CASENOTE

JAMES GRAFTON RANDALL, ESQ.

FAILURE TO INCLUDE IN A §998 OFFER A PLACE FOR PLAINTIFF TO SIGN ACCEPTANCE MAKES THE C.C.P. §998 OFFER INVALID

Where Defendant's §998 offer only included a waiver of costs and that it must be accepted din 30 days, the court held this was not sufficient. The statute states the offer "shall" include a provision for allowing the offeree to sign acceptance and "shall" is mandatory. Therefore the Court erred when it ruled Plaintiff was to pay §998 costs to defendant, including $5,000 in expert fees.

Filed 5/25/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ANTONIO PUERTA, Plaintiff and Appellant, v. ANNA BERTA TORRES, Defendant and Respondent.	G043745 (Super. Ct. No. 30-2008-00109105) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed in part and reversed in part.

Antonio Puerta, in pro. per., for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Maxine J. Lebowitz and Michele K. Williams for Defendant and Respondent.

Antonio Puerta and Anna Berta Torres were in a car accident in the City of Westminster. Puerta sued Torres, acting as his own attorney. After a one-day trial, the court

* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of Part I.A, and Parts II.A, B, C, and E.

found in Torres's favor. Puerta now appeals, arguing the court failed to provide a statement of decision after his timely request. He also argues the court's decision was not supported by substantial evidence, that the court wrongly excluded evidence and improperly granted Torres costs under Code of Civil Procedure section 998 and section 1033.5.[1]

With respect to section 998, Puerta argues that Torres's offer failed to comply with the statute, which requires the offer to include "a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." Whether an offer without such a provision is valid is apparently an issue of first impression in the published case law. As we discuss below, we are bound by the plain language of the statute and therefore agree with Puerta that Torres's offer was invalid.

On all other issues, we find no merit in Puerta's arguments and affirm the trial court's judgment. We therefore order the trial court to enter a new judgment excluding the costs awarded to Torres pursuant to section 998.

I
FACTS

A. Underlying Facts and Trial

We draw the following from the record, and we view the evidence in the light most favorable to the prevailing party, resolving all conflicts in her favor. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 787.)

In July 2008, Puerta filed the instant case against Torres in Orange County Superior Court. The form complaint alleged personal injury and property damage arising from a motor vehicle accident on June 19, 2007, and sought damages according to proof. The case was heard at a bench trial on January 5, 2010.

Puerta testified at trial that he was driving his car, an Acura, on Beach Boulevard in Westminster when Torres's sport utility vehicle (SUV) stopped in front of him. Puerta believed that Torres was attempting to turn into a gas station on the right. Her car was about one yard away from his and partly turned into the gas station entrance. But she was unable to complete the turn into the gas station, according to Puerta, instead backing up and colliding with the front of his car. Puerta claimed that he honked his horn while Torres was backing up, and despite being only a yard away, hit his car at a speed of 30 miles per hour. Thereafter, Torres turned right on a street into an alley behind the gas station, and Puerta followed her. Puerta testified that Torres did not admit hitting his car "with words," but claimed that her actions constituted an admission that she had hit his car. He testified that she stated the damage was trivial and it was not worth exchanging insurance information. A police officer responded, and the report the officer prepared did not attribute fault to either party.

Puerta claimed injuries to his neck and arm and damage to his vehicle. He received no medical care immediately after the accident, but saw a doctor five to ten days later, when he was in Spain. He was told he could immobilize his arm and take anti-inflammatory medication. He saw another doctor, Dr. Damoui, in December 2007, but he could not remember if he told that doctor about pain resulting from the accident. (According to the doctor's subsequent testimony, he did not.)

Thereafter he saw Dr. Gahn and another chiropractor, receiving treatment from January through June 2008. He saw Damoui's partner, Dr. Lever, in September 2008, and Lever noted he had been in an accident a year earlier and claimed numbness in his hand as a result.

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[1] Subsequent statutory references are to the Code of Civil Procedure.

Lever diagnosed "idiopathic peripheral neuropathy." Damoui saw Puerta again in January 2009, and he noted that Puerta reported neck pain since an accident two years earlier.

With regard to the damage to his car, Puerta could not state for sure if some of the damage had predated the accident. After looking at a photograph of Torres's SUV, he stated he did not see any "substantial" damage to it.

Puerta's son, who was nine years old at the time of trial in January 2010 (and was six at the time of the incident) testified in a manner consistent with Puerta's testimony, specifically, that "a girl backed up and crashed."

Cynthia Moranville, the officer who responded to the scene, was called to testify as a witness for the defense. Her primary duty was traffic accident investigation, and she had 18 years experience. She testified that she responded to the accident. Torres told her that she was turning into the gas station to follow her daughter, who was getting gas, stopped because of traffic in front of her, and pulled through to the alleyway behind the station to wait for her daughter. While she was waiting, Puerta approached her and said that she had hit his car, and Torres called the police.

Moranville also testified that she inspected the vehicles involved. She looked at each vehicle for "signs of damage or disturbance within the dust or markings, and I found absolutely nothing." She had found no evidence that an impact had occurred. Puerta did not complain of any injuries at the scene. On cross-examination, Moranville examined a photograph of Puerta's vehicle and stated that she saw some damage to the fender.

Torres testified in a manner generally consistent with Moranville's report of her statement at the scene. In relevant part, she stated that while entering the gas station, she had to stop to accommodate traffic in front of her. She testified that at no time did she put the vehicle into reverse, and there was no collision. Puerta approached her once she was in the alley and yelled at her about a collision, and she called the police because she felt he was aggressive and threatening. She took photographs of the vehicles as she was waiting for the police to arrive.

Judson Welcher, an accident reconstructionist, also testified for the defense. In brief, his review of the evidence led him to the opinion that Torres's version of events was more consistent with the physical evidence. Perhaps most notably, he concluded from photographs and a physical inspection that there had been no contact between the two vehicles and that the dent and scratches on Puerta's car were not the result of contact with Torres's car.

After testimony and argument, the court considered the case, noting that it was faced with "two diametrically opposed versions of what happened." The court found that Puerta had failed to establish by a preponderance of the evidence that an impact took place.

B. Torres's Request for Costs

After the trial court issued its ruling in Torres's favor at the conclusion of the bench trial, Torres filed a memorandum of costs. Among other costs, she sought $5,350 in expert witness fees pursuant to section 998 along with $593 for "Blow-Ups of Vehicles/ Scene" (photographs) and $521 for a Spanish interpreter. Puerta filed a motion to tax costs, arguing with respect to the expert witness fees that Torres had not demonstrated she was entitled to them. He also objected to the fees for the photographs and the interpreter. Puerta in turn argued that Torres had failed to show that she had made an offer pursuant to section 998.

At the hearing, the court continued the motion for a week, stating that the motion to tax costs was denied, but would be granted unless counsel for defendant submitted evidence of a

declined 998 offer by the date of the continued hearing. Torres's counsel then submitted a declaration and a copy of Torres's section 998 offer, which set forth an offer to dismiss in exchange for a waiver of costs and an expiration date 30 days after the offer was made. Puerta filed an objection, arguing once again that Torres's offer had not complied with the language of the statute requiring a provision for acceptance. The court did not hold a further hearing, but ruled via minute order that Torres had met the condition of providing evidence of a section 998 offer, and denied Puerta's motion to tax costs.

Puerta now appeals.

II
DISCUSSION

A. Statement of Decision

Puerta claims that he filed a timely request for a statement of decision within 10 days of the tentative ruling. Whether a statement of decision is required is governed by section 632, which states, in pertinent part: "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision."

Puerta claims his request was timely because he filed it on January 15, within 10 days after the court issued its tentative decision. But he does not address the issue of how long the trial was — if it was less than one calendar day or eight hours, a statement of decision is not required. Both the court's minutes and the reporter's transcript state that Puerta was asked for his opening statement on January 5. The minutes reflect court began at 9:15 a.m. At the conclusion of the same day's session, the court issued its decision and court was adjourned at 3:50 p.m.

It is appellant's burden to affirmatively demonstrate error with respect to whether a statement of decision is required. (*In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 977-978, 980.) Puerta has not shown that the trial lasted longer than one calendar day (or more than eight hours over successive days), and therefore, if he wished for the court to provide a statement of decision, he was required to request it before the matter was submitted. (§ 632.) We therefore find no error.

B. Substantial Evidence

Puerta next argues the court's decision to find in Torres's favor on the issue of liability was in error. He claims the evidence was sufficient to "prove his case," but this is not the standard of review on appeal. "When findings of fact are challenged in a civil appeal, we are bound by the familiar principle that 'the power of the 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 view the evidence most favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.] Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. [Citation.]" (*Oregel v. American Isuzu Motors*, *Inc.* (2001) 90 Cal.App.4th 1094, 1100.)

The testimony of a single witness may alone constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

We do not reweigh the credibility of witnesses or resolve conflicts in the evidence. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) Further, this court is bound by implied findings made by the trial court, such as rejecting a witness's testimony. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182.)

Thus, Puerta's argument that "the trial judge ignored the evidence presented by Puerta and instead accepted Torres['s] version of the accident despite the lack of credibility because of impossibility" is unavailing. We also must reject Puerta's argument that we should use a de novo standard of review because the same evidence that the trial court had is now before this court, and that Torres's testimony was "impossible" and therefore a legal issue. Puerta then argues that Torres's version of events is impossible; in sum, that she could not have driven through the station to park in the spot that she claimed. But under firmly established precedent, the only question before us is whether there was substantial evidence, contradicted or uncontradicted, to support the judgment.

Given this court's limited role, the evidence is more than sufficient to conclude the judgment is supported by substantial evidence. This case primarily turned upon the credibility of the witnesses, and as we noted above, it is not this court's function to second-guess the trial court's conclusions regarding credibility. The ultimate issue in this case was whether there was contact between the two vehicles. The court had the testimony of Torres, the police officer, and the accident reconstructionist from which it could determine that Torres simply never hit Puerta. This is more than substantial evidence, despite the contradictory testimony of Puerta and his son. We conclude there was no error.

C. Exclusion of Business Records

Puerta next asserts the trial court erred by failing to admit the following evidence: records of Puerta's file with a treating physician, Dr. Gahn; records of Puerta's file with another treating doctor; and records of Puerta's car damage from "another repair shop." It seems to us, however, and Puerta does not argue otherwise, that the records in question are only relevant to his measure of damages. Because we concluded above that the trial court's decision that Torres was not liable for Puerta's damages, if any, was supported by substantial evidence, we need not consider this issue further. Had the evidence been admitted, the outcome of the case would have been the same, and any error was therefore harmless.

D. Expert Witness Fees – Section 998

Section 998 concerns pretrial offers to compromise. It states, in relevant part: "Not less than 10 days prior to commencement of trial or arbitration . . . of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer 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), italics added.)

Thus, if a defendant makes an offer to settle a case pursuant to section 998, and the plaintiff fails to accept, the plaintiff is responsible for costs incurred after the date of the

offer. (§ 998, subd. (c)(1)). In addition, the court, in its discretion, may order the plaintiff to pay the fees of the defendant's expert witnesses. (*Ibid.*)

Effective January 1, 2006, the Legislature amended section 998 to add the second and third sentences of the section, which added language regarding the acceptance of a section 998 offer. As relevant here, the amendment specified that the offer must include "a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." (Stats. 2005, ch. 706. § 13.) It is undisputed from the record that Torres's offer to compromise did not include any provision regarding acceptance; it simply offered a waiver of costs in exchange for dismissal, and stated the offer would remain open for 30 days.

Puerta argues that the offer was invalid for failing to include a provision regarding acceptance as set forth in the statute, and accordingly, the court erred by awarding Torres $5,350 in expert witness fees. Because this is question of statutory construction, our review of this issue is de novo. (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.)

This issue presents two competing dynamics. On the one hand, case law predating the amendment to section 998 emphasized the importance of the purpose of the statute, which is to encourage settlement. (See *Pazderka v. Caballeros Dimas Alang*, *Inc.* (1998) 62 Cal.App.4th 658, 672.) Thus, the cases held, offers under section 998 should be held valid if they are clear and understandable, even if they do not precisely track the statute's language.

In *Berg v. Darden* (2004) 120 Cal.App.4th 721 (*Berg*), a medical malpractice case, the plaintiff's attorney faxed a section 998 settlement offer to defense counsel's office, offering to settle the case for $225,000. Defense counsel told his client that he did not believe the faxed offer was valid under section 998 and never responded. (*Id.* at p. 725.) At trial, plaintiff recovered approximately $524,000 and thereafter her attorney moved to recover costs from the date of the faxed offer. The trial court granted a motion to tax costs on the ground that the successful plaintiff and her counsel had made an "ineffective section 998 offer." (*Id.* at p. 726.) The Court of Appeal disagreed and reversed.

According to the defendant, the faxed section 998 offer was ineffective because "the offer failed to indicate whether she (1) sought to have judgment entered against Darden, (2) sought to have an 'award' entered in her favor, or (3) was willing to dismiss her malpractice action with prejudice." (*Berg*, *supra*, 120 Cal.App.4th at p. 728.) The section 998 offer by plaintiff's counsel to defense counsel was "the last paragraph of a letter addressed to other issues." (*Ibid.*) Although the court agreed that the "settlement offer undoubtedly could have been more formal . . . and could have been stated with more precision," the *Berg* court held that neither consideration (nor its transmission via fax rather than formal service) rendered the offer invalid under section 998.

The court explained: "It is in the best interests of the parties and the court that section 998 offers be as clear, straightforward and thorough as possible. To advance the important purposes of clarity of understanding and ministerial ease discussed above, courts have found that 'the legislative purpose of section 998 is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single, valid statutory offer . . . .' [Citations.] Nevertheless, we do not find fatal Berg's failure to reference the specific method by which she proposed to dispose of the case should Darden decide to accept her offer. [¶] . . . An otherwise clear section 998 offer is not rendered invalid simply because it does not track precisely the language of the statute." (*Berg*, *supra*, 120 Cal.App.4th at p. 728.)

On the other hand, we have the most fundamental principles of statutory construction, which we find more persuasive.

"If the language is clear and unambiguous, the plain meaning governs." (*Silicon Valley Taxpayers' Assn.*, *Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444; *Young v. Gannon* (2002) 97 Cal.App.4th 209, 223 [the "court looks first to the language of the statute; if clear and unambiguous, the court will give effect to its plain meaning"].) Since its amendment, section 998 now states: "The written offer *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." (§ 998, subd. (b), italics added.) The term "shall" is mandatory. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 ["It is a well-settled principle of statutory construction that the word . . . 'shall' is ordinarily construed as mandatory . . . ."])

While Torres argues that "shall" is sometimes construed as less than strictly mandatory (see *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 134), such a reading is an exception to the rule and should only apply when reading a provision as mandatory would defeat the purpose of the statute. (*Ibid.*) In this instance, the statute was amended to require that acceptances of 998 offers, as well as the offers themselves, be in writing, and that the manner of acceptance must be indicated in the offer.

Applying the statute as written does not defeat its purpose. The statute's new language seeks to eliminate uncertainty by removing the possibility that an oral acceptance might be valid, which is a legitimate concern. While there is room for interpretation as to how an appropriate statement regarding acceptance might be phrased in the offer, it is clear from the statute's language that at least *some* indication of how to accept is required by the amendment. The Judicial Council form section 998 offer (CIV-090), for example, includes a signature line to indicate acceptance. A sentence in the offer stating that acceptance could be indicated by return letter might be equally acceptable.

We do not find that the amendment's requirements are the type of overly formal requirement at issue in *Berg*. In that case (which, obviously, addressed a different provision of section 998) the issue was whether a party's failure to indicate the exact terms under which judgment would be taken rendered the offer invalid. The Court of Appeal held that if "written offer of compromise is made under section 998 and, if accepted, will result in entry of judgment —the expected and standard procedural result unless specific terms and conditions stated in the offer provide otherwise—the offer need not identically track the language of the statute under which it was made." (*Berg*, *supra*, 120 Cal.App.4th at p. 730.)

This case, in contrast, deals with the provision that sets forth two mandatory requirements about what *shall* be included in a section 998 offer: the offer shall be written, and it shall contain a provision stating that the recipient can accept the offer "by signing a statement that the offer is accepted." The offer at issue here contained nothing regarding acceptance, only the terms of the offer itself and its expiration date. It was therefore invalid under the plain language of the statute, regardless of whether Puerta ever intended to accept the offer or not. We therefore reverse that portion of the judgment requiring Puerta to pay Torres's expert witness fees.

E. Other Costs

Puerta next contests the trial court's award of $593 for photographs and $521 for an interpreter. "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.]" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) With respect to the blowups, Puerta argues that no photographs were used at trial, but he offered no evidence to support this contention, either in this court or in the court below.

The general rule is that the lower court's judgment """is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citations.]' [Citation.]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136.) With respect to the blowups, Puerta has failed to meet his burden to show error.

With regard to the interpreter, he claims that interpreter costs are not allowed because they are not authorized by section 1033.5, subdivision (a). Section 1033.5 enumerates costs which are allowable and costs which are not allowable, and restricts allowable costs to those reasonably necessary to the conduct of the litigation. But section 1033.5, subdivision (c)(4) permits an award of discretionary costs: "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

There was evidence in the record that Torres needed an interpreter to testify in her own defense. Thus, it was well within the trial court's discretion to award Torres the cost of using the interpreter. The court's discretion under section 1033.5, subdivision (c)(4) is broad (*Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 604) and we do not see any indication it was abused in this case.

III DISPOSITION

The judgment is reversed with respect to Torres's expert witness fees, and the trial court shall enter a new judgment accordingly. In all other respects, the judgment is affirmed. In the interests of justice, each party shall bear their own costs on appeal.

MOORE, J.

WE CONCUR:
RYLAARSDAM, ACTING P. J.
O'LEARY, J.