B254024

COURT OF APPEAL, STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FIVE

LINDA DE ROGATIS, et al.,

Plaintiffs and Appellants,

vs.

KAREN MICHELLE SHAINSKY,

Defendant and Respondent.

Appeal from Judgment of the Superior Court of California,
Los Angeles County, Case No. BC457891
The Hon. Jan Pluim, Judge Presiding

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

1. THIS COURT HAS JURISDICTION OVER THE SECTION 998 COSTS ISSUES

   A. Because *Fish* and *Pfeifer* are predicated on the Supreme Court's analysis of a different appellate issue relating to section 998 offers, and because the Supreme Court's rationale for that decision is no longer applicable, *Fish* and *Pfeifer* should not be followed.

   B. Because the trial court *expressly* incorporated the 998 costs award into the *existing* judgment, the notice of appeal was effective to confer jurisdiction over *all* the issues presented and, at worst, the conclusion should be drawn that the appeal notice filed on January 22, 2014 was premature and should be construed as an appeal from the final judgment, which included the section 998 costs.

2. THE RECORD DOES NOT SUPPORT RESPONDENT'S CLAIMS AND, FURTHERMORE, RESPONDENT FAILS TO ADDRESS THE SERIOUS PUBLIC POLICY CONCERNS IN PERMITTING COST WAIVERS TO JUSTIFY AN AWARD OF SECTION 998 COSTS

CONCLUSION 52

CERTIFICATE OF LENGTH OF BRIEF 54

TABLE OF AUTHORITIES

CASES

Aidan Ming-Ho Leung v. Verdugo Hills Hospital (2012) 55 Cal.4th 291 — 20

Bahl v. Bank of America (2001) 89 Cal.App.4th 389, 399 — 19

Bank of San Pedro v. Superior Court (1992) 3 Cal.4th 797

Brown v. Merlo (1973) 8 Cal.3d 855 — 7

Dominguez v. Financial Indemnity Co. (2010) 183 Cal.App.4th 388 — 13

Elrod v. Oregon Cummis Diesel, Inc. (1987) 195 Cal.App.3d 692 — 19

Fish v. Guevara (1993) 12 Cal.App.4th 142 — 5, 6, 8 9

Griset v. Fair Political Practices Commission (2001) 25 Cal.4th 688 — 9-11

In re Baycol Cases I & II (2011) 51 Cal..4th 751 — 10

Liberty National Enterprises, L.P. v. Chicago Title Ins. Co. (2011) 194 Cal.App.4th 839 — 15

Neff v. Ernst (1957) 48 Cal.2d 628 — 11

Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270 — 5, 6, 8 9

Pineda v. Los Angeles Turf Club, Inc. (1980) 112 Cal.App.3d 53 19

Silver v. Pacific American Fish Co., Inc. (2010) 190 Cal.App.4th 688 5, 6

Wear v. Calderon (1981) 121 Cal.App.3d 818 19

Westamerica Bank v. MBG Industries, Inc. (2007) 158 Cal.App.4th 109 9

STATUTES AND RULES

California Rules of Court, Rule 8.204(a)(1)(C) 13

Code of Civil Procedure section 917.1, subdivision (a) 6

Code of Civil Procedure section 998 *Passim*

Code of Civil Procedure section 1032 7

OTHERS

Eisenberg, Horvitz & Wiener, *California Practice Guide: Civil Appeals and Writs* (Rutter 2015) 9, 10

Judicial Council Governance Policies, Judicial Council of California, 2008, p. 1, available at http://www.courts.ca. gov/documents/appendix_d.pdf 19

1.

THIS COURT HAS JURISDICTION OVER THE SECTION 998 COSTS ISSUES

Respondent contends that this Court does not have appellate jurisdiction over the Code of Civil Procedure section 998 costs issues raised in this appeal. (Respondent's Brief ("RB"), pp. 15-16.) Respondent does not, however, cite to any appellate or Supreme Court cases relating to section 998 to support that proposition, and instead cites only to a decision by this Division, *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 691 dealing with *attorney fee* claims and not 998 cost issues.

There are at least two appellate cases – but no Supreme Court case – which discuss the issue of whether a separate notice of appeal is required from an order granting section 998 costs, *Fish v. Guevara* (1993) 12 Cal.App.4th 142 and *Pfeifer v. John Crane, Inc*. (2013) 220 Cal.App.4th 1270, 1315-1319. Although *Fish* and *Pfeifer* do, in fact, apply an analysis similar to that in *Silver* to the appeal of section 998 costs, that analysis is distinguishable in this case on both a legal basis and a factual basis.

A. <u>Because *Fish* and *Pfeifer* are predicated on the Supreme Court's analysis of a different appellate issue relating to section 998 offers, and because the Supreme Court's rationale for that decision is no longer applicable, *Fish* and *Pfeifer* should not be followed</u>.

Like *Silver* did in the attorney fee context, *Fish* and *Pfeifer* conclude that the determination of section 998 costs is not "incidental" to the judgment but constitutes a separate adjudication that requires a separate notice of appeal. In reaching that conclusion, *Pfeifer* relied on the *Fish* decision. And the *Fish* court, in turn, relied on the Supreme Court's decision in *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 803. (*Fish*, at 147-148.)

The *Bank of San Pedro* case, however, did not decide whether a separate notice of appeal from the order granting section 998 offers was necessary but, instead, decided the issue of whether the automatic stay provisions of Code of Civil Procedure section 917.1, subdivision (a) applied, and concluded that they did not. In other words, the Supreme Court held in *Bank of San Pedro* held that section 998 costs are not costs "incidental" to the judgment, but are separately litigated and that an appeal bond is therefore required in order to secure a stay of enforcement of the judgment.

In its rationale for that conclusion, the Supreme Court found that

section 998 costs awards were not "routine" like those permitted under Code of Civil Procedure section 1032. (*Bank of San Pedro*, at 802-803.) Indeed, the court noted, "expert witness fees are rarely awarded." (*Id*., at 803.)

But the predicate for the court's rationale, i.e., that "expert witness fees are rarely awarded," is not longer applicable. Indeed, as a survey of the published and unpublished cases in the Westlaw database demonstrate, section 998 fees have been awarded at an increasingly-accelerated rate within the more than two decades since *Bank of San Pedro* was decided. For example, a Westlaw database search of all published and non-published cases for 1992, the year *Bank of San Pedro* was decided, discloses that there were only 18 appellate decisions discussing section 998 costs awards. During the last five years, however, the appellate decisions discussing that issue average 130 cases per year, a nearly seven-fold increase over what the Supreme Court viewed as costs that were "rarely awarded."

As the Supreme Court has held, "a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered." (*Brown v. Merlo* (1973) 8 Cal.3d 855, 869-70 (hereafter *Merlo*).) Thus, although the Supreme Court assessed the status of section 998 offers and their effect on the appellate process in 1992 in *Bank of San Pedro*, "'[w]hen the reason of a rule ceases,

so should the rule itself.'" (*Merlo*, at 868-69, citation omitted.)

Fish and *Pfeifer* derive from an analysis in the *Bank of San Pedro* case which is now obsolete in light of the far more extensive use and impact of section 998 offers and that legal analysis should be reconsidered.

B. Because the trial court *expressly* incorporated the 998 costs award into the *existing* judgment, the notice of appeal was effective to confer jurisdiction over *all* the issues presented and, at worst, the conclusion should be drawn that the appeal notice filed on January 22, 2014 was premature and should be construed as an appeal from the final judgment, which included the section 998 costs.

There is also a significant factual basis for distinguishing this case from both *Fish* and *Pfeifer*. In this case, the judgment at issue left a blank for the costs awarded, to be filled in once the costs claimed had been determined. [CT 12.] Once the memorandum of costs was filed, and the motion to tax costs ruled on by the trial court, the trial court specifically ordered that the "Memorandum of Costs in the amount of $114,857.54 is *hereby entered into the Judgment dated 12-2-13*." [AR 233, emphasis added.] And, as reflected in the copy of the actual judgment contained in the Clerk's Transcript in this case, that amount was, in fact, *actually incorporated into the **original** judgment, dated December 10, 2013*, from

which this appeal was taken. [CT 12.]

These facts are distinctly different from those in *Fish* and *Pfeifer*. In *Fish*, there is no indication in the decision that any blank for inserting the final costs determined by the court after judgment was included. In *Pfeifer*, there was such a blank in the judgment, but the appellate court never addressed whether the section 998 costs were ever added to the judgment or the effect of an incorporation of those costs into the existing judgment; rather, the *Pfeifer* court merely parroted the *Fish* analysis without any consideration of that factual distinction.

And there is a legitimate legal basis for re-thinking the conclusion that section 998 cost determinations require a separate appeal, at least where their award has been *expressly incorporated into the original judgment*: To do otherwise undermines the "one final judgment" rule.

The one final judgment rule "is premised on the theory that 'piecemeal disposition and multiple appeals tend to be oppressive and costly'; the public policy preference is that review . . await final disposition of the case." (Eisenberg, Horvitz & Wiener, *California Practice Guide: Civil Appeals and Writs* (Rutter 2015) ¶ 2:22, citing *Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 697.) Further, as the court in *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 132 concluded,

the "rule was designed to prevent piecemeal dispositions and costly multiple appeals which burden the court and impede the judicial process." (Internal quotes omitted.)

And the one final judgment rule is strictly applied: "Given the one final judgment rule's deep common law and statutory roots and the substantial policy considerations underlying it, we are reluctant to depart from its principles and endorse broad exceptions that might entail multiple appeals absent compelling justification." (*In re Baycol Cases I & II* (2011) 51 Cal..4th 751, 756.) As the Rutter treatise confirms, "[t]his principle of strict construction is deemed necessary to reduce both the temptation to file dilatory appeals and the compulsion to file protective ones." (Eisenberg, at ¶ 2:23.)

As more specifically relevant here, the one final judgment rule provides that "an appeal lies only from a final judgment that *terminates* the court proceedings by *completely disposing of the matter in controversy*." (Eisenberg, at ¶ 2:21, emphasis in original, citing to *Griset*, at 697.) Where, as here, a judgment is rendered the *expressly reserves the determination of certain issues* (i.e., the amount of costs to be awarded, including section 998 costs), the judgment *is not **final***; that is, it has not terminated the court proceedings and has not completely disposed of the matter in

controversy; at least, not until those costs determinations have been made.

And that the trial court did not intend its judgment to be final is bolstered by the fact that the order on the plaintiffs' motion to tax costs specifically required that the costs amount – including the section 998 costs awarded – be "entered into the Judgment dated 12-2-13," i.e., the very judgment appeal from in the plaintiffs' notice of appeal. [CT 21 (notice of appeal, which erroneously lists the judgment as dated December 2, 2013).]

Thus, the *final* judgment, i.e., the one containing the award of over $114,000 in costs – including the section 998 costs award – was the judgment that was, in fact, appealed from and this Court has jurisdiction to determine the validity of the costs award.

At worst, the notice of appeal, filed on January 22, 2014 and before the cost award was actually determined and entered into the original judgment was premature. But prematurity should not invalidate that notice of appeal. Rather, the notice of appeal should "be treated as a premature but valid appeal from the judgment." (*Griset*, at 698-700; *Neff v. Ernst* (1957) 48 Cal.2d 628, 633-634.)

Either way – whether considered as an appeal from the final judgment entered on December 12, 2014 or as a premature appeal

from a judgment not final until the costs award was incorporated into the December 12, 2014 judgment, this Court has jurisdiction to determine the issues presented on their merits.

2.

THE RECORD DOES NOT SUPPORT RESPONDENT'S CLAIMS AND, FURTHERMORE, RESPONDENT FAILS TO ADDRESS THE SERIOUS PUBLIC POLICY CONCERNS IN PERMITTING COST WAIVERS TO JUSTIFY AN AWARD OF SECTION 998 COSTS

There are several fundamental factual problems with respondent's arguments in support of the section 998 costs award and those problems undermine respondent's basic contention that the underlying action was frivolous and that plaintiffs knew it was frivolous at the time the section 998 offer was made and refused.

Initially, the record does not support several assertions made by respondent. For example, respondent contends at page 2 of her brief that "one of plaintiffs' designated experts (not called as a witness at trial) concluded that Dr. Shainsky's treatment of Ms. De Rogatis, which included prescription pain medication, did not breach

the standard of review." But there is no record citation for that statement and it must be disregarded. (California Rules of Court, Rule 8.204(a)(1)(C); *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846; *Dominguez v. Financial Indemnity Co.* (2010) 183 Cal.App.4th 388, 391.)

Respondent also ignores the fact that the plaintiffs did have, and presented to the jury, the testimony of several expert witnesses who, in fact, confirmed that Dr. Shainsky's treatment of plaintiff *did* fall below the standard of care, *did* contribute to her suicide and that the 100 Percocet tablets Dr. Shainsky prescribed were the *sole* cause of her death. [RT 648:17-657:21, 661:20-662:6, 664:11-665:28, 659:14-660:9, 666:10-25; 667:11-669:6, 660:10-661:19 (Dr. Bluestone); 8 RT 796:20-806:16, 989:5-14, 8 RT 799:10-17 (Dr. Rudnick); RT 717:10-18, 719:28-723:16, 724:18-729:22, 730:15-731:4, 754:2-756:27, 768:3-7, 780:11-783:15, 756:28-757:18, 759:2-18, 768:8-776:11 (Dr. Wolff).]

Another contention made by respondent in her brief which is nowhere supported in the record is the assertion that plaintiffs knew at the time of the 998 offer that Dr. Shainsky had incurred $25,000 in costs to that point. (RB, pp 2, 25.) Again, there is no citation to the record to support that assertion.

Most disturbing in respondent's brief is the assertion that the evidence at trial demonstrated that Dr. Shainsky had ***no*** liability because the Percocet that killed her *was not prescribed by Dr. Shainsky*, that plaintiffs should have known that and that the zero 998 offer was therefore reasonable and in good faith. This argument is predicated on respondent's assertion that "another physician" prescribed the Percocet that Tara De Rogatis ingested and that respondent could not, therefore, be liable. (RB, pp 1, 27.)

First, Dr. Shainsky admitted in numerous contexts that *she* prescribed the Percocet that Tara De Rogatis took on the date of her death. Indeed, her counsel expressly declared, in support of her opposition to plaintiffs' motion to tax costs that "[b]oth parties had access to the Coroner's Report, which showed that decedent had ingested overdoses of numerous medications at either toxic or lethal levels, *in addition to the overdose she took of the Percocet prescribed by Dr. Shainsky*." [AR 65:7-9, emphasis added.]

Second, the evidence at trial that the Percocet that Tara ingested that day was prescribed by Dr. Shainsky:

- Trial Exhibit 116 (submitted by respondent to this Court) shows the actual prescription as written by Dr. Shainsky, as well as the details from filling that prescription as subpoenaed from the CVS drug store

at which the prescription was filled on the day Tara died. That exhibit confirms that Dr. Shainsky prescribed for Tara – and Rite Aid dispensed -100 Percocet tablets, at the 10 mg. dose on March 22, 2010.

- Furthermore, Tara's fiancée testified that he accompanied Tara on her final visit to Dr. Shainsky's office on March 22, 2010 – the day before she later killed herself; that Tara was suicidal; that Dr. Shainsky was aware of that fact, that Dr. Shainsky provided Tara with a prescription for 100 Percocet tablets, at the highest available does; that Tara went to CVS with the prescription and filled it. [RT 126:28-127:3; 127:8-19; 128:3-128:19; 129:9-19; 129:27-1; 308:22-311:24; 142:28-146:2; 312:10-26; 126:28-127:3; 130:2-21; 338:13-340:1; 379:17-380:7; 130:22-131:8; 326:23-329:11; 575:21-576:19; 333:17-22; 573:6-575:10; 133:10-134:21; 313:16-18; 315:15-316:18; 134:16-22; 334:17-27; 336:5-337:3; 135:15-25; 186:17-23; 340:20-341:11; 135:28-136:25; 137:14-138:12; 140:18-141:1.]

The ***only*** "evidence" that supports respondent's assertion that the Percocet Tara used to kill herself was ***not*** prescribed by Dr. Shainsky was a single entry in the Coroner's Report. In his report the Coroner's investigator listed a prescription for Percocet at the 10 mg level prescribed by Dr. Shainsky and issued March 22, 2010.

But in the report, the Coroner's investigator listed the prescribing doctor as "UNG" rather than Shainsky. [Trial Exhibit 114 [supplied by respondent], p. 114-30.]

A search of the reporter's transcript of the trial in this action reveals that no "Dr. Ung" was ***ever*** referenced until defendant's closing argument. Although there was extensive testimony by Tara's fiancée and her treating physicians about her medical history, ***no one ever*** testified that she had seen a doctor named Ung, that she have ever been treated by any such doctor or that she had ever obtained any prescription from such a doctor, either on March 22, 2010 or at any other time.

The first time the phantom "Dr. Ung" was ever mentioned during the trial was in defendant's closing argument, when the reference to the Coroner's investigative report first came up. [RT 1191:3-1192:1.] At that point, plaintiffs had no opportunity to submit rebuttal evidence demonstrating that "Dr. Ung" was, indeed a phantom. Yet respondent now attempts to use that single reference in a single document to assert that plaintiffs "knew" at the time of the 998 offer that Dr. Shainsky had no liability and that her zero offer was not in bad faith.

Obviously, since defendant was able to blindside plaintiffs'

counsel at trial with the phantom "Dr. Ung," plaintiffs *did not know* any such thing. No "Dr. Ung" ever appeared in any of Tara's medical records, there is no testimony that she ever visited any such doctor and there no evidence that plaintiffs could have realized the ploy that would be sprung on them during trial. It is obvious that, as argued by plaintiffs' counsel in her rebuttal closing argument, the entry by the coroner's investigator was a simple error. [RT 1197:9-1200:13.] And that conclusion is supported by the substantial evidence detailed above, including the admission by respondent's own counsel that the Percocet that Tara used to kill herself was prescribed by Dr. Shainsky.

Thus, respondent's attempt to argue that the scintilla of evidence regarding the phantom "Dr. Ung" supports the good faith of the zero 998 offer must be rejected.

Respondent's brief also repeatedly – and erroneously – asserts that, because respondent prevailed at trial, that is prima facie evidence that the case had no merit and that the jury's verdict in respondent's favor demonstrates that there was no substantial evidence to support plaintiffs' claims. (See, e.g., RB p. 3, fn. 1.) Those statements do not comport with the law or the evidence.

As extensively detailed in the Opening Brief at pages 2-15,

there *was* substantial evidence that would have supported a plaintiffs' verdict. Simply because there was also substantial evidence that supported a defense verdict does not render the plaintiffs' evidence non-existent. There was substantial evidence *on both sides of the issue*, and the jury got to pick. The fact that the jury found in favor of the defendant only means that they apparently found the defendant's evidence more compelling. But that is what juries are for. Respondent has not – and cannot – demonstrate that, had plaintiffs prevailed, there would not have been substantial evidence to support a verdict in their favor.

And if there is ever to be a test articulated under section 998 for determining whether a zero 998 offer, with a waiver of costs and a malicious prosecution action, is valid, it should be this: If there was substantial evidence presented at trial to support the losing party's claims, a zero offer should be considered to be bad faith as a matter of law. Any other outcome undermines the ability of a litigant to make a rational and reasonable assessment of whether to accept. Any other outcome is coercive and compels plaintiffs to abandon valid cases for fear of incurring devastating financial losses.

As discussed in the Opening Brief – and as unaddressed by respondent – no matter how meritorious the claim, the purposeful threat

that cost sanctions under 998 will be imposed – in amounts of thousands of dollars – if the trial simply does not go well can and will intimidate many plaintiffs into settling a meritorious claim for far less than its reasonable value. Such a doctrine undermines the basic legal principles for assessing the good faith of a section 998 offer (see, e.g., *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 63; *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821; and *Elrod v. Oregon Cummis Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698-699) and provides a windfall to the defendant because it is a "win-win" situation for the defendant – if the offer is accepted, the defendant walks away virtually scot-free irrespective of the risk to the defendant of a plaintiff's verdict and if the plaintiff refuses the offer, the defendant has at least a chance of recouping expert witness fees without itself incurring *any* risk.

The rule also undermines the public policy favoring resolution of cases on their merits (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 399) as well as the interest the courts have in assuring access to justice. (See, e.g., Judicial Council Governance Policies, Judicial Council of California, 2008, p. 1, available at http://www.courts.ca.gov/documents/appendix_d.pdf [accessed 3/13/2013] ["The Judicial Council of California provides leadership and sets the direction for improving the quality of justice and advancing the consistent, independent,

impartial, and accessible administration of justice for the benefit of the public. . . .[¶] These goals and policies include fundamental goals such as promoting public access to the justice system."].)

Any rule that fosters settlements over a valid interest in trying a case on its merits should be viewed with skepticism. As the court in *Aidan Ming-Ho Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 306 said, the "laudable" public policy goals of fostering settlements – which decreases "the substantial litigation cost to the parties and lessen[s] the burden that litigation imposes on scarce judicial resources – are not necessarily satisfied in all pretrial settlements. Although good faith settlements are to be encouraged, the same cannot be said of settlements *not* made in good faith." (Emphasis in original.) Accordingly, the use of coercion and intimidation by threats that substantial costs may be imposed on a losing party, or that a malicious prosecution claim may be brought – where the claim is not meritless – should be rejected and taken out of the equation for determining the good faith of a section 998 offer.

The public policy analyses in the cases interpreting and applying section 998 require reversal in this case. And nothing presented by respondent undermines those arguments.

CONCLUSION

Imposition of section 998 expert witness costs against litigants of modest means creates a risk of unfair coercion and intimidation. Offers providing nothing more than a waiver of costs and/or waiver of a malicious prosecution claim, where the evidence demonstrates that the action is not frivolous, should be considered unreasonable and in bad faith as a matter of law and should not be permitted to suffice as a basis for imposition of section 998 sanctions.

The evidence in this case compels the conclusion that the plaintiffs had a meritorious claim and that the potential damages were significant. In light of that evidence, the trial court's refusal to strike the section 998 expert fees claimed by Dr. Shainsky was an abuse of discretion and should be reversed.

Dated: June 15, 2015

THE ARKIN LAW FIRM

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CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 3976 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: June 15, 2015

Sharon J. Arkin

SHARON J. ARKIN

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address 225 S. Olive Street, Suite 102, Los Angeles, CA 90012.

On **June 15, 2015**, I served the within document described as:

APPELLANTS' REPLY BRIEF

on the interested parties in this action by electronic mail as follows:

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	Supreme Court (electronically)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 15, 2015 at Brookings, Oregon.

Sharon J. Arkin
Sharon J. Arkin