

***Burchell v. Faculty Physicians & Surgeons etc. (2020) 54 Cal.App.5th 515***

A party who would otherwise receive additional costs and fees under Code of Civil Procedure section 998 may not recover if the section 998 offer is made conditional on acceptance by all defendants.

**FACTS/PROCEDURE**

In 2014, Plaintiff Keith Burchell discovered a small mass in his scrotum and decided to undergo a simple, outpatient procedure to remove the mass for testing. During the surgery, the surgeon, Dr. Gary Barker, discovered the mass was more much extensive than previously thought and suspected it could be malignant. Although Dr. Barker knew removing the mass would be a much more invasive procedure and could render plaintiff impotent, Dr. Barker did not attempt to obtain plaintiff’s consent or the consent of plaintiff’s designated proxy before deciding to excise the entire mass. In fact, Dr. Barker was not even aware plaintiff had a designated proxy because he failed to check plaintiff’s consent forms. Dr. Barker proceeded to remove the entirety of the mass while plaintiff was still under general anesthesia. After the surgery, plaintiff suffered from a range of side effects, some of which were serious and irreparable.

Plaintiff sued Dr. Barker and Loma Linda University Health Care (LLUHC) for professional negligence and medical battery. In May 2017, plaintiff served defendants with a section 998 offer of \$1.5 million, which defendants did not accept. One year later, plaintiff discovered that Dr. Barker was not employed by LLUHC but Faculty Physicians & Surgeons of the Loma Linda University (FPS). Plaintiff filed an amended complaint to rectify this error and included a stipulation providing that “any verdict that becomes final with respect to Mr. Burchell will be paid by [FPS] and in exchange for that Dr. Barker would be dismissed as a defendant.” At trial, the jury found in favor of plaintiff on both causes of action and awarded \$9.25 million in noneconomic damages and \$22,346.11 in economic damages. In addition, plaintiff was also awarded expert witness fees and prejudgment interest under section 998.

**HOLDING/DISCUSSION**

The Court of Appeals for the Fourth District reversed with respect to the award of expert witness fees and interest. Code of Civil Procedure section 998 promotes settlements by “establish[ing] a procedure for shifting costs based on a party’s refusal to settle by ‘expand[ing] the number and type of recoverable costs and fees.’” If a plaintiff extends a section 998 settlement offer, the plaintiff may recover additional costs when the amount recovered at trial is greater than the initial settlement offer. Here, plaintiff’s section 998 offer was \$1.5 million but plaintiff ultimately recovered a much greater amount – over \$9 million. Thus, plaintiff was entitled to recover expert fees and prejudgment interest on top of their award. Defendant FPS appealed this additional award, arguing plaintiff’s section 998 offer was invalid because plaintiff failed to follow the statutory content requirements. A section 998 settlement offer must be made in a manner that allows each offeree to independently accept or reject the settlement. Previous courts have held that 998 offers which refer to defendants collectively, provide only one signature line, or are extended to all defendants in a single document violate this rule. Here, plaintiff served his section 998 offer to defendants in a single document addressed to both Dr. Barker and LLUHC, referred to defendants in the collective, and provided only one line for signature. Since this is a plain violation of the statutory requirements of section 998, plaintiff’s settlement offer was deemed invalid, and plaintiff could not recover expert witness fees or prejudgment interest. Defendant also attempted to appeal plaintiff’s \$9.25 million noneconomic damages award under the Medical Injury Compensation Reform Act (MICRA), which caps noneconomic damages at \$250,000 for professional negligence suits. Since plaintiff prevailed under a theory of both intentional tort and negligence, however, the court held that MICRA’s limit on damages did not apply.