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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RAYMOND MARTINEZ et al., Plaintiffs and Respondents, v. BROWNCO CONSTRUCTION COMPANY, INC., Defendant and Appellant.	B226665 (Los Angeles County Super. Ct. No. KC050128)

APPEAL from an order of the Superior Court of Los Angeles County. Elihu Berle, Judge. Affirmed in part and reversed in part.

Lindahl Beck, George M. Lindahl and Laura H. Huntley for Defendant and Appellant.

Baker, Burton & Lundy and Albro L. Lundy III for Plaintiffs and Respondents.

All parties appeal from an order awarding costs to the plaintiffs following a jury trial. Defendant maintains plaintiffs are not entitled to the cost of presenting an edited video recording of the deposition of a witness or the cost of a PowerPoint presentation used during closing argument. Plaintiff Gloria Martinez contends the court erred in taxing expert witness fees incurred between her successive Code of Civil Procedure section 998 settlement offers.[1] We conclude plaintiffs are entitled to the cost of the video presentation but not the PowerPoint presentation. Gloria is entitled to expert witness costs incurred from the date of her earliest reasonable offer.

BACKGROUND

Raymond Martinez was injured in an electrical explosion at work. He and Gloria, his wife, sued Browncо Construction Company (Browncо), which had performed demolition work at the job site, for negligence and loss of consortium.[2] Browncо answered, alleging that Raymond's and his employer's negligence caused the explosion.

On August 30, 2007, Raymond served on Browncо a statutory offer to compromise pursuant to section 998 in the amount of $4,750,000. Gloria offered to compromise for $250,000. Browncо neither accepted nor rejected the offers, and they were withdrawn by operation of law after a statutory 30-day period had passed. (§ 998, subd. ((b)(2).) On February 8, 2010, Raymond offered to compromise for $1,500,000. Gloria's offer was $100,000. Browncо took no action on these offers either, and they were withdrawn by operation of law when trial began on February 18. (*Ibid*.)

At trial, plaintiffs' theory was that as part of the demolition work, Browncо employees sawed through several vertical electrical conduits (metal tubes carrying electrical wires) directly above a live, high voltage electrical panel, causing metal shavings to fall down through the conduits into the panel. The shavings caused electrical arcs within the panel, creating superheated plasma which then exploded, severely burning Raymond. Browncо's theory was that while disassembling the electrical panel, Raymond

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[1] All undesignated statutory references will be to the Code of Civil Procedure.

[2] For simplicity, we will henceforth refer to the Martinezes by their first names.

left two live electrical lines unsecured and exposed. The wires came into contact with other parts of the panel, causing arcing that ultimately resulted in the explosion.

Browncо's foreman in charge of the demolition was Dwayne Taylor. Taylor allegedly ignored advice that the proper way to remove the conduits was either to disconnect them or to cut them "beyond the '90'," i.e., at a location beyond a 90 degree bend, so that metal shavings would at worst fall onto the electrical panel's external housing, not down through the conduits to the panel's interior. Plaintiffs took a video recording of Taylor's deposition. Shortly before trial, Browncо notified plaintiffs that Taylor no longer worked for it and could not be found. At trial, plaintiffs presented video excerpts of Taylor's deposition. The deposition testimony of other absent witnesses was read into the record by attorneys.

During closing argument to the jury, plaintiffs' counsel used a PowerPoint presentation that featured several photographic views of the workspace, including the electrical panel, conduits, and signs of arcing, with textual insets setting forth plaintiffs' argument. The presentation also included photographs of Raymond's physical injuries, bullet point lists of the impact his injuries had on his and Gloria's daily lives, and tables showing his economic damages.

In a special verdict, the jury found Raymond to be 10% at fault, his employer 40% at fault, and Browncо 50% at fault. Judgment was entered awarding Raymond $1,646,674 and Gloria $250,000.

After trial, plaintiffs sought $561,257.14 in itemized costs, including $11,956 for editing and presenting video excerpts of Taylor's deposition, $87,282.86 for the PowerPoint presentation used during closing argument, $188,536.86 in expert fees incurred after their first section 998 offers but before their second offers, and $64,555.45 in expert fees incurred after the second set of offers.

Browncо moved to tax the cost items for the video presentation of Taylor's deposition, the PowerPoint, and the $188,536.86 in expert fees incurred between plaintiffs' first and second section 998 offers. It argued the recording of the Taylor deposition was not reasonably necessary for trial, as attorneys could simply have read the

questions and answers into the record, as is normally done when a witness is unavailable for trial and as was otherwise done in this case. Browncо argued the PowerPoint presentation was similarly unnecessary and Gloria was not entitled to expert fees incurred before her second 998 offer to compromise.

Plaintiffs opposed the motion, arguing the Taylor video recording and PowerPoint presentations were reasonably necessary and Gloria should recover all witness fees incurred after her first section 998 offer.

Judge Warren Ettinger, who had presided over the trial, retired before Browncо's motion came on calendar. The motion was heard by Judge Elihu Berle, who agreed with Browncо that Gloria was not entitled to witness fees incurred between her first and second section 998 offers but found plaintiffs were entitled to the costs of editing and presenting the Taylor video and creating and presenting the PowerPoint slides.

Both sides appeal from the ensuing judgment.

DISCUSSION

A. Reasonably Necessary Costs

Browncо contends it was not reasonably necessary for plaintiffs to present Taylor's deposition in video format at trial or to make a PowerPoint presentation during closing argument.

1. Legal Principles

Section 1032 permits an award of costs to a prevailing party. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 128-129.) Section 1033.5 sets forth the items of costs that may or may not be recovered. Subdivision (a) of section 1033.5 itemizes allowable costs, which include: "Taking, video recording, and transcribing necessary depositions." (§ 1033.5, subd. (a).) Subdivision (b) of section 1033.5 itemizes certain items not allowable as costs. An item not specifically allowed under subdivision (a) or disallowed under subdivision (b) nevertheless may be recoverable in the court's discretion. (§ 1033.5, subd. (c)(4).) Only costs that are "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" may be awarded. (§ 1033.5, subd. (c)(2).) If the nonprevailing party objects to an item of costs, the burden

of proof is on the prevailing party to establish the item's reasonable necessity. (*Oak Grove School Dist. v. City Title Ins. Co*. (1963) 217 Cal.App.2d 678, 698-699.)

Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court, whose decision is reviewed for substantial evidence. (*Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39.) When an issue is tried on declarations, the rule on appeal is that declarations favoring the contention of the prevailing party establish the facts stated and all facts reasonably inferable therefrom. (*Ibid*.)

Brownco suggests our review should be de novo because Judge Berle, who presided over the costs hearing, had not presided over trial, leaving him in no better position than we to assess whether a cost item was reasonably necessary. We disagree.

In ruling on a motion to tax costs, the trial court applies the standards set forth in section 1033.5 to the litigation facts and determines whether a particular cost item was reasonably necessary to produce the successful result. Litigation facts include the nature of the action, the underlying facts alleged before and developed during trial, the nature and complexity of legal issues presented, and the practical and procedural steps necessary to present the underlying facts, apply the pertinent law, and reach a successful result. A party seeking costs must establish the litigation facts and persuade the trial court that those facts meet the requirements of section 1033.5. (Evid. Code, § 115; see generally *People v. Dubon* (2001) 90 Cal.App.4th 944, 953-954.) As a practical matter, establishing the litigation facts is most easily accomplished when the bench officer hearing the costs motion also presided over trial, as the parties may rely on the officer's familiarity with the litigation in lieu of an unnecessarily detailed evidentiary showing. If the bench officer did not preside over the trial, the parties' evidence must be more complete. That does not mean a bench officer who did not preside at trial is equally positioned with the appellate court to determine the predicate facts. The appellate court would be in no position, for example, to resolve credibility issues or evidentiary conflicts regarding the litigation facts. That the hearing officer here did not also preside at trial affects only the burden of persuasion, not the standard of review.

2. Video of the Taylor Deposition

Plaintiffs claimed that Taylor, as foreman on the demolition work performed at Raymond's workplace, ordered Browncо employees to cut electrical conduits in a manner that caused the explosion. When Browncо notified plaintiffs' counsel that it would be unable to produce Taylor at trial, plaintiffs had the option of presenting Taylor's deposition testimony by readback or by showing video excerpts. As related by plaintiffs' counsel to Judge Berle at the costs hearing, Judge Ettinger had asked the jury whether they preferred to see deposition testimony "live" on the video screen or have it read from the witness box. The jury indicated that testimony read from the witness box was, in plaintiffs' counsel's words, "a little boring, digital is more interesting." Counsel then chose to present video excerpts of Taylor's deposition. The content of Taylor's testimony—edited or unedited—is not in the record on appeal and as far as we can determine was not related to Judge Berle at the costs hearing.

In a declaration filed for the costs hearing, plaintiffs' counsel stated that he chose to use the edited video because it was an "effective and efficient" method of displaying the evidence and was "reasonably helpful" to the jury. Counsel argued the video was "essential for the Court and the jury to understand the sophisticated and complex analysis of how the accident occurred . . . ."

Judge Berle agreed, stating, "to keep the jurors' attention it would seem to me more reasonable to have the video deposition rather than somebody sitting on the stand and reading a transcript of somebody else's testimony. [¶] First of all, you don't get the same intonation and inflections as the original testimony, you get somebody who is supposed to read the testimony dry. [¶] You don't want an actor on the stand trying to inject his or her own feelings into a dry transcript . . . . [¶] Secondly, it seems to me it would be much more efficient in terms of handling a case to have an edited video where you go directly to the question and answer that has, I assume, been pre-approved by the court if there were any objections, rather than having somebody reading and stopping at objections or turning pages. It saves a lot of time in preparation for a witness aside from making it more interesting. [¶] So I think things have changed from the days of just

reading dry transcript. . . . [¶] . . . [¶] This is a reality of how cases are presented to [jurors]. . . . [T]his is what is the accepted mode of trying cases to us. So it's difficult to suggest that it is not part of the everyday trial work that it should not be covered in the costs." Judge Berle found that the video "helped the trier of fact consider the evidence" and "helped expedite the course of the trial."

On this record, we conclude the award of costs for presenting the Taylor video was not an abuse of discretion. It is undisputed that Taylor, who set in motion the acts ultimately resulting in Raymond's injuries, was a crucial witness. Judge Berle reasonably could have concluded from Judge Ettinger's informal poll of the jury that evaluation of Taylor's demeanor was necessary to the jury's task of determining his credibility. Although the existence of the alternative method of reading aloud the testimony suggests that video editing is not always necessary to the conduct of litigation (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1105), on this record we cannot say that Judge Berle's conclusion was arbitrary.

3. PowerPoint Presentation

During closing argument, plaintiffs' counsel made a PowerPoint presentation comprising 134 slides that included blow-ups of exhibits and testimony, most with textual insets setting forth plaintiffs' argument, including the following: "[Brownco employees] Knew and Ignored the Electrical Hazards of the Selective Demolition"; "[Brownco employees] Violated Their Own Safety Rule by Sending Untrained Workers into a High Voltage Area"; "Brownco Chose the Most Dangerous Method to Remove Conduit"; "Unsafe Cutting Caused Contaminated Electrical Panel"; "[Brownco's] Theory is Impossible." Several slides showed Raymond's injuries and discussed his pain and suffering and the financial and psychological impact of the accident. Only four of the slides included in the appellate record were devoid of argument. Plaintiffs attached 16 of the slides to their opposition to Brownco's motion to tax costs and brought all 134 slides to the costs hearing.

Plaintiffs sought $92,146 for the presentation.

In his declaration, plaintiffs' counsel argued the PowerPoint "was a concise, effective and efficient method of displaying the evidence for the jury, saving on time and judicial resources," and was "essential for the Court and the jury to understand the sophisticated and complex analysis of how the accident occurred, and plaintiffs' severe burn and psychological injuries. . . . [¶] The jurors deliberated for over six (6) days on the liability issue alone. Clearly this was a close call for plaintiffs. If the closing had not been so well presented due in large part to [the PowerPoint], then the outcome most probably would not have been as favorable."

At the costs hearing, plaintiffs' counsel argued that because Judge Ettinger had granted each party only two hours for closing argument, the PowerPoint was "reasonably helpful" to the trier of fact in that it allowed plaintiffs to put on 134 exhibits in two hours. "[A]fter the twenty-three day trial, . . . the jury was out for an additional six and-a-half more days" counsel argued, "[a]nd the questions that they had while they were out were primarily focused on liability. And due to a number of issues, we were on the cusp of a mistrial so that the potential of a hung jury was very close and perhaps maybe even potentially a defense verdict. So I think that this closing argument was essential to our winning the case."

Browncо's counsel argued the PowerPoint presentation was a "multimedia extravaganza," with no slide depicting solely an exhibit.

The trial court found that the "complicated graphics" were "necessary to demonstrate the[] facts to the jury" and "was appropriate and helpful to aid the trier of fact." It allowed the cost.

This was an abuse of discretion. The PowerPoint presentation was an allowable cost only if it was reasonably *necessary* to the conduct of the litigation rather than merely convenient or beneficial. Nothing in the record suggests it was. As noted, the presentation set forth plaintiffs' argument, not evidence. We know of no authority, and plaintiffs cite none, holding that visual aids setting forth a party's argument during closing remarks are reasonably necessary to the conduct of litigation.

It appears the trial court and plaintiffs' counsel applied the wrong standard to the PowerPoint cost item. Counsel repeatedly argued, and the trial court found, that the presentation was reasonably *helpful* to the trier of fact. But this standard applies to only "[m]odels and blowups of exhibits and photocopies of exhibits," which are allowable costs under subdivision (a) of section 1033.5 if they were "reasonably helpful to aid the trier of fact," i.e., to help the trier of fact determine the facts of the case. The reasonably helpful standard does not apply here because the PowerPoint did not comprise blowups of exhibits and did not help the jurors determine the facts of the case, it helped them understand only plaintiffs' argument.

Plaintiffs argue *El Dorado Meat Company v. Yosemite Meat* (2007) 150 Cal.App.4th 612 and *American Airlines, Inc. v. Sheppard, Mullin* (2002) 96 Cal.App.4th 1017 support the proposition that high-tech methods used to display documents to the jury are recoverable as costs. The cases are distinguishable. In *El Dorado Meat Company*, the prevailing party sought to recover the cost of preparing and displaying at trial a 37-page exhibit distilling years' worth of business data. The appellate court held the exhibit was reasonably necessary to the litigation. In *American Airlines*, the prevailing party sought costs for "imaging documents and deposition transcripts." (*Id.* at p. 1057.) Citing the rule that models and blowups of exhibits are an allowable cost if they are reasonably helpful to the trier of fact, the appellate court held the costs were recoverable. The obvious difference between those cases and the instant one is that in them, the prevailing party sought reimbursement for presenting evidence to the jury, whereas here plaintiffs seek reimbursement for the cost of presenting their argument.

B. Section 998 Expert Fees

The trial court denied Gloria's request for expert fees incurred after her first statutory offer but before her second, finding the second offer extinguished the first for all purposes. Gloria contends this was error. The appeal presents the following issue: When a plaintiff makes two reasonable section 998 offers, both of which expire by operation of law, can the plaintiff recover expert fees incurred after the first offer—in

addition to those incurred after the second? The issue is one of statutory interpretation that we review de novo. (*Ray v. Goodman* (2006) 142 Cal.App.4th 83, 87.)

1. Procedural History

As stated, Raymond alleged one cause of action for negligence. Gloria alleged one cause of action for loss of consortium. Plaintiffs each made offers to compromise pursuant to section 998 on August 30, 2007 and February 8, 2010, Gloria first for $250,000 and then for $100,000, Raymond first for $4,750,000 and then for $1,500,000. Each offer lapsed by operation of law after Browncо took no action to accept or reject it. At trial, Raymond's recovery of $1,646,674 was less than his first 998 offer but more than his second. Gloria's recovery of $250,000 equaled her first offer and exceeded her second.

Plaintiffs incurred $188,536.86 in expert fees between August 30, 2007 and February 8, 2010, and an additional $64,555.45 in expert fees after February 8, 2010. Plaintiffs do not contend Raymond is entitled to fees incurred between August 30, 2007 and February 8, 2010 and defendant does not dispute that Gloria and Raymond are both entitled to fees incurred after February 8, 2010. Browncо moved to tax the $188,536.86 cost item on the ground that pursuant to *Wilson v. Wal-Mart Stores, Inc*. (1999) 72 Cal.App.4th 382 (*Wilson*), Gloria was not entitled to fees incurred in the time between the offers because her second offer nullified her first offer. The trial court agreed, and disallowed the cost item.

2. Interpretation of Section 998

To interpret section 998 we follow "'[t]he fundamental rule of statutory construction . . . that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]' [Citation.] In determining that intent, we first examine the words of the statute itself. [Citation.] Under the so-called 'plain meaning' rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. [Citation.] If the language of the statute is clear and unambiguous, there is no need for construction. [Citation.] However, the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with

its purpose. [Citation.] If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] '"We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.] The legislative purpose will not be sacrificed to a literal construction of any part of the statute." (*Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515-1516.)

The Legislature enacted section 997 and its successor, section 998, to encourage pretrial settlement of litigation.[3] (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 (*Cobb*) ["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].) Section 998 provides that not less than 10 days prior to trial, "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." (§ 998, subd. (b).) If the offer is accepted, proof of acceptance is filed with the court and judgment is entered accordingly. (*Id*., subd. (b)(1).) "If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn." (*Id*., subd. (b)(2).)

"If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding . . . , the court . . . , in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the

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[3] Section 998, enacted in 1971 (Stats. 1971, ch. 1679, § 3, pp. 3605-3606), replaced section 997 (added by Stats. 1851, ch. 5, § 390, p. 113, repealed by Stats. 1971, ch. 1679, § 1, p. 3605).

plaintiff, in addition to plaintiff's costs." (§ 998, subd. (d).)[4] "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 not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding . . . , the court . . . , in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (§ 998, subd. (c)(1).)

Pursuant to the terms of subdivision (d) of section 998, Gloria was entitled (in the court's discretion) to expert witness fees incurred after August 30, 2007 because on that date she made a reasonable statutory offer to settle that Brownco failed to accept. (§ 998, subd. (d).)

Brownco contends Gloria's second section 998 offer superseded the first offer for purposes of cost shifting. We disagree.

3. Multiple Section 998 Settlement Offers

Section 998 is silent as to the effect of a later section 998 offer on an earlier offer. Brownco invites us to fill this silence essentially by adding the following language to subdivision (d): If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court may require the defendant to pay the plaintiff's expert witness fees "*unless plaintiff makes a later offer to compromise*."

Two cases would seem to support the modification.

a. Distefano v. Hall

In *Distefano v. Hall* (1968) 263 Cal.App.2d 380 (*Distefano*), the defendants served a first statutory offer to settle for $20,000, which was not accepted. (*Id*. at pp. 383-384.) Four years later, after a full trial and reversal of the judgment on appeal, defendants made a second statutory offer, for $10,000, which was also not accepted. After a second full trial, the plaintiff obtained a verdict in the amount of $12,559.96 and was allowed costs.

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[4] Expert fees are generally disallowed as costs otherwise. (§ 1033.5, subd. (b)(1).)

On appeal, defendants contended they were not required to pay plaintiff's costs; on the contrary, plaintiff was required to pay their costs because he refused to accept their first offer of $20,000 and failed to obtain a more favorable judgment. (*Id*. at p. 384.) The appellate court disagreed, concluding that defendants' second offer extinguished the first, and because plaintiff's verdict of $12,559.96 was more favorable than defendant's second offer he was not required to pay defendants' costs. (*Ibid*.)[5]

b. Wilson v. Wal-Mart

In *Wilson, supra*, the plaintiff served an initial offer to compromise for $150,000. One year later she made a second offer, for $249,000. The defendant accepted neither offer, and a jury subsequently awarded plaintiff $175,000. (72 Cal.App.4th at p. 387.) The trial court granted defendant's motion to tax the expert witness fee component of plaintiff's cost bill on the ground that her second offer "superseded and extinguished" her first offer for purposes of section 998. (*Id*. at p. 388.)

Relying heavily on *Distefano*, our colleagues in the Third Appellate District affirmed the order, holding that any new offer communicated prior to a valid acceptance of a previous offer extinguished and replaced the prior offer. (*Wilson*, at pp. 389-390.)

Distefano and *Wilson* set forth the rule defendant urges here: When a second section 998 offer is made after the first has been withdrawn by operation of law, the second offer controls the benefits afforded by section 998 to the offeror and the burdens to which the section exposes the offeree. The cases support the rule with several rationales.

c. General Contract Law Principles

The primary rationale for the rule that subsequent section 998 offers extinguish prior offers is that it comports with general principles of contract law, specifically the principle that "any new offer communicated prior to a valid acceptance of a previous

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[5] The court limited its holding to the facts before it. (263 Cal.App.2d at p. 384 ["where a case has been tried, appealed and reversed for retrial . . . an offer of compromise made before the second trial pursuant to section 997 should clearly supersede that made before the first trial"].)

offer, extinguishes and replaces the prior one." (*Distefano*, *supra*, 263 Cal.App.2d at p. 385; *Wilson*, *supra*, 72 Cal.App.4th at pp. 389-390.) We think application of contract principles compels the opposite result here.

Section 998 involves the contractual process of settlement and compromise, so "it is appropriate for contract law principles to govern the offer and acceptance process under section 998" where such principles "neither conflict with the statute nor defeat its purpose." (*Cobb*, *supra*, 36 Cal.3d at p. 280.) Because the issue here is whether Gloria's second offer extinguished her first, the principles most pertinent concern termination of offers, also called termination of the power of acceptance.

An offeree's power of acceptance may be terminated by revocation of the offer, rejection by the offeree, the making of a counteroffer, lapse of time, incapacity of the offeror, or the "non-occurrence of any condition of acceptance under the terms of the offer." (Rest.2d Contracts, § 36.) "Most offers are revocable." (*Id*., § 42, com. a.) An offer is revoked by communication from the offeror of its intention not to enter into the proposed contract. (*Id*., § 42.) The manifestation of such an intention may be express, as when the offeror explicitly revokes the offer, or implied, as when the offeree "takes definite action inconsistent with an intention to enter into the proposed contract." (*Id*., § 43; 1 Corbin on Contracts (rev. ed. 1993) § 2.20, pp. 226-227.) The making of a second offer involving the same subject matter but with terms different from those of the first offer constitutes a definite action inconsistent with an intention to enter into the contract as originally proposed and terminates the offeree's power to accept the terms of the original offer. (1 Corbin on Contracts, *supra*, § 2.20, p. 229; *Abrams-Rodkey v. Summit County Children Servs*. (Ohio App. 9 Dist. 2005) 163 Ohio.App.3d 1, 9 ["a later-made offer will revoke a previous offer to the extent that the offers are inconsistent"]; *Norca Corp. v. Tokheim Corp*. (N.Y.A.D. 1996) 227 A.D.2d 458, 458-459 [same].)

Lapse occurs when the time specified for acceptance in the offer expires, or, if no time is specified, a reasonable time passes. (Rest.2d Contracts, § 41.) A lapsed offer has no enduring contractual effect. (*Id*., § 35 ["A contract cannot be created by acceptance of

an offer after the power of acceptance has been terminated in one of the ways listed in § 36."]) A later offer therefore cannot "extinguish" a lapsed offer.

Here, Gloria's first offer lapsed long before she made her second offer. It thereafter retained no contractual significance and thus could not have been revoked or extinguished by the second offer. (See *Gallagher v. Heritage* (1983) 144 Cal.App.3d 546, 550 ["when an acceptance has not been effected under the terms of Code of Civil Procedure section 998, subdivision (b) . . . . [b]y its terms the offer has been withdrawn, but the statutorily imposed benefits and burdens remain"], disapproved on another ground in *Cobb, supra*, 36 Cal.3d at p. 280, fn. 8). The sole significance of the first offer was that pursuant to section 998 it entitled Gloria to cost shifting if Browncо failed to obtain a more favorable judgment. This conditional entitlement vested when Browncо allowed Gloria's first offer to lapse. Nothing in contract law requires that Gloria be divested of the entitlement simply because she later made another offer.

d. Encouragement of Settlement

Acknowledging that the purpose of former section 997 was to encourage the settlement of litigation without trial, the *Distefano* court observed that "to give less than full effect to the parties' reappraisals of the merits of their respective positions where a case has been tried, appealed and reversed for retrial" would deny the parties flexibility and discourage settlement. (263 Cal.App.2d at p. 385.) The *Wilson* court posed a somewhat different scenario that might arise if a late settlement demand does not extinguish an earlier demand. "A plaintiff might be encouraged to maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the plaintiff finds comfort in the knowledge that, even if the plaintiff receives an award less than his or her last demand, the plaintiff might still enjoy the cost reimbursement benefits of section 998 so long as the award exceeded a lower demand made by the plaintiff sometime during the course of the litigation. The reverse might be true of the defendant. 'Rolling the dice' then becomes somewhat less risky and we note that lawsuits are not often settled by reducing the risk of trial." (*Wilson, supra*, 72 Cal.App.4th at p. 391.)

We find this reasoning to be unpersuasive in this case. The purpose of section 998 is to encourage settlement by affording benefits to those who make reasonable settlement offers and imposing concomitant burdens on those who unreasonably reject them. Here, Gloria made two reasonable offers. To deny her the benefit of making the first offer simply because she made a later offer would actually discourage her making the later offer, and thus discourage settlement.

e. Preference for Bright Line Rules

Finally, the *Wilson* court supported its holding with the observation 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—i.e., the statutory offer most recently rejected—regardless of offers made earlier in the litigation." (*Wilson, supra*, 72 Cal.App.4th at p. 391.) Assuming for the sake of argument that bright line rules are to be preferred generally, the existing statutory rule, that a judgment will be measured against the earliest reasonable section 998 offer regardless of later offers, seems clear enough and has the added benefit of having been installed by the Legislature itself. The *Wilson* court suggested that while such a rule "arguably might promote settlement in some cases, its potential for mischief, or at least confusion, is apparent." (*Ibid*.) But a prevailing party who has made a reasonable pretrial offer pursuant to Code of Civil Procedure section 998 is eligible for specified costs only so long as the offer was made in good faith. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) Whether a section 998 offer was made in good faith is left to the sound discretion of the trial court. (*Ibid*.) Here, any mischief or confusion may be addressed by the trial court when it exercises its discretion in awarding costs.

4. Conclusion

Where a party makes two section 998 offers to compromise more than 30 days apart, the purpose of section 998 is adequately served by the statute's existing language, which entitles an offeror to cost shifting from the date of the earliest reasonable offer. This rule encourages early settlement, respects the Legislature's preference for early discovery and evaluation of the merits of lawsuits, and presents a certain, bright line rule

by which settlement negotiations may be guided. If any mischief or confusion results from later offers, or any gamesmanship arises, the court can address such concerns when it awards costs.

Here, it is undisputed that if Gloria had not made her second section 998 offer she would have been entitled (in the court's discretion) to an award of expert fees incurred after the first offer. No principle requires a different result simply because she made the second offer. The trial court thus abused its discretion when, albeit following *Wilson*, it found that Gloria's second offer to settle extinguished her first. The matter will be remanded to afford the court an opportunity to reexamine Gloria's entitlement to expert fees.

Brownco argues that even if Gloria is theoretically entitled to expert fees under section 998, she cannot obtain them here because the experts, whose opinions pertained only to the circumstances surrounding Raymond's injury, were not reasonably necessary to litigation of Gloria's claim for loss of consortium. Because the record does not clearly reflect the content of the experts' opinions, we will leave it to the trial court to determine the necessity of their evidence.

DISPOSITION

The order on defendant's motion to tax costs is reversed as to the $92,146 plaintiffs sought for their PowerPoint presentation and the $188,536.86 Gloria Martinez sought for expert fees incurred between August 30, 2007 and February 8, 2010. The matter is remanded to the trial court for its discretionary determination of Gloria's entitlement to these expert fees. In all other respects, the judgment is affirmed. All parties are to bear their own costs.

CERTIFIED FOR PUBLICATION.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.