superior Court* (2016) 245 Cal.App.4th 256, 260.)[1] Kia Motors

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated. Section 998 prevents a plaintiff who

America, Inc. (Kia) offered to pay appellant Danielle Marissa O'Green $30,000.01 plus $7,500 in attorney's fees and costs, or in the alternative, statutory damages plus attorney's fees and costs to settle the case before trial. Appellant did not respond to the offer. After the jury returned a $28,100.07 verdict in favor of appellant, the trial court awarded Kia postoffer costs pursuant to section 998, subdivision (c)(1). O'Green appeals, contending that the section 998 offer was invalid and claims that the trial court erred in not awarding appellant postoffer attorney fees ($331,000+) and prejudgment interest. We affirm. Although the Song-Beverly Act has a cost-shifting feature that includes attorney's fees to the prevailing plaintiff, it does not trump or supersede the cost-shifting provisions of section 998. (*Duale v. Mercedes-Benz USA, LLC.*, *supra*, 148 Cal.App.4th at p. 726.)

Facts and Procedural History

In 2012 appellant purchased a new Kia Soul from Kia of Ventura for $23,380.03, which included $89 in accessories and a $2,032 service contract. Appellant made a $14,000 down payment and financed the balance with a six-year car loan, for a total purchase amount of $28,888.88. A year after the purchase, appellant presented the vehicle to Kia to repair engine vibration issues. The vehicle had less than 15,000 miles on it. After the third repair, appellant demanded that Kia repurchase the vehicle but Kia did not agree to a buyback.

On July 17, 2014, appellant sued under the Song-Beverly Act for rescission and restitution, diminution in value,

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rejects a settlement offer that is greater than the recovery plaintiff ultimately obtains at trial from recovering postoffer costs and attorney fees. (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 726.)

damages, and civil penalties. On October 8, 2014, in response to written interrogatories, appellant refused to provide her car loan payment history or an itemization of the incidental and consequential damages. When asked about statutory damages, appellant objected on the ground that the interrogatory "seeks an inappropriate settlement demand."

On December 16, 2014, Kia served a section 998 offer to pay statutory damages (Civ. Code, §§ 1793.2, subd. (d)(2); 1794, subd. (b)), or in the alternative, pay the lump sum amount of $30,000.01 subject to the condition that the vehicle be returned with clear title and appellant provide a release and dismissal with prejudice. Under both options, Kia agreed to pay $7,500 for appellant's attorney fees, costs and expenses, or in the alternative, an amount to be determined by the trial court on noticed motion.

Appellant did not respond to the section 998 offer and allowed it to lapse by operation of law. At trial, the parties stipulated that the trial court "will decide all issues relating to prejudgment interest, costs, and attorney's fees, if any, and will fill in the Judgment to reflect those figures." On August 12, 2016, the jury awarded $28,100.07 rescission damages, about $1,900 less than the section 998 offer.

Each side claimed it was the prevailing party and filed costs memoranda and cross-motions to tax costs. Kia sought $17,506.14 in costs on the ground that the $28,100.07 verdict did not exceed the section 998 offer. Appellant sought $55,038.04 costs based on the theory that the 998 offer was invalid. Appellant requested prejudgment interest, which if added to the $28,100.07 verdict, exceeded the section 998 offer. Appellant also

sought $331,817 attorney fees under the Song-Beverly Act, plus a 1.5 loadstar multiplier in the amount of $165,908.50.

The trial court found that the section 998 offer was valid and that appellant's recovery did not exceed the $30,000.01 settlement offer. Although appellant was the prevailing party, the Song-Beverly Act entitlement to attorney fees was cut off by the section 998 offer. The trial court awarded appellant $6,247.50 preoffer attorney fees but no prejudgment interest. Kia was awarded costs from December 16, 2014 going forward.

Validity of Section 998 Offer to Compromise

We independently review whether the section 998 settlement offer is valid. (*Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 122.) Appellant claims the section 998 offer is uncertain and incapable of valuation. Kia counters that appellant's evasive discovery responses made it difficult to evaluate damages, forcing Kia to make a section 998 offer for optional settlements under the Song-Beverly Act.

Option 1 - Statutory Damages

Option 1 provided that Kia would pay full statutory damages pursuant to Civil Code section 1793.2, subdivision (d)(2). The offer stated that Kia would compensate appellant for past amounts paid for the vehicle including charges for transportation and manufacturer-installed options but excluding non-manufacturer items installed by a dealer or appellant, plus collateral charges for sales taxes, license fees, registration fees, and other official fees. The section 998 offer invited appellant to submit an itemization of the car loan payments and stated that Kia would, subject to proof, pay off the car loan and incidental and consequential damages. Paragraph 3 of the section 998 offer

stated that Kia would pay the statutory damages within 30 days of acceptance of the offer and included a dispute resolution process by which disputed amounts would be determined by motion or bench trial.

Option 2 - Lump Sum Payment

Settlement Option 2 provided that Kia would pay $30,000.01 to repurchase the vehicle, and the money would be paid to appellant and the car lender in exchange for clear title to the vehicle and appellant's release and dismissal with prejudice. Option 2, like Option 1, provided that Kia would pay $7,500 for appellant's attorney's fees, expenses, and costs, or if appellant disputed the amount, an amount to be determined by the trial court on noticed motion.

Sum Certain Amount

Appellant argues that the settlement offer is not for a sum certain amount. There is no requirement that a section 998 offer contain "'magic language'" so long as it is a clear written offer which, if accepted, will result in the entry of judgment or a final disposition of the action. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 731-732; see, e.g., *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1261 [section 998 offer listed no specific dollar amount and offered judgment to be taken against defendant for a waiver of costs].) Whether a section 998 offer is reasonable and made in good faith is left to the sound discretion of the trial court. (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 374-375.) "The reasonableness of a . . . section 998 settlement offer is evaluated in light of 'what the offeree knows or does not know at the time the offer is made,' along with what the offeror knew or should have known about the facts bearing on the offer's reasonableness. [Citation.]" (*Adams v. Ford Motor Co.* (2011)

199 Cal.App.4th 1475, 1485.) To trigger section 998 cost-shifting, the terms and conditions of the offer must be sufficiently certain to be capable of valuation so the trial court can determine whether plaintiff's recovery at trial is more favorable. (*Chen v. Interinsurance Exch. of the Automobile Club*, *supra*, 164 Cal.App.4th at p. 121; *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050.)

Here the section 998 offer tracks the language of the Song-Beverly Act and provides that the parties will have the trial court determine the disputed damage amount if the parties do not agree on a number. The offer requests that appellant itemize her damages, which is reasonable because the offer was made early in the proceedings after appellant refused to itemize her damages in response to written interrogatories. Under the Song-Beverly Act, a defendant may make a section 998 offer to pay restitution "'in an amount equal to the actual price paid or payable by the Plaintiff, including any charges for transportation and manufacturer-installed options, but excluding non-manufacturer items installed by a dealer or the Plaintiff, and including any collateral charges . . . all to be determined by court motion if the parties cannot agree.'" (*Kirzhner v. Mercedes-Benz USA, LLC* (2017) 18 Cal.App.5th 453, 456, review granted Feb. 21, 2018, S246444.) Although *Kirzhner* is pending review before our Supreme Court, we cite it for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

Appellant argues that the section 998 offer contains so many conditions that the monetary value of the offer is uncertain. The offer excludes payment for such things as "'non-manufacturer items'" which appellant contends is too vague to evaluate. The offer tracks the language in the Song-Beverly Act

which provides that accessories added to the vehicle are not recoverable (Civ. Code, § 1793.2, subd. (d); *Kirzhner v. Mercedes-Benz USA, LLC.*, *supra*, 18 Cal.App.5th 453.) Appellant's trial counsel specializes in Song-Beverly Act claims and should know the difference between manufacturer and non-manufacturer items. He did not ask for clarification.

Appellant argues that the Option 2 offer to pay $30,000.01 to repurchase the vehicle is vague because the balance due on the car loan was unknown. The trial court ruled that appellant should have known the car loan balance. We agree. Appellant was deposed two days after the section 998 offer was made and said she owed $7,700 on the car loan. Before the section 998 offer expired, appellant had the requisite information to determine whether the $30,000.01 lump sump settlement was enough. Appellant argues that the amount owed on the car loan was subject to negotiation. She had 30-days to accept the section 998 offer, more than enough time to negotiate a payoff with the car lender and better her settlement.

Appellant contends that the section 998 offer was invalid because appellant did not understand Kia's offer to "repurchase the subject vehicle." Like any other contract, the section 998 offer must be given its plain and commonsense meaning. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 278-279.) The trial court did not err in concluding that the 998 offer was enforceable. Had appellant accepted the $30,000.01 settlement, appellant would have to pay off the car loan, return the vehicle with clear title, and dismiss the action with prejudice. Appellant cites *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, for the principle that "an offer to two or more parties, which is contingent upon all parties' acceptance, is not a valid offer

under [section 998]. [Citations.]" (*Id.* at p. 799.) Appellant, however is the only plaintiff.[2] The trial court correctly found that the section 998 offer avoided the problem of making multiple plaintiffs allocate a lump sum settlement as was the case in *Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 791.) "To enforce the purpose of section 998, we find as a matter of law 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." (*Ibid.*) Nor is this a case where the offer requires a release of claims other than those pled in the action. (See *Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 84 [general release of "any and all claims" whether "known or unknown" went beyond scope of current litigation and rendered offer invalid].)

Appellant argues that Paragraph 5 of the offer is vague and ambiguous because it requires that the vehicle be returned with all the factory-installed equipment and excludes compensation for nonmanufacturer accessories. Appellant asks whether a "'nonmanufacturer'" accessory includes a cigarette lighter installed by the dealer or appellant. The answer is "No." (Civ. Code, § 1793.2, subd. (d)(2)(B).) The settlement offer provides that if appellant accepts the $30,000.01 lump sum settlement, "the . . . vehicle [must] be returned with all factory equipment on the subject vehicle at the time of [appellant's] purchase." That is how a Song-Beverly Act buyback works. If

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[2] Appellant argues that the clerk of the superior court could not have entered judgment if the offer was accepted because the clerk lacked the power to pay off a nonparty car lender. We reject the argument because appellant was required to deliver the vehicle with clear title which required that she pay off the car lien.

the law was otherwise, appellant could take the $30,000.01 and strip the vehicle of its factory-installed equipment before returning it.

Applying well established contract principles (Civ. Code, § 1638), the trial court correctly found that the offer to compromise was valid. "[F]rom 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.]" (*Berg v. Darden*, *supra*, 120 Cal.App.4th at p. 727.) Unlike *MacQuiddy v. Mercedes-Benz USA, LLC*, *supra*, 233 Cal.App.4th 1036, the section 998 offer does not have uncertain conditions requiring appellant to return the vehicle "'in an undamaged condition, save normal wear and tear.'" (*Id.* at p. 1050.)

Mileage Offset

Appellant asserts that the section 988 offer is invalid because it does not provide for a mileage offset as set forth in Civil Code section 1793.2, subdivision (d)(2)(C). The offer implicitly waived the offset which benefited appellant and provided that appellant would receive more money than she was entitled to under the Song-Beverly Act. That does not render the offer invalid.

Offer to Pay Attorney's Fees

Paragraph 8 of the offer provides that Kia will pay, under either Option 1 or 2, $7,500 attorney fees or a reasonable amount to be determined by the trial court pursuant to Civil Code section 1794, subdivision (d). Under the Song-Beverly Act, appellant had the burden of showing that the attorney fees were reasonable in amount and reasonably necessary to conduct the

litigation. (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 816.) Kia's section 998 offer mirrors the language in *Levy*. The trial court rejected the "argument that paragraph 8 [of the offer] was a fraud intended to cheat [appellant] out of her legal fees." Appellant's argument "ignores the fact that this offer was made very early before fees began to escalate, and reserved to [appellant] the option of petitioning the court for more."

Jurisdiction to Determine Attorney Fees, Costs, and Expenses

Appellant complains that the section 998 offer requires appellant to file a dismissal with prejudice which would deprive the trial court of jurisdiction to determine attorney's fees, costs, and expenses on noticed motion. A section 998 offer, if accepted, is the legal equivalent of a judgment and enforceable. (*Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, 1263 [dismissal with prejudice pursuant to section 998 offer did not bar plaintiff from recovering attorney fees as prevailing party in Song-Beverly Act suit].) Had appellant accepted the offer to compromise and filed a dismissal, it would not affect the trial court's jurisdiction to award attorney fees and costs. (*Ibid.*) Even without a stipulation to reserve jurisdiction, a "pretrial dismissal does not preclude an award of attorney fees and other costs sought under statutes . . . ." (*Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1150, overruled on other grounds in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261; and *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6.) Under the terms of the section 998 offer, appellant could have delayed filing the dismissal until the trial court ruled on appellant's motion for fees and costs.

Prejudgment Interest

Appellant argues that the trial court erred in not awarding prejudgment interest which appellant claims is the linchpin of the case because prejudgment interest, when added to the jury verdict, results in a recovery that exceeds the $30,000.01 settlement offer. (See, e.g., *Bodell Constr. Co. v. Trs. of Cal. State Univ.* (1998) 62 Cal.App.4th 1508, 1526 [preoffer prejudgment interest added to jury verdict to determine whether plaintiff obtained a judgment more favorable than section 998 offer].) Civil Code section 3287, subdivision (a) provides that prejudgment interest may be awarded where the amount due plaintiff is fixed or readily ascertainable. (*Great Western Drywall*, *Inc. v. Roel Construction Co.*, *Inc.* (2008) 166 Cal.App.4th 761, 767.)

Appellant was not entitled to prejudgment interest because the damages were uncertain and Kia contested both liability and damages. (See *Duale v. Mercedes-Benz USA*, *LLC*, *supra*, 148 Cal.App.4th at p. 729.) The jury found that Kia started the vehicle repairs within a reasonable time and found in Kia's favor on incidental and consequential damages and civil penalties. Prejudgment interest is not recoverable where the amount of damages cannot be resolved except by verdict. (*Doppes v. Bentley Motors*, *Inc* (2009) 174 Cal.App.4th 1004, 1010.) Appellant's citation of *Leaf v. Phil Rauch*, *Inc.* (1975) 47 Cal.App.3d 371, is inapposite because the action was for rescission of a conditional sale contract for a sum certain, i.e., full payment of the $7,085.38 purchase price. (*Id.* at p. 374.)

Appellant cites Civil Code section 3287, subdivision (b) as an alternative basis for prejudgment interest, but that governs causes of action "in contract," not an action based on the

violation of a statute such as the Song-Beverly Act. (Civ. Code, §§ 1793.2, 1794.) Appellant's reliance on *Bishop v. Hyundai Motor Am*. (1996) 44 Cal.App.4th 750, is mislead. There, the Court of Appeal stated that a Song-Beverly action was akin to a breach of contract action and did not permit the recovery of emotional distress damages. (*Id.* at p. 758.) The *Bishop* court never considered prejudgment interest. Cases are not authority for propositions they do not consider. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)[3]

Post-judgment interest

Appellant claims that the trial court erred in not awarding postjudgment interest but waived the issue by not asserting it below. Before trial, appellant and Kia entered into a "Stipulation Regarding Prejudgment Interest." Appellant did not ask for postjudgment interest and is precluded from raising the issue for the first time on appeal. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1398-1399.)

Concluding Language

Appellant complains that the last paragraph of the section 998 offer warns that appellant will not recover postoffer costs and attorney fees if appellant rejects the offer and fails to obtain a more favorable judgment. This tracks Code of Civil Procedure section § 998, subdivision (c)(1) and is a correct statement of the law. Appellant objects to language in the offer

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[3] Assuming that appellant was entitled to prejudgment interest, it would stop on December 16, 2014, the date the section 998 offer was made. (*Bodell Constr. Co. v. Trs. of Cal. State Univ.*, *supra*, 62 Cal.App.4th at p. 1517.) Appellant makes no showing that the prejudgment interest and verdict amount exceed the $37,500.01 settlement offer for damages, attorney's fees, and costs.

that the trial court "in its discretion may require plaintiff to pay defendant's costs from the date of the filing of the Complaint." That is a correct statement of the law where the plaintiff could have brought the action in small claims court but did not do so. (§ 1033, subd. (b)(1).) There is no merit to the argument that the concluding language in the offer contains false statements of law or invalidates the offer to compromise. The very essence of section 998 is to encourage both the making and the acceptance of reasonable settlement offers. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114.)

Who Signs the Section 998 Offer?

Appellant argues that the section 998 offer is invalid because it was signed by Kia's trial counsel rather than Kia. Section 998, subdivision (b) provides that an offer to compromise "shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." Our Supreme Court has held that section 998 should be applied symmetrically and evenhandedly to both plaintiffs and defendants. (*Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at p. 1115.) Section 998 offers are customarily signed by the attorney for the party making the offer, as reflected in the California Judicial Council approved form, CIV-090. Appellant cites no authority that the section 998 offer to compromise is invalid unless Kia signed it.

Cut-Off Date for Costs

Appellant contends that the trial court erred in using December 16, 2014, the date the section 998 offer was made, as the cut-off date for costs and attorney fees. Appellant claims that she had 35 days to accept or reject the offer (see Code Civ. Proc., §§ 998, subd. (b)(2) [30 days to accept or reject offer]; 1013, subd. (a) [five days for service of offer by mail]) and that it extended the

cut-off date for fees and costs. Section 998, subdivision (c)(1) provides: "[i]f 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*." (Italics added; see *Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at p. 1112; *Duale v. Mercedes-Benz USA, LLC*, *supra*, 148 Cal.App.4th at p. 725.) The trial court did not err in using December 16, 2014 as the cut-off date for attorney fees and costs.

Conclusion

Appellant was not forthcoming in itemizing her damages or car loan payments in pretrial discovery. Kia tried to make the best of the situation and tendered a section 998 offer that tracked the language of the Song-Beverly Act. The offer to compromise warned that appellant would not be awarded postoffer costs if appellant rejected the offer and did not obtain a more favorable judgment at trial. We conclude that the offer satisfied the statutory requirements of section 998 and the trial court did not abuse its discretion in denying appellant prejudgment interest or postoffer attorney fees. "The carrot-and-stick approach of section 998 encourages parties seriously to consider settling disputes before trial while, at the same time, permitting them the flexibility to fashion settlements on terms best suited to the circumstances of a particular action. [Citations.]" (*Berg v. Darden, supra*, 120 Cal.App.4th at p. 732.)

Appellant's remaining arguments have been considered but warrant no further discussion.

The judgment is affirmed. Kia is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

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