

Oakes v. Progressive Transportation Services, Inc.

(2021) 71 Cal. App. 5th 486

§998 Offers – Failure of a 998 Offer to Address Worker’s Compensation Lien did not Render Offer Uncertain or Invalid / CCP § 998 Applies before Labor Code §3856

FACTS/ PROCEDURE

This convoluted case arises out of a simple rear-end automobile accident. Both Plaintiff and Defendant were driving in the course and scope of their employment when Defendant rear-ended Plaintiff. Plaintiff’s work comp carrier, Liberty, paid for all treatment except a later spinal surgery. Plaintiff filed suit alleging negligence and negligence per se claims and Liberty intervened. Thereafter, Liberty assigned its \$256,631.76 work comp lien to Defendants and was dismissed.

Defendants issued a 998 Offer for \$200,000; it was rejected. Before trial, Defendants stipulated to negligence but not causation and it was agreed they could present evidence of comparative fault. It was also stipulated the jury would be informed a work comp lien existed in the amount of \$256,631.76. The jury returned a verdict of \$115,000.

Plaintiffs filed a motion for attorney fees and costs under Labor Code section 3856(b) claiming a \$50,600 fee and \$28,343.52 in costs. Defendants opposed Plaintiff’s motion and moved to tax the Plaintiff’s post-offer 998 costs arguing Plaintiff did not beat the 998. Defendants argued Plaintiff was only entitled to their pre-offer costs (\$475 filing fee) and filed their own cost memorandum claiming they were prevailing parties under the 998 and sought costs of \$174,830, primarily consisting of causation experts.

The trial court granted Plaintiff’s motion for \$50,600 in attorney fees, denied Plaintiff’s motion to strike Defendants’ \$174,830 cost bill and granted Defendants’ motion to tax Plaintiff’s post-offer costs under section 998. After motions for clarification, the trial court ruled Plaintiff was entitled to attorney fees under Labor Code section 3856 and these were not subject to the 998-penalty provision but his litigation costs were. Even though the trial court noted the Labor Code required costs to be paid from the judgement (subtracted), it still added the attorney fees to the verdict rather than subtracting them.

The incorrect calculation by the Court was: Plaintiff award \$115,475+ \$50,600 (attorney fees) + \$475 (pre-offer filing fee) = \$166,075. The Court then awarded Defendants \$174,830 in costs under 998 and concluded the defense had a net gain over plaintiff of \$8,754 to find they became the prevailing party. The court vacated the jury judgement and entered a new final judgment on behalf of Defendants for \$8,754. Plaintiff appealed.

2nd APPELLATE DISTRICT

Judgement for Defense affirmed, however.....

Plaintiff argued the 998 offer was uncertain because it failed to clarify how the lien would be paid. This argument was rejected as previous cases have expressly held a party making a 998 offer need not consider a lien against the judgement. Under section 998, in determining the prevailing party, a trial court may not deduct any liens, including work comp, to determine if the plaintiff obtained a more favorable judgement. Therefore, the 998 offer was not uncertain.

Additionally, Plaintiff argued his attorney fees should be added to the judgement under Labor Code section 3856. Section 3856 is a statutory application of the “common fund doctrine.” It allows the party who expends attorney fees (plaintiff) in winning a suit and creating a common fund from which another will derive benefits (the work comp carrier in being repaid its lien from the judgement) to bear a fair share of litigation costs.

Both parties agreed the trial court erred in adding the \$50,600 attorney fees to the judgement rather than subtracting them. The disagreement here was which statute takes priority and applies first – Labor Code section 3856 or CCP section 998. Plaintiff counsel unsurprisingly argued his attorney fees and expenses were entitled to priority under the Labor Code and should be deducted from the \$115,000 verdict with judgement entered in his favor before satisfying the work comp lien and before applying the cost-shifting provisions of section 998. Defendants argued the opposite; the cost-shifting 998 provisions should apply before the Labor Code allocation is applied.

The court engaged in a statutory interpretation analysis of the two code sections and found when read together, the statutes dictated the sequence in which they should be applied. Section 998 contemplates entry of a final judgement between plaintiff and defendant after its cost-shifting provisions have been applied. On the contrary, Labor Code section 3856 contemplates the existence of a judgement before it applies. Therefore, the cost shifting of CCP section 998 must occur before ordering payment from the judgement for attorney fees and expenses under Labor Code section 3856.

Therefore, Plaintiff’s award was only \$115,000, to which Plaintiff’s pre-offer costs of \$475 should have been added. From this award, as the prevailing party under section 998, Defendants’ costs should have been deducted. Proper calculation: \$115,000 (verdict) + \$475 (Pl pre-offer costs) - \$174,830 (Def post-offer costs) = \$ -59,355.) Therefore, there should have been a \$59,355 judgement entered for Defendants.

As discussed above, only after entry of judgement can the Labor Code be applied. However, here the resulting judgement was in Defendants’ favor and there was no judgement for damages recovered in favor of Plaintiff from which any attorney’s fees or work comp lien could be paid. Therefore, judgement in favor of Defendants was affirmed. However, because Defendants did not file a cross-appeal and did not challenge the \$8,754 judgement entered in their favor, there was no basis for overturning the judgement to what should have been the proper Defense judgement of \$59,355.