



WEEKLY LAW RESUME™

Issue By: KAREN L. MOORE

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Unilateral Attorney Fees Clause in the Elder Protection Act Does Not Preclude Award of Costs and Expert Witness Fees to a Prevailing Defendant Under C.C.P. § 998

Katherine Lee Bates, et al. v. Presbyterian Intercommunity Hospital, Inc.
Court of Appeal, Second District (March 12, 2012)

Appellant Katherine Lee Bates (“Bates”) was the administrator of the estate of Rinda Lou Bates (“Rinda”). Bates sued respondent Presbyterian Intercommunity Hospital, Inc. (“PIH”) and several other defendants for injuries suffered by Rinda prior to her death. Following surgery for a broken hip at PIH, Rinda was discharged to her home under the care of nurses employed by Arcadia Home Health (“Arcadia”). Rinda developed a serious pressure sore over her coccyx which became severely infected, causing her death. At trial, Bates contended that the Arcadia home nursing staff failed to properly assess the severity of the pressure sore and immediately seek emergency treatment. Bates asserted that PIH was responsible for the negligent actions of the Arcadia nurses because PIH was a “licensee and operator” of Arcadia.

Before trial, PIH served a § C.C.P. 998 offer to Bates, offering a mutual waiver of costs and waiver of PIH’s claim for malicious prosecution in exchange for a dismissal of PIH with prejudice. Bates did not accept PIH’s C.C.P. § 998 offer, and it expired. At trial, Bates voluntarily dismissed her claims against PIH. As the prevailing party, PIH submitted a cost bill to Bates seeking \$83,713 in costs, including \$64,826 in expert witness fees based on C.C.P. § 998. Fees of experts not ordered by the court are ordinarily not recoverable as costs under C.C.P. § 1033.5. However, pursuant to C.C.P. § 998, if a defendant makes an offer to compromise that is not accepted “and the plaintiff fails to obtain a more favorable judgment or

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award,” the plaintiff “shall not recover his or her post-offer costs and shall pay the defendant’s costs from the time of the offer.” Section C.C.P. § 998 also provides that the court or arbitrator may require the plaintiff to pay expert witness fees actually incurred and reasonably necessary to the defense at trial or arbitration.

Bates moved to strike PIH’s cost bill contending: 1) a provision of the Elder Protection Act (Welfare & Institutions Code § 15657) precludes recovery of costs by a prevailing defendant where the claims arise from allegations of elder abuse and; 2) PIH’s C.C.P. § 998 offer was unreasonable and/or not made in good faith. The trial court rejected Bates’ contentions and awarded PIH its costs and expert fees totaling \$78,165, after striking approximately \$5,547 from the cost bill which PIH conceded were improperly included.

On appeal, Bates contended that the Elder Protection Act contained a unilateral or “one-way” attorney fee provision in favor of successful plaintiffs, but not successful defendants. Bates cited two Fourth District Court of Appeal cases, *Carver v. Chevron U.S.A. Inc.* (2004) 119 Cal.App.4th 498 and *Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, in which the Fourth District held that unilateral attorney fee-shifting provisions in both the Cartwright Act and the Elder Protection Act allowed a prevailing plaintiff-but not a prevailing defendant-to recover mandatory attorney fees. Bates contended that the legislature did not intend to create “reciprocal” rights under these statutory schemes to allow PIH to recover costs and expert fees.

The Court of Appeal rejected Bates contentions relying on the California Supreme Court case *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985. In *Murillo*, the Supreme Court held that costs are recoverable by a defendant in situations where attorney fees would not be, pursuant to C.C.P. § 998. The *Murillo* court reasoned that the statute at issue, the Song-Beverly Act, did not explicitly preclude a prevailing defendant from recovering costs and fees. The legislative intent of the Song-Beverly Act to award attorney fees to prevailing plaintiffs did not override the legislative intent expressed in C.C.P. § 998 to encourage settlement of lawsuits.

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Relying on *Murillo*, the Court of Appeal determined that the Elder Protection Act did not explicitly disallow a prevailing defendant such as PIH from obtaining litigation fees and costs. Further, the trial court did not abuse its discretion in determining that PIH's C.C.P. § 998 offer to Bates was both reasonable and made in good faith. The offer was presumptively reasonable because PIH obtained a more favorable judgment at trial (dismissal) than its C.C.P. § 998 offer of a mutual waiver of costs. Bates abandoned her claim against PIH because the factual basis for holding PIH liable for the actions of nurses employed by co-defendant Arcadia was tenuous. The trial court reasonably found that that PIH's offer to compromise to Bates was "not a mere token" because it included a waiver of costs, including waiver of substantial expert witness fees. Accordingly, PIH was entitled to recover its C.C.P. § 998 litigation costs and fees, including pre-offer expert witness and consultant fees totaling \$64,826.

COMMENT

In cases where expert witness fees are substantial, it pays to serve a C.C.P. § 998 offer. If a plaintiff fails to obtain a more favorable judgment or award than the defendant's C.C.P. § 998 offer, a prevailing defendant may recover both post-offer costs and pre-offer expert witnesses and consultant fees incurred and reasonably necessary to prepare for trial or arbitration.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/B232731.PDF](http://www.courtinfo.ca.gov/opinions/documents/B232731.pdf)

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