***Anthony v. Li,* 2020 Cal. App. LEXIS 302**

Joint, unapportioned 998 to multiple defendants (one of whom had been previously dismissed) was invalid and did not shift expert witness fees and costs. Parties' agreements to split costs precluded prevailing party from later recovering those costs after trial.

FACTS AND PROCEDURAL POSTURE

This case arose out of a motor vehicle accident between plaintiff Chad Anthony and defendant Xiaobin Li. Li, a foreign citizen, was driving a rental vehicle owned by PV Holding Corp. at the time of the accident. Plaintiff sued both Li and PV Holding. Li was served by way of former Civil Code section 1936 (now 1939.33). This statute permits a plaintiff to serve a foreign national who rented a vehicle by serving the complaint on the rental company.

Prior to trial, plaintiff voluntarily dismissed PV Holding (Li was covered by a supplemental liability policy purchased with the rental, which would subsume PV Holdings' ownership liability; the Graves Amendment also preempts any ownership liability for rental companies.) After PV Holding was dismissed, plaintiff served a section 998 offer to compromise, jointly to Xiaobin Li and PV Holding for $500,000. The offer did not apportion the amount between the defendants.

After a ten-day trial before Judge Leslie Nichols, the jury returned a verdict for plaintiff, awarding plaintiff $650,000 in damages. Plaintiff thereafter served a memorandum of costs totaling $83,048.06. The costs included $62,082.50 in expert witness fees, $2,650.00 for mediation fees, and $6,561.62 for trial court reporter fees. Defendant moved to tax costs on the basis that the 998 offer was joint and unapportioned, making it impossible for defendant Li to accept or reject the offer individually, and that directing the 998 to a dismissed party made it ambiguous and invalid. Defendant also argued that the parties had previously agreed to split the mediation and court reporter fees evenly. The parties had agreed to standard form agreements from JAMS and the court reporter, both of which stated the parties would evenly split costs, and neither of which reserved the right to seek costs as a prevailing party.

The trial court granted defendant's motion, taxing the full amount of the expert witness fees, mediation costs, and court reporter costs. Plaintiff appealed.

DISCUSSION

As to the expert witness costs, plaintiff claimed on appeal that because plaintiff served Li pursuant to Civil Code section 1936, and because PV Holding was the insurer, the parties were one and the same for purposes of the 998. On this basis, Anthony argued, the 998 was not ambiguous, and apportionment was unnecessary.

The Court of Appeal disagreed. The weight of California case law supports that 998 offers made jointly to multiple parties *must be apportioned* as between those parties.[1] Because the 998 here was both unapportioned and conditioned on acceptance by both defendants, it was invalid as a matter of law. The Court also held that directing the 998 offer to a dismissed party rendered the offer invalid. The Court was not convinced by plaintiff's argument that the parties were essentially one and the same, noting "To

[1] There are some exceptions to this rule, but they were not relevant to this case.

accept Anthony's argument that his section 998 offer should be deemed valid based on the happenstance that the action was being litigated by an insurer would add uncertainty to the use of section 998 offers."

With respect to the Mediation and Court Reporter fees, plaintiff claimed the trial court erred by improperly reading into the parties' agreements to share costs "a provision waiving the right to claim court reporter or mediation fees as items of costs" by a prevailing party.

The Court held where, as in this case, the parties agree to share costs during litigation, the courts will enforce those agreements as written under the principles that "[w]hen the language of a document is unambiguous, we are not free to restructure the agreement," and "if the parties [] wanted to allow recovery of the apportioned fee by the prevailing party as an item of cost, they were free to spell this out in their agreement," but such a provision will not be read into the agreement. (Citing *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 25, 30.) Thus, because the parties agreed to share mediation and court reporter fees equally, without providing for later recovery of those shared fees by a prevailing party, the trial court did not err or abuse its discretion in taxing those costs.