Case No. C090463

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

OSCAR and AUDREY MADRIGAL,
Plaintiffs and Respondents,

vs.

HYUNDAI MOTOR AMERICA,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR PLACER COUNTY, HONORABLE MICHAEL W. JONES, JUDGE, CASE NO. SCV0038395.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT

FRED J. HIESTAND (SBN 44241)
COUNSELOR AT LAW
3418 Third Ave., Suite 1
Sacramento, CA 95817
Tel: (916) 448-5100
fred@fjh-law.com

Counsel for *Amicus Curiae*
The Civil Justice Association of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

QUESTION PRESENTED 8

INTEREST OF AMICUS AND IMPORTANCE OF ISSUE 8

SALIENT FACTS AND PROCEDURE. 10

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. THE "COST-SHIFTING" PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 998 APPLY TO SONG-BEVERLY ACT LAWSUITS THAT RESULT IN PRE-TRIAL SETTLEMENT AND DISMISSAL WITH PREJUDICE. 14

A. CCP Sections 998, 1032 and the Song-Beverly Act Provisions on Recoverable Costs and Attorney Fees have been held by Numerous Appellate Authorities to be Read together and Harmonized. 14

B. A Voluntary Dismissal with Prejudice that Disposes of the Underlying Lawsuit Constitutes a "Judgment" under section 998. 19

II. TO EXEMPT SECTION 998's "COST-SHIFTING" PROVISIONS IN SONG-BEVERLY ACT LITIGATION DEFEATS ITS PURPOSE TO ENCOURAGE SETTLEMENT AND LEADS TO ABSURD RESULTS.. . 25

CONCLUSION 30

CERTIFICATE OF WORD COUNT 31

PROOF OF SERVICE 32

TABLE OF AUTHORITIES

Page

Cases

American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017 22

Berg v. Darden (2004) 120 Cal.App.4th 721 . . . . 22, 24

Bodell Construction Co. v. Trustees of Cal. State University (1998) 62 Cal.App.4th 1508 28

Duale v. Mercedes-Benz USA, LLC (2007) 147 Cal.App.4th 718 . . . . 18, 19

Fontana Unified School Dist. v. Burman (1988) 45 Cal.3d 208 25

Gonzalez v. Mathis (2021) 12 Cal.5th 29. 10

Goodstein v. Bank of San Pedro (1994) 27 Cal.App.4th 899 . . . . 22, 23

Guerrero v. Rodan Termite Control, Inc. (2008) 163 Cal.App.4th 1435 28

John v. Superior Court (2016) 63 Cal.4th 91. 27

Kim v. Toyota Motor Corp. (2018) 6 Cal.5th 21. 10

Lexin v. Superior Court
(2010) 47 Cal.4th 1050 15

Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.
(1999) 73 Cal.App.4th 324 28

Mon Chong Loong Trading Corp. v. Superior Court
(2013) 218 Cal.App.4th 87 23

Murillo v. Fleetwood Enterprises, Inc.
(1998) 17 Cal.4th 985 17

New York Trust Co. v. Commissioner
(2d Cir. 1933) 68 F.2d 19 20

Nicholson v. Barab
(1991) 233 Cal.App.3d 1671 26

On-Line Power, Inc. v. Mazur
(2007) 149 Cal.App.4th 1079 22

Reck v. FCA US LLC
(2021) 64 Cal.App.5th 682 29

Scott Co. v. Blount, Inc.
(1999) 20 Cal.4th 1103 18

Seever v. Copley Press, Inc.
(2006) 141 Cal.App.4th 1550 27

Southern California Gas Leak Cases
(2019) 7 Cal.5th 391 10

Utah Junk Co. v. Porter
(1946) 328 U.S. 39 20

Villa v. Cole
(1992) 4 Cal.App.4th 1327 26

Wilson v. Wal-Mart Stores, Inc.
(1999) 72 Cal.App.4th 382 25

Wohlgemuth v. Caterpillar Inc.
(2012) 207 Cal.App.4th 1252 20-22

Zhou v. Unisource Worldwide
(2007) 157 Cal.App.4th 1471 26

Codes and Statutes

Civ. Code § 1790 . . . . *passim*

Civ. Code § 1794(c) 16

Civ. Code § 1794(d) 15, 16

Civ. Code § 1795.8 16

Civ. Code § 3541 28

Code of Civil Procedure § 998 . . . . *passim*

Code of Civil Procedure § 1032 17

Code of Civil Procedure § 1033.5 18

Stats. 1994, c. 332 (S.B.1324), § 1 24

Stats. 1997, c. 892 (S.B.73), § 1 24

Stats. 1999, c. 353 (S.B.1161), § 1 24

Stats. 2001, c. 153 (A.B.732), § 1 24

Stats. 2005, c. 706 (A.B.1742), § 13 24

Stats. 2015, c. 345 (A.B.1141), § 2, eff. Jan. 1, 2016 24

Articles, Texts, Treatises and Miscellaneous

Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 34 (1921) 25

Felix Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 *COLUM. L. REV*. 527. 14

Brian S. Kabatek & Stephanie Charlin, *Cost Factors Related to Code of Civil Procedure Section 998* (2019) 41*FEB.L.A. LAW*. 16 29

1 James Kent, *COMMENTARIES ON AMERICAN LAW* 433 (1826). . 14

Procedure, the Handmaid of Justice (Charles A. Wright & Harry M. Reasoner eds., 1965) 15

Roger Traynor, *Reasoning in a Circle of Law* (1970) 56 *VA. L. REV*. 739 20

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA**
THIRD APPELLATE DISTRICT

OSCAR and AUDREY MADRIGAL,
Plaintiffs and Respondents,

vs.

HYUNDAI MOTOR AMERICA,
Defendant and Appellant.

QUESTION PRESENTED

Do Code of Civil Procedure section 998's "cost-shifting" expert witness and attorney fee provisions apply when a monetary offer of settlement is made in Song-Beverly Act (Civ. Code § 1790 et seq.) litigation by a defendant car seller and the buyer-plaintiffs reject it and then settle with defendant before trial for less than the amount of that offer?

INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The trial court answered "No" to this question, refusing to undertake any calculation to reduce plaintiffs' post-offer fees and costs by ruling that section 998 was not applicable because the parties *settled.* Cost shifting under section 998, the court proclaimed, *only* occurs when there is a final "judgment or award" following rejection of a settlement offer;

and a “settlement” for money in exchange for a voluntary dismissal of the action with prejudice does not qualify as a “judgment” or “award.”

The Civil Justice Association of California (“CJAC”) disagrees with this ruling because it misreads pertinent statutory language, ignores common sense and judicial opinions holding otherwise, and creates an unnecessary conflict with, and deterrent to, California’s well-settled policy to encourage settlement. If upheld, the ruling rends the basic purpose of Code of Civil Procedure § 998 — to encourage pretrial settlement by mandating that parties who reject reasonable settlement offers and then ultimately obtain less than that, whether by trial or settlement, lose not only their right to recover their own costs and attorney fees incurred after the rejected offer, but also must pay the contesting party’s post-offer costs.

CJAC is a long-standing non-profit organization of businesses, professional associations and financial institutions. Our principal purpose is to inform and educate the public on ways to make our civil liability laws more fair, economical, efficient and certain. Settlement is, of course, consonant with these goals as it furthers judicial economy by reducing the persistency and expense of litigation, including attorney and expert witness fees.

CJAC participates as amicus curiae in cases that implicate our purpose. See, *e.g.*, *Gonzalez v. Mathis* (2021) 12 Cal.5th 29; *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391; and *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21. This is such a case.

SALIENT FACTS AND PROCEDURE

Plaintiffs Oscar and Audrey Madrigal bought a new 2012 Hyundai Elantra for $41,369.68. Dissatisfied with the car's performance and unable to reach agreement with Hyundai about how best to resolve their differences, the Madrigals sued Hyundai under the Song-Beverly Act ("Act"). Their complaint sought "up to $120,000," an amount arrived at by adding "the price paid for the car, and up to twice that . . . as a civil penalty." Respondents' Brief (hereinafter "RB"), p.18.

Hyundai then made a written offer of $37,396 to settle the case, which plaintiffs rejected. Hyundai later upped that settlement offer to $55,556.70. This too was rejected by plaintiffs. Both offers were made pursuant to C.C.P. § 998, which provides that when a valid written offer of compromise is rejected by a party (whether plaintiff or defendant), and that party "fails to obtain a more favorable judgment or award," then that party shall <u>not</u> recover post-offer costs and

shall pay the opposing party's post-offer costs.

The parties then settled before trial, with Hyundai agreeing to pay plaintiffs $39,000 and submit the tallying of attorney's fees and costs to the court by motion and briefing. Plaintiffs moved for $20,865.85 in costs and $138,292.50 in attorney fees plus a 0.5 lodestar enhancement. Hyundai opposed this amount, arguing that because the second 998 offer of ($55,556.70) was larger than the settlement, it barred any award of post-offer costs and fees incurred after it was made. (The vast majority of plaintiffs' attorney time on the case occurred after the second offer to settle from Hyundai was rejected.)

The trial court eschewed any calculation of post-offer fees and costs under section 998 by ruling that it was not applicable because the parties "settled;" and cost shifting can only occur upon a "judgment" or "award," not a voluntary dismissal pursuant to a pre-trial settlement. "[T]he parties settled the case prior to trial, and as there was no trial, no 'judgment' or 'award' was rendered." Decision, Placer County Superior Court, July 18, 2019, p. 5. Hence, the court ruled it would not "cut off [plaintiff] attorneys' fees at the time of the second . . . offer" because the Song-Beverly Act requires courts to "ascertain whether, under all circumstances, the amount of actual time expended on each task and monetary

charges is reasonable," and not to award fees based on the case outcome. RB 24.

The court awarded plaintiffs $81,142.50 in attorney fees and $17,681 in costs, which when added to the amount Hyundai paid in settlement, came to a total recovery for plaintiffs and their attorney of $137,823.50. Hyundai's appeal of the attorneys' fees and costs award followed.

SUMMARY OF ARGUMENT

The Song-Beverly Act's authorization for court-awarded attorney's fees and costs to the "prevailing" party must be read in conjunction and harmonized with Code of Civil Procedure sections 998 and 1032. Thus, a defendant seller that makes a valid offer of settlement under section 998 to a plaintiff buyer who rejects it and then obtains less than that offer when the suit is resolved, can obtain its own post-offer costs and fees from plaintiffs, as well as reduce their post-offer costs and fees.

A "judgment" after trial is, of course, one way to resolve Song-Beverly or any other litigation, but it is not the only way. Abundant and controlling appellate opinions hold that a voluntary dismissal with prejudice triggers and satisfies the "cost-shifting" provisions of section 998. In other words, a compromise agreement for payment by the defendant and

dismissal of the action by the plaintiff is the legal equivalent of a judgment. Whether the defendant “prevails” because the lawsuit is dismissed with prejudice or the plaintiff “prevails” because of receipt of money is beside the point. What matters when a 998 offer of compromise is made and rejected is the court’s weighing and balancing of pre-offer and post-offer costs and fees between the parties once the Song-Beverly Act lawsuit is resolved.

That calculation was not undertaken by the trial court here because it erroneously believed that section 998 did not come into play because this case was resolved by settlement and not a trial and ensuing judgment. This mistake of law warrants reversal. If allowed to stand it effectively extirpates the cost-shifting provisions of section 998 from Song-Beverly Act litigation, thereby deterring settlements in contravention of strong public policy favoring them, and leads to absurd results.

ARGUMENT

I. THE "COST-SHIFTING" PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 998 APPLY TO SONG-BEVERLY ACT LAWSUITS THAT RESULT IN PRE-TRIAL SETTLEMENT AND DISMISSAL WITH PREJUDICE.

A. CCP Sections 998, 1032 and the Song-Beverly Act Provisions on Recoverable Costs and Attorney Fees have been held by Numerous Appellate Authorities to be Read together and Harmonized.

Section 998 and the Song-Beverly Act contain attorney fees and recoverable "cost" provisions that do not conflict with each other; indeed, they have been judicially reconciled and held to be in harmony. This, of course, is consistent with the long-established principle that "acts *in pari materia* ['of the same matter' or 'on the same subject'], and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and acting upon one system." 1 James Kent, *COMMENTARIES ON AMERICAN LAW* 433 (1826). As Justice Felix Frankfurter wrote, "[s]tatutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes." Felix Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 *COLUM. L. REV.* 527, 539. "It is a basic canon of statutory construction that statutes *in pari materia* should be construed together so that all parts of the

statutory scheme are given effect." *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091. Here, of course, the trial court ignored this fundamental principle by wrongly construing the Song-Beverly Act in isolation from section 998 and treating the Act as the sole statute governing the calculation of "costs" and attorney fees due plaintiff buyers.

Section 998 is found in the Code of Civil Procedure and governs "offers by a party to compromise" litigation. It serves as a "handmaid of justice"[1] to, *inter alia*, the Song-Beverly attorney fee provision in Civil Code § 1794(d). Section 998 provides financial incentives for parties in litigation to "settle" before trial. Specifically, subsection (c)(1) provides that if a valid offer to compromise "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 post-offer costs and shall pay the defendant's costs from the time of the offer." Emphasis added.

The Song-Beverly Act (also known as the "lemon law" because its initial emphasis and current primary use is in disputes between automobile buyers and sellers) "regulates warranty terms, imposes service and repair obligations on

---

[1] *Procedure, the Handmaid of Justice* 147-48 (Charles A. Wright & Harry M. Reasoner eds., 1965).

manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer's remedies to include costs, attorney's fees, and civil penalties." Civ. Code §§ 1790-1795.8. It provides for an award of attorney fees whenever a "buyer prevails in an action under" the Act. The amount the buyer "shall be allowed by the court to recover" is "a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended . . . [that is] . . . reasonably incurred by the buyer in connection with the commencement and prosecution of such action." Civ. Code § 1794(d). "Judgment" appears twice in the Act in reference to action by a court: once, with regard to what it "may include," mentioning actual damages and civil penalties (§ 1794(c)); and again in subsection (d) to clarify that if the buyer "prevails" what the court shall allow a party to recover "as part of the judgment."

Both statutes apply to the award of costs, which can include attorney fees, in litigation: § 998 to encourage settlement by imposing "cost shifting" consequences when reasonable offers to compromise are rejected and the rejecting party does not ultimately do better than the rejected offer; and Song-Beverly for "prevailing" parties when the litigation is concluded. Their common objective is to do justice

to the litigants in the ultimate judicial award of costs and attorney fees between them depending on the number, timing and terms of compromise offers by the parties to their litigation adversaries.

Though the Song-Beverly Act's statutory language speaks only of prevailing "buyers" recovering "costs," and not sellers, *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985 holds that "sellers" are also entitled to expert witness fees as recoverable "costs" when they prevail. As the appellate court described the issue presented:

> Defendants sought to recover their costs and expert witness fees under sections 1032, subdivision (b) and 998, subdivision (c), whereas plaintiff argued the more specific provisions of the [Song-Beverly] Act prohibited prevailing defendants from any such recovery. We conclude defendants are entitled to recover their costs and expert witness fees. *Id.* at 988.

Why? "Because CCP section 1032(b) grants a prevailing party the right to recover costs 'except as otherwise provided by statute,' . . . [and] Civil Code section 1794(d) does not provide an 'express' exception to the general rule permitting a seller, as a prevailing party, to recover its costs under section 1032(b)."[2] *Id.* at 991.

---

[2] Code of Civil Procedure § 1032 is the fundamental

(continued...)

Murillo was followed by *Duale v. Mercedes-Benz USA, LLC* (2007) 147 Cal.App.4th 718, which reversed the trial court's ruling that the seller's § 998 offer did not affect the attorney fees allowable under the Song-Beverly Act. *Duale* found that the trial court abused its discretion as a matter of law when it ruled that the more specific provisions of Song-Beverly trumped or superseded the "general provisions" of § 998 and Code of Civil Procedure § 1032. Instead, *Duale* holds, both § 998's and § 1032's language on recoverable costs and attorneys fees can be "reconciled" and read in harmony with the Act. *Id.* at 726.

Although *Murillo* specifically concerned expert witness fees rather than attorney fees, the unanimous opinion by Justice Cantil-Sakauye in *Duale* saw no reason not to extend *Murillo*'s reasoning to encompass attorney fees. 148 Cal.App.4th at 728. Nothing in the relevant statutes or

---

[2](...continued)
authority for awarding costs in civil actions. It establishes the general rule that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108. Code of Civil Procedure section 1033.5 "specifies the 'items ... allowable as costs under Section 1032.' " (*Id.* at 1108.) Costs include "Attorney fees, when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law."

controlling case law suggests the legislature intended to exempt lemon law plaintiffs from the "carrot and stick" of § 998's provisions encouraging settlement of pending cases. *Id.* Nor was the Song-Beverly Act's purpose inconsistent with the application of the § 998 provision barring prevailing plaintiffs from obtaining post-offer attorney fees and costs if they fail to recover more than a rejected pretrial settlement offer. As *Duale* explained:

> An injured plaintiff may be encouraged to sue by the prospect of recovering his costs if successful, but no articulated public policy is served by allowing him to maintain a lawsuit that loses its economic viability by virtue of the seller's willingness to settle on terms better than those a jury will award. *Id.*

B. A Voluntary Dismissal with Prejudice that Disposes of the Underlying Lawsuit Constitutes a "Judgment" under section 998.

Not only did the trial court here misread the Song-Beverly Act's attorney fee provision as trumping and superseding section 998's provision permitting defendant sellers to recover expert witness and attorney's fees when the buyers fail to obtain a more favorable result than the offer they rejected; but to do so it gave an overly narrow, crabbed construction to the phrase "judgment or award" in section 998.

According to the trial court, since the seller's § 998 offer was conditioned on the buyers' agreement to "dismiss this entire action with prejudice," this was at odds with the statute's requirement that defendants must, to garner their post-offer costs and attorney's fees and deny those for plaintiff from the time of the offer, obtain a formal "judgment or award."

But that hyper-literal reading of section 998 is mistaken; it ignores precedents to the contrary and illustrates why "[l]iteralness may strangle meaning" (*Utah Junk Co. v. Porter* (1946) 328 U.S. 39, 44 (per Frankfurter, J.) and "a sterile literalism . . . loses sight of the forest for the trees." *New York Trust Co. v. Commissioner* (2d Cir. 1933) 68 F.2d 19, 20 (per L. Hand, J.). As Roger Traynor advised, we need "literate, not literal, judges." Roger Traynor, *Reasoning in a Circle of Law* (1970) 56 *VA. L. REV.* 739, 749.

Ample appellate authority establishes that the phrase "judgment or award" in section 998 includes acceptance of an offer that provides for a dismissal with prejudice of actions alleged in the complaint. *Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, for instance, discussed and rejected the same argument made by the seller there that is made by the buyers here. There, defendant seller made a § 998 offer to

compromise shortly before trial. The offer provided that plaintiff buyers would be paid $50,000, in exchange for which they would dismiss the action with prejudice and sign a release of all claims. The offer was silent as to attorney fees and costs. Plaintiffs filed a notice of acceptance of the offer, dismissed the action with prejudice and then moved to recover their attorney fees and costs under section 1794(d). Defendant opposed the motion, arguing, as plaintiff buyers do here, that there was no formal judgment in plaintiffs' favor as a predicate for an attorney fee or cost award and that, in any event, defendant was the true prevailing party, not plaintiffs, since a dismissal had been entered.

The trial court in *Wohlgemuth* rejected defendant's arguments, found that plaintiffs prevailed, and awarded attorney fees and costs to them. *Id.* at 1256. In affirming the trial court's award of attorney fees, *Wohlgemuth* addressed the weakness of the seller's "literal" reading of section 1794(d) that found a buyer who prevails in an action under the Song-Beverly Act is entitled to recovery of attorney fees and costs "*as part of the judgment.*" Emphasis added. Since there was no formal judgment, the seller argued plaintiffs were statutorily precluded from obtaining fees and costs. But, as the appellate opinion explains, § 998 expressly applies to offers to compromise that allow for a "judgment to be taken"

(*id.*, subd. (b)), and cases construing that language hold it includes offers that call for a dismissal with prejudice. "[A] compromise agreement contemplating payment by defendant and dismissal of the action by plaintiff *is the legal equivalent of a judgment in plaintiff's favor* [citation omitted]." *Id.* at 1260; emphasis added.

Wohlgemuth underscored that its interpretation of § 998 has been followed consistently by several other appellate opinions, citing *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1084-1085 ("Several courts have held that a section 998 offer calling for a dismissal with prejudice instead of entry of judgment is valid and enforceable."); *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1055-1056 ("[A]cceptance of the . . . compromise agreement calling for a voluntary dismissal with prejudice would have finally disposed of the complaint as effectively as one calling for entry of judgment . . .."); and *Berg v. Darden* (2004) 120 Cal.App.4th 721, 729 [describing these opinions as elucidating that "so long as the compromise offer contemplated some final disposition of the lawsuit which functioned as the legal equivalent of a judgment, entry of a judgment was not strictly required"].

Goodstein v. Bank of San Pedro (1994) 27 Cal.App.4th

899 is consistent with the above authorities. There the defendant moved under § 998 to recover expert witness fees totaling about $116,000 based on plaintiff's rejection of defendant's offer to settle and plaintiff's failure to obtain a judgment more favorable than the offer. The trial court ruled for the defendant and plaintiff appealed, arguing that defendant's requirement of a dismissal with prejudice invalidated its 998 offer "because it fails "to allow judgment to be taken." *Id.* at 905. The appellate opinion unanimously repudiated that contention, explaining:

> "Judgment" is defined in Code of Civil Procedure section 577 as "the final determination of the rights of the parties in an action or proceeding." "[A] valid compromise agreement has many attributes of a judgment, and in the absence of a showing of fraud or undue influence is decisive of the rights of the parties thereto and operates as a bar to the reopening of the original controversy." *Id.* at 905-906; citation omitted.

Further, *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 90 [trial court erred in requiring defendant to first obtain judgment before it would consider claim for expert fees] informs us that "a voluntary dismissal constitutes the conclusion of the action and is therefore an appropriate precipitating event triggering the trial court's discretion as to the assessment of expert witness

[and attorneys'] fees under section 998." And *Berg v. Darden*, *supra*, 120 Cal.App.4th at 731-732 clarifies that "a statutory offer of compromise need not contain any 'magic language,' so long as it is clear the offer, which must be written, is made under section 998 and, if accepted, will result in the entry of judgment or an *alternative final disposition of the action legally equivalent to a judgment*." Emphasis added.

Once the meaning of statutory phrases such as "judgment or award" (§ 998) and "as part of the judgment" (Song-Beverly Act) have been judicially established, which the above authorities show has consistently occurred for more than a quarter century, it is most difficult and unwise to judicially rewrite those definitions. Code of Civil Procedure section 998 has been amended six times since 1994,[3] which is when the first judicial opinions cited herein explained that voluntary dismissals with prejudice are equivalent to a "judgment" as used in these reconcilable statutes. Not once did the Legislature seek to change the judicial meaning of "judgment or award" in section 998. Similarly, the Song-Beverly Act has been amended several times in the past 29

---

[3] Stats. 1994, c. 332 (S.B.1324), § 1; Stats. 1997, c. 892 (S.B.73), § 1; Stats. 1999, c. 353 (S.B.1161), § 1; Stats. 2001, c. 153 (A.B.732), § 1; Stats. 2005, c. 706 (A.B.1742), § 13; Stats. 2015, c. 345 (A.B.1141), § 2, eff. Jan. 1, 2016.

years, but with no changes to the phrase “as part of the judgment” since appellate authorities have held that this phrase does not require a formal judgment following a trial. “[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. ” *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219.

If *stare decisis* and predictability in the law are to retain any meaning, the court should adhere to this long-standing doctrine of legislative acquiescence. As Justice Cardozo wrote, “Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.” Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 34 (1921).

II. TO EXEMPT SECTION 998’s “COST-SHIFTING” PROVISIONS IN SONG-BEVERLY ACT LITIGATION DEFEATS ITS PURPOSE TO ENCOURAGE SETTLEMENT AND LEADS TO ABSURD RESULTS.

The unanimous opinion by Justice Hull in *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 391 clarifies the purpose of section 998:

> Although settlements achieved earlier rather than later are beneficial to the parties and thus to be

> encouraged, our public policy in favor of settlement primarily is intended to *reduce the burden on the limited resources of the trial courts*. The trial of a lawsuit that should have been resolved through compromise and settlement uses court resources that should be reserved for the resolution of otherwise irreconcilable disputes. Emphasis added.[4]

This description of section 998's *purpose* is defeated by the rule the trial court applied here—no "cost shifting" unless a *trial and ensuing judgment* obtains a more favorable result for the plaintiff buyers than the seller's last 998 offer that they rejected. Rather than "reducing the burden on the limited resources of the trial courts," such a rule encourages trial and discourages settlement. Should this gambit be upheld, plaintiff buyers in Song-Beverly Act litigation could, as happened here, accept a settlement lower than the seller's last § 998 offer and still recoup all of their full post-offer

---

[4] "It is important to recognize there is a strong public policy favoring settling of disputes." *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1475. "[T]here is a well-established policy in the law to discourage litigation and favor settlement. Pretrial settlements are highly favored because they diminish the expense of litigation." *Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1683. "[S]ettlements of litigation are favored and should be encouraged. [¶] It is common knowledge that costs of litigation, such as attorney's fees, costs of expert witnesses, and other expenses, have become staggering. The law favors the resolution of disputes." *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1339.

costs. That consequence financially punishes and deters defendant sellers from accepting a settlement with buyers for less than defendants' last rejected 998 offer, even though the litigation dynamics make it apparent to the parties at the time that plaintiff's case would likely yield a trial result for less than the seller's last compromise and rejected offer.

Both parties are thus forced by an erroneous statutory interpretation, one that defangs section 998's "carrot and stick" cost shifting, into foregoing settlement and instead rolling the dice by burdening the limited trial court resources. This overly restrictive application of the governing statutes, where section 998 is discarded and given no effect, yields an absurd result and should not be countenanced by the court. "We construe the statute's words in context, and harmonize statutory provisions to avoid absurd results." *John v. Superior Court* (2016) 63 Cal.4th 91, 96.

Acceptance of the trial court's conclusion that section 998 has no applicability in adjusting and weighing the recoverable costs by the parties in Song-Beverly Act lawsuits guts its primary purpose: to create economic incentives on both parties to settle rather than try their lawsuits. This requires "both sides to face some economic consequences if it turns out they miscalculate and lose." *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1562. Most importantly,

this purpose "will not be sacrificed to a literal construction of any part of the statute." *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 329-330, quoting *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515-1516, citations omitted. Courts have adhered to this principle and found the purposes of section 998 best served by enforcement of offers which, despite the absence of the statutory language proposing to "allow judgment to be taken," make it clear that settlement of money accompanied by a dismissal with prejudice will result in a final disposition of the litigation. "An interpretation which gives effect is preferred to one which makes void." Civ. Code § 3541.

Guerrero v. Rodan Termite Control, Inc. (2008) 163 Cal.App.4th 1435 confirms the intended economic consequences when a plaintiff rejects a defendant's section 998 offer of compromise and then settles for a less favorable monetary result: the plaintiff shall not recover his or her post-offer costs and shall pay the defendant's costs from the time of the rejected offer. "Section 998 contemplates a comparison of the section 998 offer with the circumstances as they existed when plaintiff had the opportunity to accept the section 998 offer." *Id.* at 1441-1442. In addition, "when the prevailing plaintiff is not able to obtain more than the

defendant's section 998 offer and the plaintiff's recovery is less than the costs owed to the defendant, . . .the court may enter a judgement against the plaintiff for the difference." Brian S. Kabatek & Stephanie Charlin, *Cost Factors Related to Code of Civil Procedure Section 998* (2019) 41*FEB.L.A. LAW*. 16.

The trial court did not undertake this reasonable calculation because it erroneously believed the Song-Beverly Act alone, untethered to the pertinent and "reconcilable" section 998, gave it discretion to determine the plaintiffs' fees and costs because they received a monetary settlement from the defendant and were thus the "prevailing" party. (As stated, defendant sellers also claim they "prevail" in settlements that result in dismissal of the Song-Beverly Act lawsuit. See *ante* at p. 13.) *Reck v. FCA US LLC* (2021) 64 Cal.App.5th 682, however, corrects the trial court's misunderstanding:

> [T]he trial court must exercise its discretion in awarding fees subject to the *legal standards that apply to its decision.* [Citation] . . .[A]lthough the trial court has broad authority in determining the amount of reasonable legal fees, the award can be reversed for an abuse of discretion *when it employed the wrong legal standard in making its determination.* [Citations omitted.]" *Id.* at 690-691; emphasis added.

The “wrong legal standard” employed by the trial court here was to entirely ignore the effect that rejection of the seller’s last 998 offer has on the determination of the plaintiff buyers’ recoverable costs, including attorney fees.

CONCLUSION

For all the aforementioned reasons, amicus urges the court to reverse the trial court’s rulings and remand the case for further determination on the correct amount of recoverable costs and attorney fees.

Dated: December 17, 2021

/s/ Fred J. Hiestand
Fred J. Hiestand
CJAC General Counsel

CERTIFICATE OF WORD COUNT

I certify that the word processing program used to compose this amicus brief reports this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 5,300 words.

Dated: December 17, 2021

/s/ Fred J. Hiestand
Fred J. Hiestand
CJAC General Counsel

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On December 17, 2021, I served the foregoing document(s) described as: AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT in *Madrigal, et al. v. Hyundai Motor America*, C090463 on all interested parties in this action by placing a true copy thereof electronically or in the U.S. Mail (where indicated) addressed as follows:

Cynthia E. Tobisman
Greines, Martin, Stein Richland LLP
5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036
ctobisman@gmsr.com
Counsel for Plaintiff & Respondent (Via TrueFiling)

Roger Kirnos
Knight Law Group LLP
10250 Constellation Blvd., Ste. 2500
Los Angeles, CA 90067
rogerk@knightlaw.com
Counsel for Plaintiff & Respondent (Via TrueFiling)

Michael H. Rosenstein
Law Office of Michael H. Rosenstein, LC
10900 Wilshire Blvd., Ste. 300
Los Angeles, CA 90024
mrosenstein@rose-lawoffice.com
Counsel for Plaintiff & Respondent (Via TrueFiling)

Bryan C. Altman
The Altman Law Group
10250 Constellation Blvd. #2500
Los Angeles, CA 90067
Bryan@altmanlawgroup.net
Counsel for Plaintiff & Respondent (Via TrueFiling)

Soheyl Tahsildoost
Theta Law Firm, LLP
15901 Hawthorne Blvd. Ste. 270
Lawndale, CA 90245
st@thetafirm.com
Counsel for Defendant & Appellant (Via TrueFiling)

Julian G. Senior
SJL Law PC
841 Apollo Street, Suite 300
El Segundo, CA 90245
julian@sjllegal.com
Counsel for Defendant & Appellant (Via TrueFiling)

Hon. Michael Jones
Placer County Superior Court
10820 Justice Center Drive
Roseville, CA 95678
(Trial Court via U.S. Mail)

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
(Via TrueFiling)

[X](VIA E-SERVICE) I electronically served the foregoing documents via the TrueFiling website.

[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

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

Executed this 17th day of December 2021 at Sacramento, California.

/s/ David Cooper
David Cooper