No. S280598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OSCAR J. MADRIGAL and AUDREY MADRIGAL,
Plaintiffs and Respondents,
v.
HYUNDAI MOTOR AMERICA,
Defendant and Appellant.

California Court of Appeal, Third District, Civil No. C090463
Appeal from Placer County Superior Court
Case No. SCV0038395
Honorable Michael Jones

OPENING BRIEF ON THE MERITS

KNIGHT LAW GROUP LLP
Roger Kirnos, SBN 283163
rogerk@knightlaw.com
10250 Constellation Boulevard, Suite 2500
Los Angeles, California 90067
Telephone: (310) 552-2250 | Facsimile: (310) 552-7973

GREINES, MARTIN, STEIN & RICHLAND LLP
*Cynthia E. Tobisman, SBN 197983
ctobisman@gmsr.com
Alana H. Rotter, SBN 236666
arotter@gmsr.com
Joseph V. Bui, SBN 293256
jbui@gmsr.com
Katarina Rusinas, SBN 352688
krusinas@gmsr.com
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048
Telephone: (310) 859-7811 | Facsimile: (310) 276-5261

Attorneys for Petitioners
OSCAR J. MADRIGAL and **AUDREY MADRIGAL**

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	11
INTRODUCTION	11
STATEMENT OF THE CASE	13
A. Plaintiffs sue Hyundai for failing to promptly buy back a defective vehicle that it failed to fix within a reasonable number of attempts.	13
B. Hyundai makes two Code of Civil Procedure section 998 offers; both expire after Hyundai refuses plaintiffs' requests for mediation.	14
1. Hyundai's first settlement offer.	14
2. Hyundai's second settlement offer.	14
C. The parties settle on the eve of trial *outside* the section 998 framework. They agree the court will determine plaintiffs' motion for attorney's fees/costs under the Song-Beverly Act.	15
D. When plaintiffs move for fees and costs, Hyundai argues for the first time that its previous section 998 offers prohibit recovery of any post-offer costs.	16
E. Relying on the absence of "settlement" in the plain text of section 998's penalty provision, the trial court rejects Hyundai's argument and awards fees and costs to plaintiffs.	17
F. The Court of Appeal reverses with a vigorous dissent.	17
1. The majority opinion.	17
2. The dissent.	20

TABLE OF CONTENTS

Page

G. Plaintiffs petition for rehearing. 22

H. The Court of Appeal denies the petition for rehearing but modifies its holding. 23

I. Plaintiffs petition for review. 23

STANDARD OF REVIEW 24

ARGUMENT 25

I. Section 998's Text, Legislative History, And Purpose Establish The Legislature Did Not Intend The Cost-Shifting Penalty To Apply In Cases That Settle Before Trial. 25

A. In interpreting section 998, the Court examines all indicia of legislative intent and construes penalty provisions narrowly. 25

B. Section 998's plain language is directed at cases resolved through *adjudication*. The penalty provisions do not ever mention "settlement." 26

C. Legislative history confirms that the Legislature intended section 998 cost-shifting to apply after adjudications, not settlement. 32

D. Penalizing plaintiffs for pre-trial settlements will undermine section 998's purposes. 41

1. Penalizing parties who settle after an initial offer is rejected would deprive the parties of the flexibility necessary to settle as a case progresses. 42

TABLE OF CONTENTS

Page

2. It's no answer to say that parties could simply negotiate around section 998's penalties; requiring the parties to negotiate around those penalties is an *additional hurdle* to pre-trial settlement. 46

3. Applying section 998's penalties to cases that settle would prevent plaintiffs from being compensated for their injuries precisely because *they agreed to settle*. 51

4. Penalizing settling parties would result in complicated post-settlement litigation. 53

E. Contract principles cut against applying section 998 to cases that settle pre-trial. 56

II. Nothing In The Opinion Persuasively Supports Its Holding That The Legislature Intended To Impose A Cost-Shifting Penalty On Plaintiffs Who Settle Their Case Before Trial. 58

A. Cases interpreting "judgment" for purposes of what constitutes a valid offer to compromise under a *different* subdivision of section 998 have no bearing here. 58

B. Legislative silence after *Goodstein* is irrelevant, especially since no decision before the Opinion held that mandatory cost-shifting applies to cases that settle. 61

C. It makes no difference how settlements are treated under other statutes that, unlike section 998, don't seek to encourage pre-trial settlements. 63

TABLE OF CONTENTS

Page

D. The Opinion's public policy discussion ignores the Legislature's focus on reducing the burden of *trials* on courts—a goal accomplished regardless of whether settlement is via an accepted 998 offer or a later negotiation. 66

1. The Opinion overlooks the Act's purpose: To encourage all settlements that render a trial unnecessary, including negotiated settlements. 66

2. The Opinion's concerns about gamesmanship are unfounded. 68

3. The Opinion's concerns about discouraging early settlement are unfounded. 69

4. The Opinion's concerns about a defendant's willingness to make multiple offers are unfounded. 70

5. The Opinion never confronts the unintended consequences of its reasoning. 72

CONCLUSION 74

CERTIFICATION 75

PROOF OF SERVICE 76

SERVICE LIST 78

TABLE OF AUTHORITIES

Page(s)

Cases

Agnew v. State Bd. of Equalization
(1999) 21 Cal.4th 310 67

Benun v. Superior Court
(2004) 123 Cal.App.4th 113 65

Bradford v. Southern California Petroleum Corp.
(1944) 62 Cal.App.2d 450 57

Charton v. Harkey
(2016) 247 Cal.App.4th 730 68

Covert v. FCA USA, LLC
(2022) 73 Cal.App.5th 821 49

Delaney v. Baker
(1999) 20 Cal.4th 23 65

DeSaulles v. Community Hospital of Monterey Peninsula
(2016) 62 Cal.4th 1140 30, 58

Dix v. Superior Court
(1991) 53 Cal.3d 442 38

Duff v. Jaguar Land Rover North America, LLC
(2022) 74 Cal.App.5th 491 52

Estate of Duke
(2015) 61 Cal.4th 871 32

Etcheson v. FCA US LLC
(2018) 30 Cal.App.5th 831 26

Fassberg Construction Co. v. Housing Authority of City of Los Angeles
(2007) 152 Cal.App.4th 720 53

TABLE OF AUTHORITIES

Page

Goodstein v. Bank of San Pedro
(1994) 27 Cal.App.4th 899 58, 61, 62, 64

Guerrero v. Rodan Termite Control, Inc.
(2008) 163 Cal.App.4th 1435 53

Hale v. Morgan
(1978) 22 Cal.3d 388 26, 65

Heimlich v. Shivji
(2017) 12 Cal.App.5th 152 27

Heimlich v. Shivji
(2019) 7 Cal.5th 350 62

Jensen v. BMW of North America, Inc.
(1995) 35 Cal.App.4th 112 47

Kirzhner v. Mercedes-Benz USA, LLC
(2020) 9 Cal.5th 966 65

Kohn v. Jaymar-Ruby, Inc.
(1994) 23 Cal.App.4th 1530 57

Licuidine v. Cedars-Sinai Medical Center
(2019) 30 Cal.App.5th 918 52

Martinez v. Brownco Construction Co.
(2013) 56 Cal.4th 1014 11, 41, 42, 51, 63, 65, 73

Mendoza v. Fonseca McElroy Grinding Co., Inc.
(2021) 11 Cal.5th 1118 25, 26, 32, 41, 62

Murillo v. Fleetwood Enterprises, Inc.
(1998) 17 Cal.4th 985 52

Naranjo v. Spectrum Security Services, Inc.
(2022) 13 Cal.5th 93 62

TABLE OF AUTHORITIES

	Page
Oakes v. Progressive Transportation Services, Inc. (2021) 71 Cal.App.5th 486	26
People ex rel. Garcia-Brower v. Kolla's, Inc. (2023) 14 Cal.5th 719	62
People v. Braden (2023) 14 Cal.5th 791	24
People v. Hernandez (1981) 30 Cal.3d 462	59
People v. Raybon (2021) 11 Cal.5th 1056	27
People v. Superior Court (2018) 6 Cal.5th 457	59
Poster v. Southern Cal. Rapid Transit. Dist. (1990) 52 Cal.3d 266	67
Puerta v. Torress (2011) 195 Cal.App.4th 1267	66
Scher v. Burke (2017) 3 Cal.5th 136	62
See *Rodriguez v. FCA US, LLC* (2022) 72 Cal.App.5th	48
T.M. Cobb Co. v. Superior Court (1984) 36 Cal.3d 273	32, 42, 43, 45, 57, 60
Tonya M. v. Superior Court (2007) 42 Cal.4th 836	26
Trujillo v. City of Los Angeles (2022) 84 Cal.App.5th 908	26

TABLE OF AUTHORITIES

	Page
Valentino v. Elliott Sav-On Gas, Inc. (1988) 201 Cal.App.3d 692	67
Varney Entertainment Group, Inc. v. Avon Plastics, Inc. (2021) 61 Cal.App.5th 222	45
Wilson v. Wal-Mart Stores, Inc. (1999) 72 Cal.App.4th 382	42, 43, 45, 69
Wohlgemuth v. Caterpillar Inc. (2012) 207 Cal.App.4th 1252	64, 65
Statutes	
Civ. Code, § 1625	57
Civ. Code, § 1794	13, 68
Civ. Code, § 3291	47, 50
Code Civ. Proc., § 426.50	29
Code Civ. Proc., § 664.6	57
Code Civ. Proc., § 997	36
Code Civ. Proc., § 998	*passim*
Code Civ. Proc., § 1002	29
Code Civ. Proc., § 1029.6	29
Code Civ. Proc., § 1030	29
Code Civ. Proc., § 1033.5	68
Code Civ. Proc., § 1268.020	29
Code Civ. Proc., § 1297.116	29
Welfare & Institutions Code, § 6603	59

TABLE OF AUTHORITIES

Page

Other Authorities

Black's Law Dictionary (11th ed. 2019 27, 28, 30, 36

Managed Cooperation In A Post-Sago Mine Disaster World (2013) 33 Pace L.Rev. 491 53

Psychological Barriers to Litigation Settlement: An Experimental Approach (1994) 93 Mich. L.Rev. 107 45

ISSUE PRESENTED

Do Code of Civil Procedure section 998's cost-shifting provisions apply if the parties ultimately negotiate a pre-trial settlement?

INTRODUCTION

Section 998 creates a framework for offers to compromise, with the goal of "encourag[ing] the settlement of lawsuits prior to trial."[1] (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019.) This "encourage[ment]" comes in the form of cost-shifting penalties: If a plaintiff doesn't accept a statutory offer to compromise and "fails to obtain a more favorable judgment or award," he cannot recover his post-offer costs—and instead, "shall pay the *defendant's* costs from the time of the offer." (§ 998, subd. (c)(1).) Plaintiff can also be ordered to pay the defendant's expert witness fees. (*Ibid.*) These costs "shall be deducted from any *damages awarded* in favor of the plaintiff." (*Id.,* subd. (e), italics added.)

This cost-shifting regime has been part of California law for over 150 years. Yet, until the Opinion, *no* California court held that section 998 cost-shifting applies to a case resolved by a *pre-trial settlement*. (Dissent ("Dis.")-12; Opinion ("Opn.")-2 [describing this as a "novel" issue].)

The Court should reverse the Opinion's novel holding.

---

[1] Unassigned statutory references are to the Code of Civil Procedure.

Although section 998's text doesn't expressly state whether the cost-shifting penalties apply to cases that settle before trial, numerous clues in the statute's text, legislative history, and public policy all show that the Legislature didn't intend the penalties to apply to cases that settle. The Legislature instead sought to unclog *trial* calendars, not to penalize parties for evaluating and reevaluating their willingness to settle, and ultimately reaching a settlement before trial (as commonly occurs during the course of litigation, including here).

The Court should reverse.

STATEMENT OF THE CASE

A. Plaintiffs sue Hyundai for failing to promptly buy back a defective vehicle that it failed to fix within a reasonable number of attempts.

Plaintiffs purchased a new Hyundai Elantra with an express warranty against defects. (Opn.-2; 1-AA-16, 26, 250.)

The car didn't run as promised. It often failed to start, and if it did, it jerked violently while the "check engine" light flashed. (1-AA-26-27, 250-251.) Plaintiffs sought repairs from certified Hyundai dealers *nine times* in the first two years of ownership. (1-AA-26-27, 251.)

When repairs didn't resolve the defects, plaintiffs asked Hyundai to buy back the car pursuant to its obligations under the Song-Beverly Act ("Act"). (1-AA-252.) Despite the vehicle's sordid repair history, Hyundai refused. (*Ibid.*)

In September 2016, plaintiffs retained counsel and sued Hyundai for willfully violating the Act. (Opn.-2.) Plaintiffs stood to recover up to $120,000—the price they paid for the car, plus up to twice that amount as a civil penalty. (Civ. Code, § 1794, subd. (e)(1); Rehearing Petition ("Rhrg Pet.")-20.)

B. Hyundai makes two Code of Civil Procedure section 998 offers; both expire after Hyundai refuses plaintiffs' requests for mediation.

1. Hyundai's first settlement offer.

In November 2016, Hyundai made a statutory offer to compromise under section 998. Subject to several non-monetary terms, Hyundai offered to pay (1) the total amount that plaintiffs paid for the vehicle plus "an amount equal to one times the amount of actual damages," or (2) $37,396.60 plus $5,000 in attorney fees or an amount of fees determined by the trial court upon motion. (Opn.-2-3; 1-AA-19-21.)

Plaintiffs had questions about certain ambiguous terms of the offer, and invited Hyundai to private mediation. (1-AA-252.)

Hyundai refused to mediate or modify the offer's terms (2-AA-660, 668; 1-AA-267-269), and the offer expired. (Opn.-3.)

2. Hyundai's second settlement offer.

In May 2017, after failed attempts to strike plaintiffs' complaint, Hyundai re-evaluated the case and made a second 998 offer for a higher dollar amount. (Opn.-3; 1-AA-36-38.) Hyundai offered to pay (1) the total amount plaintiffs paid for the car plus "an amount equal to one times the amount of actual damages," or (2) a flat sum of $55,556.70 plus attorney fees of $5,000 or fees as determined by the court upon motion. (Opn.-3.)

This offer contained the same non-monetary terms that plaintiffs took issue with in the first offer, so again, plaintiffs invited Hyundai to private mediation. (1-AA-252, 254.) Again,

Hyundai refused (2-AA-660), and instead, chose to continue litigating the case, requiring plaintiffs to do the same. (Opn.-3; 1-AA-255.)

C. The parties settle on the eve of trial *outside* the section 998 framework. They agree the court will determine plaintiffs' motion for attorney's fees/costs under the Song-Beverly Act.

On January 3, 2019, the first scheduled day of trial, the court urged the parties to explore settlement. (Opn.-3.)

To facilitate settlement talks, plaintiffs asked the court to issue tentative rulings on Hyundai's motions in limine to exclude certain damages. (Opn.-3.)

The court obliged, advising the parties that it was tentatively granting Hyundai's motions. (*Ibid.*)

This prompted Hyundai to *again* re-evaluate its settlement demands and to now refuse to settle for the $55,556.70 it had previously offered. (See Opn.-3.) Plaintiffs, too, re-evaluated their willingness to settle, and the parties ultimately reached an agreement right before the jury was to be impaneled for a trial that was scheduled to last up to three weeks. (Opn.-3; 1-RT-78.)

The attorneys recited the terms of the settlement under section 664.6: (1) Hyundai would pay $39,000; (2) plaintiffs would release their claims against Hyundai; (3) the settlement would be subject to section 664.6; (4) plaintiffs could seek fees by motion; and (5) plaintiffs would dismiss their complaint only after

Hyundai paid the settlement amount and any statutory fees and costs the court might award. (Opn.-3-4; 1-AA-111-113.)

The terms of the settlement didn't incorporate section 998's penalties into the settlement, nor did they say anything about limiting plaintiff's recovery of fees or making plaintiffs pay Hyundai's costs out of plaintiffs' settlement funds, or anything about what effect—if any—the rejected 998 offers would have on recovery. (Opn.-4.)

D. When plaintiffs move for fees and costs, Hyundai argues for the first time that its previous section 998 offers prohibit recovery of any post-offer costs.

Plaintiffs moved for costs and attorney fees under the Song-Beverly Act and section 1032, subdivision (a)(4)'s prevailing party provision. (Opn.-4.) They sought $20,865.83 in costs and $138,292.50 in attorney fees plus a lodestar enhancement of $69,146.26. (*Ibid.*)

Hyundai opposed plaintiffs' fee motion and moved to strike or tax costs on the ground that plaintiffs couldn't recover anything incurred after Hyundai made its second 998 offer, because the ultimate settlement amount was less than the amount of the 998 offer—and plaintiffs had thus failed to obtain a more favorable "judgment" under section 998. (Opn.-4-5.)

E. Relying on the absence of "settlement" in the plain text of section 998's penalty provision, the trial court rejects Hyundai's argument and awards fees and costs to plaintiffs.

The trial court rejected Hyundai's arguments, reasoning that section 998's purpose is to encourage pre-trial settlements, that the parties had achieved that purpose by settling pre-trial, and that because there hadn't been a trial, there was no "judgment" triggering section 998. (Opn.-5.)

The court then exercised its discretion under the lodestar analysis, awarding a reduced amount of $81,142.50 in fees and $17,681.05 in costs and expenses. (2 AA-774, 779; Opn.-5.)

F. The Court of Appeal reverses with a vigorous dissent.

Hyundai appealed the order rejecting its section 998 theory. The Third District Court of Appeal reversed in a published decision, over Justice Ronald Robie's dissent.

1. The majority opinion.

The majority noted that under section 998, subdivision (c)(1) ("section 998(c)(1)" or "subdivision (c)(1)"), a plaintiff who "'fails to obtain a more favorable judgment or award'" than a 998 offer cannot recover its post-offer costs and instead must pay the defendant's post-offer costs. (Opn.-11, quoting § 998, subd. (c)(1).)

In determining its jurisdiction to decide the appeal, the majority acknowledged that no judgment had ever been entered.

(Opn.-6-10.) Yet, in turning to the merits, the majority held that the parties' settlement contemplating dismissal constituted a "judgment" within the meaning of section 998(c)(1) and that section 998's penalties therefore applied. It reasoned:

- Courts have held that a *different* provision of section 998, which sets forth the criteria for a valid 998 offer (namely, subdivision (b)), requires the offer to "allow judgment to be taken" and to set forth the "terms and conditions of the judgment." (Opn.-14-15, citing cases.) Although "the use of the term 'judgment' in the two subdivisions is not identical," the Legislature must've meant for "judgment" in both subdivisions "to be construed in a similarly flexible way." (Opn.-15.)

- The Legislature hasn't amended section 998 to "contravene the holding [in those other cases] that the term 'judgment' was equivalent to *any final resolution* of the action" (i.e., for purposes of determining whether a 998 offer is valid under subdivision (b)). (See Opn.-16, original italics.)

- The settlement "has several other indicia of a final judgment under section 998" in that (1) it finally determined the parties' rights (aside from the amount of fees/costs); (2) it was memorialized under section 664.6, which provides a method for reducing a stipulated settlement to judgment; and (3) the Song-Beverly Act provides for prevailing plaintiff fees "'as part of the judgment,'" and case law interprets "judgment" for that purpose to include a pre-trial dismissal with prejudice pursuant to a settlement agreement. (Opn.-17-19, italics omitted.)

- There's no "material inconsistency" between the settlement and Hyundai's 998 offer because the 998 offer expired before the accepted settlement offer, the record doesn't show whether it was Hyundai or plaintiffs who made the accepted settlement offer, and the settlement agreement left open the issue of fees and costs. (Opn.-26.)

- The plain meaning of "fails to obtain" for purposes of section 998(c)(1) is that "the plaintiff fails to, or does not, meet its obligation at the conclusion of the lawsuit to obtain a judgment more favorable than the amount stated in the offer to compromise," and legal dictionaries indicating otherwise are irrelevant. (Opn.-23-24.)

- Applying section 998 to settlements "furthers the statute's policy of avoiding gamesmanship and encouraging careful consideration and acceptance of reasonable offers to compromise." (Opn.-20.) Limiting the application of the penalty provisions to judgments "at trial" would only encourage plaintiffs to settle on the eve of trial and would encourage defendants to go to trial instead of offering a settlement. (Opn.-21.)

- Although the dissent warned that applying 998's penalties to cases that settle could discourage settlements after changes in the law or facts had changed a case's valuation after a previous 998 offer had expired, the majority brushed those concerns aside, declaring that those "are far afield of the question we decide today." (Opn.-22.)

2. The dissent.

Justice Robie disagreed that penalizing settlements by imposing section 998's penalties on settling parties wouldn't have a chilling effect on settlements. (Dis.-18-21.) "Based on the plain language of the statute, the legislative history, and the purpose and public policy behind section 998, [Justice Robie] believe[d] section 998(c)(1)'s cost-shifting provision applies only when a plaintiff through unilateral action obtains a less favorable judgment than a previously rejected section 998 offer." (Dis.-2.)

Justice Robie reasoned:

- A party who achieves a compromise settlement with another party cannot "fail[] to obtain a more favorable judgment." (§ 998, subd. (c)(1).) Under the dictionary definition of "fail," a plaintiff can only "fail[] to obtain" a more favorable judgment where a court adjudicates a case adversely to the plaintiff or where she abandons her action without trying to obtain a judgment. (Dis.-7.) Neither is true in a settlement.

- Legislative materials indicate that section 998 doesn't apply where the parties make adjudication *unnecessary* by settling. The provision that section 998 is derived from was intended to ensure that when a plaintiff rejects an offer to compromise and carries on "'in order to recover a greater amount, he does it at the hazard of paying costs to the defendant, if he *shall fail to establish a greater claim*.'" (Dis.-9-10, original italics.)

- In 1997, when the Legislature considered amendments to section 998, legislative analyses stated that section 998 applies when a party fails to do better "'at trial'" or arbitration. (Dis.-11.)

- The fact that no case in the statute's 170-year history has held that section 998 applies to pre-trial settlements is "indicative of the overall historical understanding" that section 998(c)(1) applies only when the plaintiff receives a less favorable result when the parties *act as adversaries at trial or arbitration*. (Dis.-12.)

- This Court has held that section 998 incorporates general contract principles, which should include the implied-revocation doctrine. (Dis.-17.) That doctrine dictates that "a subsequent settlement can render a previously unaccepted or withdrawn offer inoperable." (*Ibid*.)

- Applying section 998(c)(1)'s penalties to settlements that occur after a rejected 998 offer would subvert section 998's goals by (1) discouraging the parties from settling as the facts or law evolve during the course of litigation; (2) taking from settlement proceeds meant to compensate the injured party; and (3) forcing trial courts to resolve complex and numerous post-settlement motions on whether an ultimate settlement is less favorable than a rejected 998 offer. (Dis.-18-21.)

- The majority's reading, which transforms section 998(c)(1)'s reference to a "judgment" into *any* litigation-ending result, is incongruent with a reading of section 998(c)(1)

that "judgment" refers to matters in the court system while "award" refers to matters in arbitration. (Dis.-22.)

G. Plaintiffs petition for rehearing.

Plaintiffs petitioned for rehearing, arguing that the Opinion failed to grapple with parts of section 998's language. Specifically:

- Subdivision (f) states that judgments or awards entered upon acceptance of a 998 offer "shall be deemed to be a compromise settlement" (§ 998, subd. (f)) and thus signal that a non-adjudicatory judgment isn't a "failure" to secure a more favorable judgment or award;

- Subdivision (e) requires a plaintiff to pay a defendant's post-offer costs out of any "*damages awarded*," without using a broader term that can apply to *settlement proceeds*, such as a plaintiff's "recovery" (italics added); and

- The Legislature could've used a broader term encompassing settlement proceeds (as it did in a related provision), yet chose not to do that when discussing section 998 (see § 1032, subd. (a)(4)).

(Rhrg. Pet.-15-16.)

The rehearing petition also argued that section 998's penalties wouldn't apply here regardless, because Hyundai couldn't have shown that the 998 offer was more favorable than

the ultimate settlement when considering the non-monetary terms attached to each. (Rhrg. Pet.-12-14.)

H. The Court of Appeal denies the petition for rehearing but modifies its holding.

In another 2-1 split, the Court of Appeal denied rehearing but "change[d] the judgment" in one material way. (Modification Order (Mod. Order)-2.) The modified judgment provided that on remand, the trial court was to "consider the parties' arguments regarding the validity of the offer, whether the offer was more favorable than the judgment obtained by plaintiff, and any other arguments that may flow from the application of section 998." (Mod. Order-2.)

Justice Robie "continue[d] to disagree with the disposition as modified and would grant the petition for rehearing." (Mod. Order-3.)

I. Plaintiffs petition for review.

Plaintiffs successfully petitioned for review. (Petition for Review ("Pet. Rev.")-8; Order Granting Review.)

STANDARD OF REVIEW

This case presents an issue of statutory interpretation—namely, the scope of section 998(c)(1)'s cost-shifting provision. The Court reviews that issue de novo. (*People v. Braden* (2023) 14 Cal.5th 791, 804 ["'interpretation of a statute presents a question of law that this court reviews de novo'"].)

ARGUMENT

I. Section 998's Text, Legislative History, And Purpose Establish The Legislature Did Not Intend The Cost-Shifting Penalty To Apply In Cases That Settle Before Trial.

Section 998's plain text doesn't explicitly answer the question presented. But the words the Legislature used strongly signal that the cost-shifting penalty does *not* apply where cases settle before trial. That reading is bolstered by the legislative history and by what this Court has previously identified as section 998's purpose. A contrary reading, by contrast, would undermine the statutory purpose and push parties to roll the dice by going forward with a trial instead of taking the offramp of pre-trial settlement.

A. In interpreting section 998, the Court examines all indicia of legislative intent and construes penalty provisions narrowly.

The Court's "fundamental task" in interpreting section 998 "is to determine the legislative intent and effectuate the law's purpose, giving the statutory language its plain and commonsense meaning." (*Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1125.)

"If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable

interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*)

Further, in interpreting section 998(c)(1), the Court must consider that cost-shifting is a *penalty*. (See, e.g., *Trujillo v. City of Los Angeles* (2022) 84 Cal.App.5th 908, 915 [party subjected to cost-shifting "suffers a penalty"]; *Oakes v. Progressive Transportation Services, Inc.* (2021) 71 Cal.App.5th 486, 499 [section 998 imposes "mandatory penalties"]; *Etcheson v. FCA US LLC* (2018) 30 Cal.App.5th 831, 843 [cost-shifting provision is a "penalty"]; *Prince v. Invensure Ins. Brokers, Inc.* (2018) 23 Cal.App.5th 614, 621-622 [section 998 "punish[es] a party"].)

As a general matter, penalty clauses are given "the narrowest construction" to which they are "reasonably susceptible in light of [their] legislative purpose." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 405 [as to penal statutes, "we adopt the narrowest construction of its penalty clause to which it is reasonably susceptible in the light of its legislative purpose"].)

B. Section 998's plain language is directed at cases resolved through *adjudication*. The penalty provisions do not ever mention "settlement."

We begin with what section 998's plain language reveals about the Legislature's intent. (*Mendoza, supra*, 11 Cal.5th at p. 1125; see also *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 ["We begin with the text of the statute *as the best indicator of legislative intent*," italics added].)

On its face, 998's penalty provision—subdivision (c)(1)—doesn't state that the penalty applies to cases that *settle*. The absence of the word "settlement" in the face of other words ("judgment or award") should be construed as showing a legislative intent that the penalty provision was never meant to apply to cases that settle. Indeed, multiple aspects of what the provision *does* say strongly signal that the penalty doesn't apply in that context.

Specifically: Section 998(c)(1) penalizes plaintiffs who "fail[] to obtain a more favorable judgment or award" than an unaccepted 998 offer; it cuts off their post-offer costs and requires them to pay "defendant's [post-offer] costs" out of any "damages awarded." (§ 998, subds. (c)(1), (e).) Many of these word choices are specific to cases that end in an *adjudication* by a court or arbitrator, and are a mismatch for cases that end in settlement:

"Judgment or award." Section 998(c)(1) asks whether the plaintiff received a "judgment or award" that was more favorable than the 998 offer. A "judgment" is "[a] *court's* final determination of the rights and obligations of the parties in a case." (Black's Law Dictionary (11th ed. 2019), italics added; see *People v. Raybon* (2021) 11 Cal.5th 1056, 1066-1067 [collecting dictionary definitions, including from Black's, to interpret statute].) An award in this context is an "arbitration award" (see *Heimlich v. Shivji* (2017) 12 Cal.App.5th 152, 161 & fn. 7, *revd. in part on other grounds* (2019) 7 Cal.5th 350)—that is, "[a] final decision by an arbitrator or panel of arbitrators" (Black's Law Dictionary (11th ed. 2019), italics added).

"Judgment" and "award" refer to dispositions reached *through trial, arbitration, or some other adjudication.* They are an *adjudicatory* result, not a *compromise.*

Had the Legislature meant to sweep in *every* mode of resolving a case, including settlement, it would've chosen a broader term, such as "result" or "outcome"—e.g., it could've drafted section (c)(1) to state its trigger for penalties as being a plaintiff's failure to obtain a "more favorable result."

The Legislature's choice to use words connoting a decision by a court or arbitrator ("judgment or award") instead of a broader term, demonstrates that the Legislature conceived of section 998 as applying only to those specific situations where parties looked to *an outside decisionmaker* to adjudicate their dispute—a scope that makes sense, given that section 998's purpose was to unburden courts' *trial* calendars. (§ I.C, *post*.)

"[F]ails." Section 998(c)(1) applies where the plaintiff "fails to obtain" a certain judgment or award. "Fails" connotes defeat, abandonment, or "[i]nvoluntarily" falling short of one's purpose. (Dis.-6-7, citing Burton's Legal Thesaurus (3d ed. 1998) p. 228, col. 1 and Black's Law Dict. (rev. 4th ed. 1968) p. 711, col. 1; accord Cambridge Dict. Online (2023)[2] ["fail" means "to not succeed in what you are trying to achieve"].)

Consistent with that definition, other parts of the Code of Civil Procedure use the word "fail" to refer to "action or inaction

[2] https://dictionary.cambridge.org/us/dictionary/english/fail

in litigation." (Dis.-9, italics added, citing §§ 426.50 ["A party who fails to plead," and "if the party who failed to plead the cause acted in good faith"], 1297.116, subd. (a) ["A party who fails to act"], 1268.020, subd. (a) ["the plaintiff fails to pay the full amount"], 1029.6, subd. (a) ["The failure of any defendant to join"], 1030, subd. (d) ["If the plaintiff fails to file the undertaking"], 1002, subd. (e) ["An attorney's failure to comply"].)

Under these definitions, a plaintiff who achieves a compromise settlement doesn't "fail" to obtain a more favorable judgment or award, nor has either party secured a "win." *Both sides* have simply changed their goal from a trial in which they could win or lose, to a negotiated settlement that provides certainty and, in some cases, non-monetary terms that a party couldn't obtain in a 998 offer or in an adjudication. (See § I.D.4, *post*.) A negotiated settlement isn't a loss, or abandonment. It's a "compromise" with no winner and loser, and that isn't tantamount to an *unnegotiated* abandonment of a claim. (Dis. 7-8; § 998, subd. (f).)

"***Compromise settlement***." Section 998's other text makes clear that a judgment resulting from an *adjudication* is distinct from a settlement, which is necessarily the product of a *compromise*. In recognition of the fact that 998 offers may call for entry of a "judgment," subdivision (f) expressly states that a "judgment" entered after an accepted 998 offer shall be deemed a "compromise settlement." Thus, even where a formal judgment is entered in the wake of a settlement—as can occur where there's an accepted 998 offer—that judgment is recognized as

distinct from the *adjudicatory* judgment that a party succeeds or fails to obtain in litigation (and which would therefore trigger subdivision (c)(1)'s penalty).

This, too, shows that the Legislature saw a distinction between cases that ended by way of adjudicatory judgments and cases that ended by way of parties compromising.

"Any damages awarded." Section 998, subdivision (e) states that where 998's penalties apply, "the costs under this section, from the time of the offer, shall be deducted from *any damages awarded in favor of the plaintiff*." (Italics added.)

This is another clue that the Legislature intended an *adjudicatory* result to be the trigger for 998's penalties. Indeed, a settlement doesn't result in "any damages awarded" in either party's "favor"; rather, a settlement results in *agreed-upon settlement proceeds*. (§ 998, subd. (e); see also Black's Law Dict. (11th ed. 2019) ["damages" refer to "money adjudged to be paid" for loss].) Thus, unlike a trial, a settlement can't result in a "damages award[]" from which any post-offer costs awarded as a 998-penalty are to be taken.

If the Legislature meant to penalize parties who achieved a pre-trial settlement—and to force a settling plaintiff to give some or all of its settlement funds to the defendant—then the Legislature would've used a term that encompassed settlement proceeds when it identified where the shifted costs would be paid from, just as the Legislature did in a related provision that defines a prevailing party entitled to costs as the party with a

"net monetary recovery." (§ 1032, subd. (a)(4); *DeSaulles v. Community Hospital of Monterey Peninsula* (2016) 62 Cal.4th 1140, 1153 [interpreting section 1032's definition of "prevailing party," which "broad[ly]" includes a party who secures a "net monetary recovery," to include recovery via settlement].)
For example, the Legislature could have stated in section 998, subdivision (e) that "the costs under this section, from the time of the offer, shall be deducted from *any settlement amounts the plaintiff received*, *or any* damages awarded, in favor of the plaintiff." But the Legislature didn't include any such language.

The making and acceptance of 998 offers prior to "the commence of trial." The fact that a 998 offer can be made as late as 10 days before trial and can be accepted before "the commence of trial" with "opening statement" likewise reflects a legislative focus on avoiding resource-intensive *trials*. (§ 998, subd. (b) [subdivision (2) explains that offers may be accepted "prior to trial," which subdivision (3) explains is just before "the opening statement of the plaintiff"].)

****

The Court should give effect to the Legislature's decision to not use the word "settlement" in 998's penalty provision, and to instead use words that apply to *adjudicated* cases. That section 998 is silent as to its application to cases that settle should be read to mean that the Legislature didn't conceive of the penalty as applying to cases that settle before trial.

At the very least, section 998 is *susceptible* to that interpretation. To the extent that the absence of an express carve-out for settlements also permits other readings, the Court must "consider other aids" to "determine the legislative intent and effectuate the law's purpose." (*Mendoza, supra,* 11 Cal.5th at p. 1125.) As shown below, *all* those interpretive aids compel a conclusion that the Legislature didn't intend for section 988 to apply to cases resolved through pre-trial settlements.

C. Legislative history confirms that the Legislature intended section 998 cost-shifting to apply after adjudications, not settlement.

Section 998's history illustrates that the Legislature has long viewed section 998's penalties as applying only following an adjudication—and not where the parties achieve a pre-trial settlement that avoids the need for adjudication.

Section 998's origins. Section 998(c)(1) "has been a part of California law, in one form or another, since... 1851...." (Dis.-12.) Section 998's predecessor was substantially the same as a New York statute derived from the Field Code, a summary of New York common law. (Dis.-9-10; *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 286 (dis. opn. of Broussard, J.); *Estate of Duke* (2015) 61 Cal.4th 871, 880 [describing Field Code].)

The Field Code's analog to section 998 "was intended to ensure that, when a plaintiff rejects an offer to compromise, 'but carries on the action, in order to recover a greater amount, he does it at the hazard of paying costs to the defendant, if he *shall*

fail to establish a greater claim.'" (Dis.-9-10, quoting First Rep. of the Comrs. on Prac. & Pleadings, Code Proc., § 348 (1848), at p. 239, italics in Dissent.)

The "'principal benefit hoped' for was '*to save the time of courts and witnesses*, and the expense to parties, *in proving the amount of damages, in case the right to recover in the action, shall be established.*'" (Dis.-10, italics altered.)

Given this intent, it makes no sense to penalize parties who settle before trial. A pre-trial settlement achieves the goal of saving courts' and witnesses' time; it need not be a settlement via an accepted 998 offer. A pre-trial settlement also doesn't require "prov[ing]" a claim or "the amount of damages;" it *avoids the need* for such an adjudication via a compromise where the defendant typically disclaims fault. (Dis.-10.)

Thus, section 998 has always been aimed at penalizing plaintiffs who *go to trial* after declining a 998 offer, thereby burdening courts' *trial* calendars. There's no indication in the history that 998's penalties were also directed at plaintiffs who investigate their cases and learn facts or maneuver through changes in law that bear on a case's potential value. Nothing indicates that the Legislature sought to end *litigation* at the first possible point; rather, its intent was to avoid judicial-resource-consuming *trials*.

Since its enactment, section 998 has been amended multiple times. Materials over *seven decades* support what's apparent from section 998's origins—the Legislature has long

understood the penalties as only applying where the party rejecting the 998 offer does worse *at trial* or other *adjudication*.

1967 Amendment. In 1967, at the California Bar Association's request, the Legislature amended section 998's predecessor to add this sentence: "Any judgment entered pursuant to this section is deemed to be a compromise settlement."[3]

The bar association sought this change out of concerns that because a 998 settlement can call for entry of judgment (under what's now codified at section 998, subd. (b)), a judgment entered pursuant to a 998 settlement might be treated the same as "a *final judgment 'on the merits*'" after trial—rather than being treated as products of compromise like any other settlement. (See MJN-44, italics added.)

Although the bar association was specifically concerned about these settlements being given preclusive effect (i.e., courts treating settlements as an adjudication for purposes of collateral estoppel), the Legislature made clear that it was even more broadly concerned about *any context* in which such settlements might be mistakenly interpreted as the same as the adjudications that section 998 sought to limit. (See MJN-40 ["The bill adds

---

[3] The 1967 action amended section 997, which was section 998's companion statute to allow cost-shifting penalties to apply to defendants and plaintiffs. In 1971, the Legislature merged the two sections, and the relevant language regarding "compromise settlements" was adopted into the modern section 998. For clarity, we refer to all predecessor provisions as "section 998."

clarifying language to assure that compromise settlements which are encouraged by statute are not misused through misinterpretation of the statute"].)

The Legislature thus rejected an early iteration of the amendment that stated that judgment entered under section 998 is "inadmissible to prove any issue in any other action," in favor of the much broader mandate that is still found in section 998 subdivision (f)—namely, that such judgments will be "deemed to be a compromise settlement," period. (See MJN-10-13.)

The Legislature thus recognized that a settlement that results in the mere ministerial entry of a "judgment" is *not* tantamount to an adjudicatory judgment and therefore should not be treated as such. By so doing, the Legislature made clear that that "judgment" in 998, subdivision (b) doesn't necessarily have the same meaning as "judgment" in 998, subdivision (c).

1969 Amendment. The 1969 amendment applied 998's penalties to defendants for the first time. The Assembly Policy Committee Analysis described the proposed legislation as: "Adds CCP 998 to permit any party after assignment for trial but before its commencement to recover all costs including expert's fees if such party has made a 'more favorable' offer than the ultimate judgment." (MJN-122.) Materials in the Governor's File stated that "Assembly Bill 1756 will permit offers of compromise and settlement to be made, in writing, 10 days before trial. If the person to whom the offer is made does not get a more favorable judgment *at the trial*, he cannot recover…" (MJN-131.)

Those materials go on to explain that "[t]he purpose of the bill is to promote the settlement of thousands of cases which are now clogging our overcrowded court calendars but which need some *small impetus* to settle." (MJN-131, italics added.)

The Legislature thus sought only to penalize parties who fail to settle *at any point* before a trial or other adjudication, not to penalize parties who reassess their willingness to settle over the course of litigation, and then settle before trial. (See Black's Law Dict. (11th ed. 2019) [defining "trial" as "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding"].)

1971 Amendment. In 1971, the proponent of the bill that merged sections 997 and 998 (the State Bar of California) explained how section 998 worked: 998's cost-shifting provisions apply based on how the value of an offer compares to the final "[v]erdict." (MJN-226.)

The State Bar's chart repeatedly shows that the triggering event for 998 penalties is a *verdict*—i.e., a judgment entered *after a trial*. (See Black's Law Dict. (11th ed. 2019) [defining "verdict" as "[a] jury's finding or decision on the factual issues of a case"].)

Snapshot of MJN-226

Situation	Plaintiff Costs			Defendant Costs			Other Side Expert Witness Fees Under 998
	General Law	997	998	General Law	997	998	
Plaintiff Offer Verdict Higher	Defendant Pays	N.A.	Defendant May Pay	Defendant Pays	N.A.	Defendant Pays	Defendant May Pay Plaintiff
Plaintiff Offer Verdict Lower	Defendant Pays	N.A.	N.A.	Defendant Pays	N.A.	N.A.	N.A.
Plaintiff Offer Defendant Verdict	Plaintiff Pays	N.A.	N.A.	Plaintiff Pays	N.A.	N.A.	N.A.
Defendant Offer Verdict Higher	Defendant Pays	N.A.	N.A.	Defendant Pays	N.A.	N.A.	N.A.
Defendant Offer Verdict Lower	Defendant Pays	Plaintiff Pays	Plaintiff Pays	Defendant Pays	Plaintiff Pays From Date of Offer	Plaintiff May Pay From Date of Complaint	Plaintiff May Pay Defendant
Defendant Offer Defendant Verdict	Plaintiff Pays	Plaintiff Pays	Plaintiff Pays	Plaintiff Pays	Plaintiff Pays From Date of Offer	Plaintiff May Pay From Date of Com-	Plaintiff May Pay Defendant

The Legislature apparently shared the State Bar's understanding that 998 penalties apply only after an adjudication: Assemblyman James A. Hayes, the bill's author, urged the Governor to sign because the proposed amendment would make section 998 "an even more effective tool in settling cases and relieving the crowded *trial* calendars." (MJN-189, italics added.)

Thus, the Legislature's focus was on encouraging parties to take *any* offramp that would avoid a *trial*—i.e., the largest consumption of court resources. The Legislature didn't intend to punish settling parties just because rather than settling earlier in the case, they avoided trial by settling later on. (See also MJN-217 [Statement of Reasons from the proposed resolution at 1969 conference: "[A]llowing a plaintiff in civil litigation to make an offer of settlement any time before judgment, and penalizing

the defendant who refuses such offer and then *fails at trial* to obtain a more favorable result...," italics added].)

1997 Amendment. To ensure that 998's penalties applied to arbitrations, the Legislature revised section 998's cost-shifting provisions to apply upon the "fail[ure] to obtain a more favorable judgment *or award*," and not just the failure to obtain a more favorable judgment. (§ 998(c)(1); MJN-292, 309.)

That the Legislature saw fit to add "award" shows that "judgment" in section (c)(1) wasn't intended to include every case-ending result, but rather was intended to mean only *an adjudication after a trial*. Adding "award" would've been unnecessary if a party already could've sought the penalties for failure to secure a more favorable "judgment" through *any* result. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 ["Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary"].)

The 1997 Amendment also clarified that courts cannot consider any post-offer costs in determining whether section 998's penalties apply. Here, too, the Legislature reiterated its understanding that section 998 applies only after a trial or other adjudication. The Legislature explained that the law presently "award[s] costs against a party who rejects a '998' settlement offer and fails to do better *at trial*." (MJN-336, italics added.) The Legislature went on to explain that the amendment excluded those post-offer costs "from the calculation of whether the party does better, by specifying that a plaintiff who rejects a settlement

offer and fails to do better *at trial* must pay the defendant's costs from the time of rejection to *the trial*." (*Ibid.*, italics added.)

1999 Amendment. In amending section 998 in 1999, the Legislature again confirmed that "[e]xisting law provides that if the offer is rejected and the offering party obtains a more favorable *result at trial or arbitration*, the court or arbitrator, in its discretion, may require the other party to pay the offering party's costs of the services of expert witnesses, as specified...." (MJN-580, italics added.)

2001 Amendment. The Legislature amended section 998 to "exempt[] prosecutors in civil enforcement actions from" the penalties section 998 imposes for "fail[ing] to obtain a more favorable judgment *at trial*." (MJN-618, italics added.)

The Los Angeles District Attorney's Office, a co-sponsor of the amendment, explained that section 998 had been enacted "to address the problem of unreasonable private litigants *burdening the courts with trials* in tort and contract lawsuits" that could have been settled. (MJN-619.)

By passing the bill, the Legislature formalized what the District Attorney's Office and other co-sponsors described as "the accepted view that section 998 could not apply to those prosecutors" because "[s]ection 998 speaks of offsetting costs against the plaintiff's award of '*damages*'" in contract and tort cases, and not other forms of recovery, such as the "injunctions, restitution and civil penalties" that civil prosecutors seek. (MJN-619, italics added.)

The Legislature's rationale for excluding civil enforcement indicates that section 998 wasn't intended to apply to cases that settle, too—where the plaintiff has settled for negotiated terms and foreclosed the need for a burdensome trial in which "damages" might be awarded.

2015 Amendment. At the behest of the Consumer Attorneys of California and the California Defense Counsel, the Legislature sought to equalize treatment of expert-witness costs so that they're awarded to either a defendant or a plaintiff for failing to secure a more favorable judgment or award. (MJN-661-662.) In explaining the amendment's import, the Legislature emphasized that the amendment would encourage pre-trial settlement by penalizing parties who reject an offer and are awarded less "*at trial*," stating: "The primary purpose of CCP Section 998 is to encourage parties to settle their disputes *prior to trial*. One incentive for the parties to accept *pre-trial settlement offers* is to avoid being ordered to pay the expert witness costs of the other party, as a court may order, if he or she is awarded less than the amount of the pre-trial settlement offer amount *at trial*." (MJN-664, italics added.)

Thus, section 998's severe penalties, including post-offer expert costs, are to apply "for failing to settle when the result *after trial* is less favorable than the offer that was made to settle the case *before trial*." (MJN-664, italics added.)

There's no indication that the Legislature intended to allow parties to bilaterally negotiate a settlement amount and then,

post-facto, make one of those parties pay the other side's post-offer expert costs *out of that negotiated amount*.

****

The legislative history shows that section 998's penalties apply only on the failure to secure a more favorable judgment or award *following a trial* or other adjudication. As the Dissent correctly notes, references to "trial" or "arbitration" reflect the legislative view that section 998(c)(1) "applies when a plaintiff obtains a *litigated result* less favorable than a previously rejected section 998 offer." (Dis.-11-12, original italics.) Nothing indicates that the Legislature intended section 998 to operate as the Opinion would have it: to penalize plaintiffs who *settle before trial*. The Court shouldn't adopt an interpretation of the statute at odds with the Legislature's view of its scope.

D. Penalizing plaintiffs for pre-trial settlements will undermine section 998's purposes.

Courts interpreting a statute consider the statute's purpose and public policy. (*Mendoza, supra*, 11 Cal.5th at p. 1125 ["fundamental task" in statutory interpretation "is to determine the legislative intent and effectuate the law's purpose"].)
As relevant here, this Court has recognized that section 998's purpose is to (1) "'encourage the settlement of lawsuits prior to trial'" and (2) fairly "compensat[e] the injured party"—(3) without "inject[ing] uncertainty into the section 998 process." (*Martinez, supra*, 56 Cal.4th at pp. 1019-1021.) Penalizing parties who agree to a pre-trial settlement subverts all of those goals.

1. Penalizing parties who settle after an initial offer is rejected would deprive the parties of the flexibility necessary to settle as a case progresses.

Section 998 "was enacted to encourage the settlement of lawsuits *prior to trial*" given the "time delays and economic waste *associated with trials*." (*Martinez*, *supra*, 56 Cal.4th at pp. 1017, 1019, italics added; *T.M. Cobb, supra*, 36 Cal.3d at p. 280.)

Section 998's focus is not on encouraging the *earliest* settlement; rather, it's on *avoiding trials*. That's consistent with the State's overall policy favoring pre-trial settlement: "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*." (*Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390.)

In line with the focus on promoting any settlement that unburdens courts' *trial* calendars, "[c]ourts look favorably upon applications [of section 998] that provide flexibility when parties discover new evidence." (*Martinez, supra*, 56 Cal.4th at p. 1021.)

T.M. Cobb is illustrative. There, this Court held that a party who makes a 998 offer is allowed to revoke it based on information learned later. The Court reasoned: "A party is more likely to make an offer pursuant to section 998 if that party knows that the offer may be revised if circumstances change or new evidence develops"—there, after post-offer depositions

"suggested that petitioner was considerably more culpable than real parties had realized at the time the original offer was made." (36 Cal.3d at pp. 276, 281.) "[I]t would make little sense to prohibit the offeror from revoking an offer which was based on an incomplete understanding of the relevant facts. To encourage parties to make offers pursuant to section 998, and to ensure that those offers are based on as complete an understanding of the facts as possible, such offers must be revocable." (*Id.* at p. 281.)

Yet, the Opinion here means that an offeror-defendant can change its litigation strategy and case valuation whenever it wants—once an initial offer is served, he can increase or decrease it, and the most recent offer would control. (See *Wilson, supra*, 72 Cal.App.4th at pp. 391-392.) But the offeree-plaintiff wouldn't be allowed to reevaluate settlement prospects of the case as it progresses by accepting less than an earlier offer *without being penalized for doing so*. Defendant would have flexibility, while plaintiff would have none. This is antithetical to the flexibility necessary to achieve a settlement as litigation progresses.

Just as Hyundai had the right to *revoke* its 998 offers before trial as the litigation progressed and to propose multiple settlements amounts based on its evaluation and re-evaluation of the merits of settling (see Statement of the Case, §§ B-C, *ante* [discussing $37,396.60, $55,556.70, and $39,000 offers]), plaintiffs must have the corollary right to weigh those multiple offers before agreeing to a settlement that eliminates the need for a trial. Promoting pre-trial settlement means giving the parties

maximum flexibility to adjust their valuations as they learn more about their cases.

After all, there are countless circumstances where a party may want to settle after declining a prior 998 offer. As in *T.M. Cobb*, discovery may unearth bad facts that had previously only been in the hands of the other party. New authorities may change the case's strength. Witnesses may become unavailable. A party might be diagnosed with a grave illness or face other changed personal circumstances that make the prospect of drawn-out litigation a bigger ask. The offeree may insist on a non-monetary term that cannot be included in a valid 998 offer. Or the trial court may make rulings on the viability of certain claims, the admissibility of certain evidence, or the availability of certain relief. It thus isn't surprising that "[e]xperience shows many cases can be settled 'on the courthouse steps,' notwithstanding earlier unsuccessful settlement conferences." (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2023) ¶ 4:1378.)

The risk that a plaintiff who settles for any of these reasons will be hit with a cost-shifting penalty makes a case less likely to settle. Plaintiffs who have rejected an initial 998 offer will be disinclined to make or accept any subsequent settlement offer that might *even arguably* be deemed less favorable than the first 998 offer, because if a court were later to find the settlement less favorable, plaintiffs would have to pay their own costs *and* use their settlement proceeds to cover the defendants' costs. Plaintiffs in this position would be more likely to go to trial to

have a chance of winning a result better than the prior 998 offer. (See Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach* (1994) 93 Mich. L.Rev. 107, 136 ["Losers were more likely to risk an uncertain trial verdict than to accept a settlement offer that appeared to leave them in a 'worse' position than when they began"].)

"The reverse might be true of the defendant," who would be reluctant to consider settlement offers that a trial court might deem *more favorable* to the plaintiff than a prior 998 offer and therefore cut off the defendant's prospect of shifting costs to the plaintiff. (*Wilson, supra,* 72 Cal.App.4th at p. 391.) Instead, defendants would have an incentive to go to trial in the hope of obtaining a verdict that's less favorable to the plaintiff than the prior 998 offer. (*Ibid*.)

In this way, *all* parties would lose the flexibility needed to achieve pre-trial settlements "based on as complete an understanding of the facts as possible." (See *T. M. Cobb*, *supra*, 36 Cal.3d at p. 281; see also *Varney Entertainment Group, Inc. v. Avon Plastics, Inc.* (2021) 61 Cal.App.5th 222, 236 ["Allowing Varney to enter into the stipulated judgment... without fear of section 998 cost shifting" serves section 998 by "encourag[ing] the settlement of lawsuits prior to trial"].)

2. It's no answer to say that parties could simply negotiate around section 998's penalties; requiring the parties to negotiate around those penalties is an *additional hurdle* to pre-trial settlement.

Saying that parties could simply negotiate around 998's cost-shifting penalties is no answer, since that obstacle will as a practical matter preclude many settlements. For example:

Example A. A plaintiff brings two claims—(1) a breach-of-contract claim for actual damages, and (2) a fraudulent-inducement claim for actual damages and punitive damages. Early on, the defendant offers to settle for $400,000, roughly equating to actual damages. Years later, the trial court grants summary adjudication as to the breach of contract claim.

Recognizing that her chances of recovery have decreased, plaintiff is now willing to accept $350,000 to dismiss her high-risk, high-reward fraud claim. Imposing 998's penalties on the plaintiff—including requiring her to cover defendant's post-offer costs—will likely stop this settlement. If the defendant has incurred $50,000 in post-offer costs, for instance, the plaintiff would recover just $350,000 in the settlement if the defendant was now willing to make another $400,000 offer—something the defendant isn't likely going to repeat now that plaintiff's chances of recovery have decreased. Both sides are thus left to roll the dice in a high-stakes trial and appeal.

Example B. A man is in a car accident with a truck driver. He sues the trucking company for his alleged physical impairments. He makes a 998 offer to settle for $1,000,000. The trucking company declines, both because it maintains that the man was at fault and because it plans to use surveillance footage to impeach the man's claims regarding the extent of his injuries. But two years later, the trial court rules that it won't permit the use of surveillance footage to impeach the plaintiff at trial.

With its key piece of evidence excluded from the upcoming trial, the trucking company is now willing to pay the previously rejected $1,000,000 or even more than that if demanded by the plaintiff, who now stands in a better bargaining position than before. But under the Opinion, if the defendant settles for that same $1,000,000 (or more), the defendant will face section 998's penalties, which can include (1) 10% prejudgment interest from the date of the first offer (Civ. Code, § 3291), and (2) the plaintiff's post-offer expert witness fees (§ 998, subd. (d)). Thus, application of 998's penalties would likely derail any effort to settle. Going to trial for a chance at a defense verdict becomes a more enticing prospect to a defendant faced with a larger settlement demand, *plus* the obligation to pay a sizable prejudgment interest penalty and the other side's post-offer costs.

Example C. A consumer purchases a used car that is sold with a balance remaining on the manufacturer's new car warranty but that fails to perform as warranted. The consumer sues the manufacturer under the Song-Beverly Act based on existing case law permitting such claims. (See *Jensen v. BMW of*

North America, Inc. (1995) 35 Cal.App.4th 112, 121-127 [Act's new motor vehicle protections extend to "cars sold with a balance remaining on the manufacturer's new motor vehicle warranty"].) Early in the litigation, the manufacturer makes a 998 offer for $30,000, which the consumer rejects. Then, shortly before trial, a new appellate opinion creates a split in authority as to whether the Song-Beverly Act protects those who purchase a used vehicle with a balance remaining on a new car warranty. (See *Rodriguez v. FCA US, LLC* (2022) 72 Cal.App.5th 209, review granted July 13, 2022.)

Ordinarily, the risk that this new split in authority creates may prompt the consumer to consider settling for $30,000 or even less. But the Opinion's reading of section 998, would discourage any settlement. The defendant would be unlikely to accept a settlement for *more* than $30,000, since the plaintiff's prospect of winning is worse than when the defendant made the prior $30,000 offer. But the plaintiff would be unlikely to accept a settlement of $30,000 or less because doing so would trigger section 998's harsh penalties. The plaintiff would specifically be deprived of post-offer costs and fees otherwise available to a prevailing plaintiff under the Song-Beverly Act. And because the defendant's post-offer costs are to "be deducted from any damages awarded in favor of the plaintiff" with judgment entered in the defendant's favor where those post-offer costs exceed the "damages awarded" (§ 998, subd. (e)), the plaintiff could end up recovering nothing and actually *owe the defendant money* if the defendant's post-offer costs exceed the settlement proceeds. (E.g.,

Covert v. FCA USA, LLC (2022) 73 Cal.App.5th 821, 830 [FCA sought $69,178 in post-offer costs where plaintiff recovered $48,416 *in total* at trial].)

A trial and the inevitable appeal—in light of the pending *Rodriguez* case—where the plaintiff has a chance of winning more than $30,000 would be the only opportunity to avoid those harsh penalties and, thus, would become a more attractive option than a settlement that is *virtually certain* to result in the plaintiff recovering little, if anything. Again, a case that would've been a strong candidate for settlement absent application of 998's penalties would instead become highly unlikely to settle.

Example D. A farmer's relatives bring a wrongful death claim against a farm equipment manufacturer. Although the farmer's relatives brought the case in a rural community that's likely to be highly sympathetic to the farmer's surviving relatives, the manufacturer rejects an early 998 offer for $5,000,000, because it believes it will be able to get venue moved to an urban area where it is headquartered, where many witnesses are located, and where the manufacturer is well-regarded for providing high-paying jobs. A year later, the trial court denies the transfer motion on the basis that the witnesses' locale is unimportant since they can always testify via Zoom.

Ordinarily, the manufacturer might now consider settling for $5,000,000 or even more. But a rule penalizing parties that settle under less favorable terms than a rejected 998 offer could stop the manufacturer from making such a settlement, which

could expose it to $500,000 in pre-judgment interest[4] (see Civ. Code, § 3291) and any post-offer costs awarded (see § 998, subd. (d)). If the plaintiff refused to waive 998 penalties, the manufacturer might well go to trial.

Exhibit E. A pedestrian falls and breaks his ankle after tripping on a sidewalk that he claims a small business owner failed to safely maintain. The business owner rejects an early 998 offer for $50,000, believing that she can convince a jury that the pedestrian fell due to his own negligence. Two years later, however, changed personal circumstances—such as a move out-of-state, a high-risk pregnancy, or an elderly parent who she must now take care of due to a recent dementia diagnosis—makes the prospect of trial much more burdensome. She might now seek to settle for $50,000 or more. The Opinion, however, would penalize her for agreeing to a less favorable settlement. She'd now have to *also* pay $10,000 in prejudgment interest (see Civ. Code, § 3291) and, at the trial court's discretion, the plaintiff's post-offer expert fees. To avoid those penalties, she's thus pushed to move forward with a burdensome trial in a case that she might have settled otherwise.

****

In sum, imposing 998's penalties will create friction to getting a settlement done after an earlier effort to settle has

[4] All prejudgment interest calculation were performed using the San Diego County Superior Court's Judgment Calculator, https://ijcalc.sdcourt.ca.gov/.

failed. That the parties would have to negotiate around the penalty means, as a practical matter, that they won't be able to settle in some cases—cases that *will now go to trial*. Accordingly, if the goal of 998's penalties is to promote pretrial settlements, then neither side should have a penalty provision imputed as a matter of law into a settlement agreement—a penalty provision that the parties would then have to try to negotiate to waive.

3. Applying section 998's penalties to cases that settle would prevent plaintiffs from being compensated for their injuries precisely because *they agreed to settle*.

Applying 998 penalties to cases that settle would also subvert section 998's goal of "compensating the injured party." (*Martinez, supra,* 56 Cal.4th at p. 1021.) Section 998 would cut off a settling plaintiff's entitlement to fees *and* force the plaintiff to pay for the other side's costs—potentially including $400-$500/hour expert fees or more. (See (§ 998, subd. (e); *2021 Expert Witness Fees – How Much Should an Expert Witness Charge?*, SEAK Expert Witness Discovery [median fees as of 2021].[5])

Interpreting section 998 to apply to cases that settle could *wipe out* the injured plaintiff's entire settlement and cause the plaintiff to owe the defendant money. This might make sense

[5] https://blog.seakexperts.com/expert-witness-fees-how-much-should-an-expert-witness-charge/

when a plaintiff *went to trial*, but it makes no sense when a plaintiff achieves section 998's purpose by *settling before trial.*

Penalizing a party who *never* settles certainly accomplishes section 998's purposes by encouraging plaintiffs to *repeatedly reconsider* whether to go forward with a time-consuming trial in which she may not receive *any* compensation for her injuries. In contrast, penalizing a party merely for not accepting an *initial* offer would *stop* her from trying to settle thereafter unless she could get an amount greater than the offer, even if new developments make trial more risky or otherwise less attractive.

Thus, rather than ensuring that plaintiffs are compensated, the Opinion threatens a plaintiff's recovery as a matter of law *precisely because* he "[re]assess[ed] realistically [his] position[] prior to trial" and settled—conduct that section 998 is supposed to encourage, not penalize. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 1001.)

This is an absurd result.

After all, although section 998's penalties apply only when the 998 offer is later found to be reasonable and valid, both of those determinations are evaluated *by a court* based on the facts that exist *at the time the offer was made*. (See *Licuidine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924 [reasonability "evaluated in light of the circumstances 'at the time of the offer' and 'not by virtue of hindsight'"]; *Duff v. Jaguar Land Rover North America, LLC* (2022) 74 Cal.App.5th 491, 500 [same except as to validity].)

A plaintiff would thus have to be clairvoyant or be able to perfectly assess the value of her case at the time of the initial 998 offer or else the "stick" of the penalty follows her through the entire litigation. That stick would mean she *could not avoid* trial down the line—a result that would subvert section 998's purpose.

4. Penalizing settling parties would result in complicated post-settlement litigation.

Raising the specter of cost-shifting in *every* civil litigation where a plaintiff doesn't accept a 998 offer, but later reaches a settlement, would spawn disputes in a massive number of cases. Section 998 applies broadly in civil litigation and arbitration. More than 200,000 unlimited civil cases are filed in California each year. (Judicial Council of California 2022 Court Statistics Report, p. 97 [Table 4a].)[6] Ninety-five percent of California cases settle. (Baker, *Managed Cooperation In A Post-Sago Mine Disaster World* (2013) 33 Pace L.Rev. 491, 514.)

Those disputes would also be complex. Courts would face post-settlement motions on whether a prior 998 offer was more favorable than a negotiated settlement—and those motions would require courts to weigh differences in non-monetary terms. Indeed, to determine which offer was more favorable, courts would have to measure (1) "the status of the litigation" when [each] section 998 offer was submitted" (*Guerrero v. Rodan Termite Control, Inc.* (2008) 163 Cal.App.4th 1435, 1441) and (2)

[6] https://www.courts.ca.gov/documents/2022-Court-Statistics-Report.pdf

the value of any non-monetary terms in each 998 offer (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764-765), against the terms of the final settlement. This is more difficult than simply comparing a rejected 998 offer to an adjudicatory judgment for a certain damages sum: Negotiated settlements are likely to contain detailed *non-monetary* terms that would not appear in a judgment after trial and that may not appear in a valid 998 offer.

For example, consider a defamation claim where a plaintiff rejected a large 998 offer because the plaintiff wanted a public statement rescinding the previous defamatory statement, a public apology, or both. How does the rejected offer compare with a later negotiated settlement for less money but with a public retraction or a public apology?

Or consider a workplace sexual harassment suit where the plaintiff rejected an initial $150,000 section 998 offer, but later settles for $125,000 and the condition that the employer implement anti-harassment training or terminate the alleged harasser.

If section 998 applies to cases resolved through settlement, then litigants will routinely be asking courts to compare such apples to oranges. The result would be *more* work for trial courts, instead of less. That's contrary to section 998's purpose.

The harm would fall on defendants, too. Consider a claim based on the failure to pay overtime rates where a plaintiff might make a $50,000 998 offer, but the defendant rejects the offer

because it doesn't release other potential claims. But the defendant happily agrees to a later settlement for $75,000 and a release from all such claims. Under the Opinion's rule, a court would have to assign some *objective value* to the release term that might have high *subjective value* to the employer for the peace of mind provided.

Or, take a breach-of-contract claim where two companies have a contract setting an annual rate adjustment for the sale of goods. If the defendant rejects a 998 offer for $1 million but later agrees to a settlement for $1.5 million and a contract reformation that sets clear and favorable rate increases for the next decade, should the defendant be penalized for ultimately settling for more money but under more defendant-friendly non-monetary terms?

Penalizing parties who reject a 998 offer but later settle invites these types of complex questions, which the Opinion refused to confront in this very case. (See Rhrg. Pet.-12-14 [explaining that the Opinion failed to consider plaintiffs' argument that settlement required payment before dismissal and was thus more valuable than offers that plaintiffs would've had to bring a breach of contract claim to enforce]; Mod. Order-2 ["On remand, the trial court may consider the parties' arguments regarding the validity of the offer, whether the offer was more favorable than the judgment obtained by plaintiff, and any other arguments that may flow from the application of section 998"].)

The complex questions posed in these examples may actually be far simpler than some of the other issues that courts will confront if the Opinion takes root since courts will have to

decide whether the ultimate settlement is more favorable than *the multiple 998 offers that were previously rejected*.

Forcing courts to decide whether one settlement is objectively more valuable than another one may also implicate attorney work-product issues. For instance, to show that a settlement for more money is nevertheless more favorable to the defendant than a rejected offer because the settlement contains a release of claims, a defendant may have to disclose the legal advice or work product about his potential liability on yet-to-be brought claims. Can he do that without waiving attorney-client privilege? And if not, is he excused from providing that evidence?

What's more, the complex questions that will arise would also be new in the courts: Until now, no case held that 998's penalty applies to cases that end in pre-trial settlement. (Opn.-2 ["novel"]; Dissent-12 [same].) As practitioners have explained, courts and litigants generally have *not* viewed section 998 as applying to cases that settle. (Wirtz Law Depublication Request-1; Dreyer Babich Letter In Support Of Review-2; CAOC Letter In Support of Review-1].) Thus, the Opinion upends the status quo. If section 998 penalizes parties who ultimately settle, the floodgates will open to cost-shifting motions in a whole new swath of cases, significantly increasing courts' workloads.

E. Contract principles cut against applying section 998 to cases that settle pre-trial.

General contract-law principles apply to section 998 where the statute is silent and "where such principles neither conflict

with the statute nor defeat its purpose." (*T.M. Cobb, supra*, at pp. 279-280.)

Here, under the merger doctrine, "all prior negotiations and stipulations concerning the subject matter of a contract are considered merged therein when the contract is executed." (*Bradford v. Southern California Petroleum Corp.* (1944) 62 Cal.App.2d 450, 461; accord, Civ. Code, § 1625.)

This "firmly established principle of contract law"—and the absence of any "express[] and unequivocal[]" language providing that this principle doesn't apply in the section 998 context—means that when parties settle before trial, there's no longer a live 998 "offer" that could trigger section 998's penalty provisions in the first place. (See *T.M. Cobb*, *supra*, 36 Cal.3d at p. 278.)

A plaintiff who settles thus cannot have "failed to secure a more favorable judgment or award" than a prior 998 offer that, under well-settled contract rules, the settlement extinguishes and subsumes.

The Opinion rejected the merger doctrine on the basis that "it applies to only *written* contracts" and not where it is "presented orally to the trial court in accordance with section 664.6." (Opn.-24, original italics.) But oral settlements presented in court and memorialized in the resulting transcript and minute order are treated the same as signed writings. (See *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1534 [statute of frauds inapplicable to oral settlements under Code of

Civil Procedure section 664.6].) There's no basis to hold that the merger doctrine is inapplicable to oral settlements.

II. Nothing In The Opinion Persuasively Supports Its Holding That The Legislature Intended To Impose A Cost-Shifting Penalty On Plaintiffs Who Settle Their Case Before Trial.

The Opinion's stated grounds for holding that section 998's penalty provisions apply to cases resolved by pre-trial settlement are unpersuasive: None establishes the touchstone for statutory interpretation—namely, that the Legislature *intended* section 998 to apply in this context.

A. Cases interpreting "judgment" for purposes of what constitutes a valid offer to compromise under a *different* subdivision of section 998 have no bearing here.

The Opinion relies heavily on case law interpreting the word "judgment" in a *different* subdivision of section 998—namely, subdivision (b), which articulates the criteria for a valid 998 offer and which states *in that context* that an offer must "allow judgment to be taken" against the offeror. (§ 998, subd. (b).) (Opn.-14.)

For purposes of subdivision (b), courts treat a proposal that plaintiff dismiss her action once she's received payment as equivalent to an offer for "judgment to be taken" in her favor. (Opn.-14-15, citing *DeSaulles, supra,* 62 Cal.4th at p. 1155 and *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 907.)

The Opinion presumes that "judgment" has an equally expansive and flexible meaning in section 998's cost-shifting penalty provision, subdivision (c). (Opn.-15.) But that presumption isn't well-founded. While a dismissal with prejudice might be the same as a judgment for purposes of affording the finality necessary to be a valid offer under subdivision (b), that doesn't mean that dismissal is tantamount to a penalty-triggering "judgment or award" under subdivision (c)(1).

This Court makes clear there's no "inflexible rule" that a word has "precisely the same meaning" throughout a statute. (*People v. Superior Court* (2018) 6 Cal.5th 457, 467.)

"Just as people sometimes use the same word to convey different meanings even in the same sentence, so too have we held that certain statutes are sometimes best read in context to assign different meanings to the same word used in different portions of a statute." (*Ibid.*)

Statutory interpretation focuses on legislative intent, not on the meaning of a word in a vacuum. Accordingly, the "interpretive task is not necessarily to slavishly assign a word precisely the same meaning every time it is used in a statute—regardless of the context—but to accord it the meaning best suited to effectuating the statute's intended purpose." (*Ibid.* ["updated evaluation" in Welfare & Institutions Code section 6603, subdivision (j)(1) encompasses "replacement evaluations," even though subdivision (c)(1) refers separately to an "updated or replacement evaluation"]; see also *People v. Hernandez* (1981) 30 Cal.3d 462, 468 ["When the occasion demands it, the same word

may have different meanings to effectuate the intention of the act in which the word appears," internal quotation marks omitted].)

As the Opinion itself acknowledges—and as the text and the legislative history confirm (see pp. 29-30, 34-35 [discussing section 998's "compromise settlement" language)—"the use of the term 'judgment' in the two subdivisions is not identical...." (Opn.-15.) And the dissent in a prior decision from this Court pointed out that this Court has already interpreted another term in section 998—"offer"—to have different meanings within the statute. (*T.M. Cobb, supra*, 36 Cal.3d at p. 286 (dis. opn. of Broussard, J).)

Plus, however expansively "judgment" may be interpreted for purposes of what constitutes a valid 998 *offer* under subdivision (b), a broad interpretation is inconsistent with the Legislature's purpose to penalize cases *that go to trial*.

The Opinion's assertion that the settlement qualifies as a "judgment" under section 577 (see Opn.-17) is inapposite for the same reason. Section 577 *generically* defines the term "judgment" as "a final determination of the rights of the parties...." The Opinion cites nothing indicating that the Legislature intended to import that definition into section 998's cost-shifting provision, or whether it intended cost-shifting penalties to apply to cases that settle before trial.

A voluntary dismissal following a settlement isn't a final determination of the rights of the parties. A settlement is the *opposite* of a final "determination" on the merits—there's no final

determination of anything. Rather, defendants usually *disclaim* any liability in settlement agreements (while still agreeing to pay some amount).

B. Legislative silence after *Goodstein* is irrelevant, especially since no decision before the Opinion held that mandatory cost-shifting applies to cases that settle.

The Opinion notes that the Legislature has amended section 998 since *Goodstein, supra*, 27 Cal.App.4th 899 held in 1994 that "judgment" for purposes of subdivision (b) includes dismissals with prejudice, but did not amend the statute to contravene *Goodstein*'s holding or add the words "at trial" to subdivision (c)(1). (Opn.-16.) The Opinion concedes that this legislative silence is "not conclusive," but treats it as "signify[ing] legislative acquiescence in the decisions finding that entry of a formal judgment is not required to trigger section 998's cost-shifting provisions." (*Ibid.*)

There are multiple flaws in this reasoning.

First, there was no case law before the most recent section 998 amendment (2015) that would've signaled that an amendment was necessary: The Opinion was the *first time* any appellate court held that the cost-shifting penalty applies to cases that settle. (Opn.-2 ["novel" question], Dis.-12 ["no case has addressed the question whether section 998(c)(1)'s cost-shifting provision applies to a negotiated settlement"].) Given that the cost-shifting penalty has existed in various forms since 1851 and

that no court had held that it applies when cases settle—even after *Goodstein* interpreted "judgment" broadly in 1994—legislators who believed that the penalty doesn't apply to cases that settle would've seen no need to amend the penalty provision in 2015.

Second, this Court has repeatedly dismissed legislative inaction as unilluminating even when courts *have* previously weighed in on the issue. (E.g., *People ex rel. Garcia-Brower v. Kolla's, Inc.* (2023) 14 Cal.5th 719, 733-734 ["'[a]rguments based on supposed legislative acquiescence rarely do much to persuade,'" quoting *Scher v. Burke* (2017) 3 Cal.5th 136, 147; *Mendoza, supra*, 11 Cal.5th at p. 1139 [inaction "is a weak reed upon which to lean," internal quotation marks omitted]; *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 116 ["even when a clear consensus has emerged in the appellate case law, we have noted that legislative inaction supplies only a weak reed upon which to lean in inferring legislative intent," internal quotation marks omitted].)

Third, legislative *action* (as opposed to inaction) undermines the Opinion's conclusion that the Legislature meant "judgment" in the penalty provision to refer to "any final resolution of the action ...." (Opn.-16, italics omitted.) The Legislature has repeatedly indicated that section 998's penalties apply only following *an adjudication*. (See § I.C, *ante*.)

Fourth, in 1997—three years after the *Goodstein* decision—the Legislature amended section 998's penalty provision to encompass arbitrations. (*Heimlich v. Shivji* (2019) 7 Cal.5th 350,

360-361.) It did so by changing "fails to obtain a more favorable *judgment*" to "fails to obtain a more favorable *judgment or award*." (*Ibid.*; Stats. 1997, ch. 892, § 1, p. 6390, italics added.) That change would have been unnecessary if the Legislature understood "judgment" to mean "*any* final resolution of the action"—arbitration awards would already have been included. The fact that the Legislature added "or award" indicates that it did not intend for "judgment" to be as "flexible" and all-encompassing as the Opinion posits.

C. It makes no difference how settlements are treated under other statutes that, unlike section 998, don't seek to encourage pre-trial settlements.

Emphasizing that the parties here invoked section 664.6, which provides that upon oral stipulation, the court can "enter judgment pursuant to the terms of the settlement," the Opinion concludes that "the parties' use" of section 664.6 indicates that they "intended to effect a final judgment." (Opn.-18.)

But the question here isn't whether the settlement would result in a "judgment" within the meaning of section 664.6; it's whether the Legislature intended section 998's cost-shifting penalty to apply to cases that are resolved through a pre-trial settlement rather than through adjudication. The parties' invocation of section 664.6 in this particular case has no bearing on the latter question of what the *Legislature* intended.

Nor would it make sense to have application of 998's penalty provision turn on whether a settlement invokes section 664.6. Section 998's penalty is designed to "encourage the settlement of lawsuits prior to trial." (*Martinez*, *supra,* 56 Cal.4th at p. 1019.) Pre-trial settlements achieve that goal equally well, regardless of whether they use section 664.6: Either way, the settlement saves the court from adjudicating the case. There's no need for a penalty to incentivize settling before trial, when that's exactly what happens.

It's equally irrelevant that the settlement allowed plaintiffs to seek fees and costs under the Song-Beverly Act. (Opn.-18-19.) The Opinion treats this as significant, observing that the Song-Beverly Act allows awarding a prevailing car purchaser fees and costs "'as part of the judgment,'" and that case law has held that a settled pre-trial dismissal with prejudice constitutes a "judgment" for purposes of this Song-Beverly provision because it constituted a "judgment" for purposes of section 998. (*Ibid.*) But again, one has nothing to do with the other.

The Song-Beverly Act case that the Opinion cites, *Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, relied on *Goodstein, supra*, 27 Cal.App.4th 899, and on other cases interpreting "judgment" in section 998, subdivision (b), the provision about what constitutes a valid 998 offer. (*Id.* at p. 1260.) As discussed, *Goodstein* didn't consider "judgment" for purposes of the cost-shifting penalty provision, subdivision (c)(1), and *Goodstein*'s holding doesn't automatically carry over to that context. Nor did *Wohlgemuth* consider whether 998's penalty

applies where a case settles after non-acceptance of a 998 offer: *Wohlgemuth* was about whether a settlement resulting from an *accepted* 998 offer constituted a "judgment" entitling the plaintiff to seek fees and costs under the Song-Beverly Act. "[S]imilar language used in different statutes with different purposes" do not have the same meaning. (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 117; *Delaney v. Baker* (1999) 20 Cal.4th 23, 42.)

The Song-Beverly Act is a "'remedial measure'" designed to compel manufacturers to promptly repurchase or replace a defective vehicle without the plaintiff needing to ask, let alone sue. (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 971-972.) Accordingly, when the manufacturer forces a plaintiff to sue to get relief, that plaintiff is treated as the prevailing party even where he recovers via settlement. (*Wohlgemuth*, *supra*, 207 Cal.App.4th at p. 1262.)

Section 998, in contrast, is designed to "encourage the settlement of lawsuits *prior to trial*." (*Martinez, supra,* 56 Cal.4th at p. 1019, italics added.) Its penalties must be read in "the narrowest construction" to advance that goal. (*Hale, supra*, 22 Cal.3d at p. 405 [as to penal statutes, "we adopt the narrowest construction of its penalty clause to which it is reasonably susceptible in the light of its legislative purpose"].)

It follows that section 998's penalties apply only where the parties do not settle before trial—not where the parties achieve a pre-trial settlement.

D. The Opinion's public policy discussion ignores the Legislature's focus on reducing the burden of *trials* on courts—a goal accomplished regardless of whether settlement is via an accepted 998 offer or a later negotiation.

The Opinion's public policy arguments fail. Penalizing parties who settle doesn't encourage settlement, nor does it achieve any of section 998's other purposes.

1. The Opinion overlooks the Act's purpose: To encourage all settlements that render a trial unnecessary, including negotiated settlements.

The Opinion reasons that the Legislature only sought to encourage settlements from an accepted 998 offer—and not settlements that arise outside of that framework. (Opn. 20.) Tellingly, however, the Opinion doesn't cite to a single piece of legislative history to support that assertion. There is none.

The legislative history makes clear that section 998 aims to "reliev[e] the crowded *trial* calendars of our courts" (MJN-189, italics added)—as is accomplished through *any* pre-trial settlement, not just those that arise under section 998.

That section 998 only penalizes a party for not accepting a *998* offer to compromise makes no difference. Section 998's requirements are meant to ensure that a party is only penalized for rejecting a settlement offer that meets certain standards. (See MJN-217; e.g., *Puerta v. Torress* (2011) 195 Cal.App.4th

1267, 1273 [provision that 998 offers must be in writing and include a signature for acceptance, for instance, "seeks to eliminate uncertainty by removing the possibility that an oral acceptance might be valid"].)

Section 998's rigid requirements about what constitutes a valid offer do not indicate any intent to discourage settlements outside of the section 998 framework—which actually might be the *only* way to achieve any settlement where a party's appetite for settlement turns on at all on *non-monetary terms* that lack a readily identifiable value. (See § I.D.4, *ante*; *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698 [non-monetary "conditions may render it difficult to accurately value the monetary of the offer so the court cannot fairly determine whether the damage award is 'more favorable' or less favorable than the statutory offer"].)

Poster v. Southern Cal. Rapid Transit. Dist. (1990) 52 Cal.3d 266, 270, cited in the Opinion, never suggests that section 998 penalizes parties who reach settlements outside of 998. (See Opn.-20.) *Poster* never even considered that question. (*Poster,* at p. 270; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332 ["'[A] decision does not stand for a proposition not considered by the court'"].) Indeed, in answering the question actually before it, *Poster* warned that negotiations commonly follow a statutory offer, and that treating such negotiations as revoking the 998 offer would "have a negative effect on encouraging settlement." (*Poster, supra,* 52 Cal.3d at p. 271.) Thus, *Poster* actually reinforces what's apparent from the legislative history:

Section 998 encourages *all pre-trial settlements*, whether they arise within the 998 framework or not.

2. The Opinion's concerns about gamesmanship are unfounded.

The Opinion speculates that if section 998 isn't interpreted to apply to all cases that settle before trial, then plaintiffs will reject "reasonable" early 998 offers so that they can rack up fees that they'll recover if they settle later. (See Opn.-21.) Not so. Plaintiffs and their counsel have no incentive to drive up costs and fees after rejecting a prior 998 offer—especially where they believe that the offer will later be found reasonable. After all, plaintiffs cannot unilaterally dictate whether a defendant will even be willing to settle later on.

Moreover, even if a subsequent settlement offer is accepted, the Legislature *already has a mechanism* for ensuring that plaintiffs don't unreasonably rack up fees thereafter. Code of Civil Procedure section 1033.5 only affords a plaintiff who recovers with costs—including "fees, when authorized by … (A) Contract[,] (B) Statute[, or] (C) Law" (§ 1033.5, subd. (a)(10))—when those costs are "'reasonably necessary to the conduct of the litigation'" and "'reasonable in amount.'" (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 743; see also Civ. Code, § 1794, subd. (d) [awarding prevailing buyers "costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been *reasonably incurred*," italics added].) In this case, for instance, the court awarded plaintiffs just $84,142.50 of the $138,292.50 incurred to litigate the case.

There's no need to adopt a radical rule that would penalize parties who settle after rejecting an earlier 998 offer just to stop plaintiffs' attorneys from doing *unreasonable* work for which *they will not be paid*.

3. The Opinion's concerns about discouraging early settlement are unfounded.

The Opinion reasons that penalizing parties who settle after rejecting a prior 998 offer is necessary to encourage parties to "incentivize careful review and acceptance of reasonable offers to compromise" by not allowing them to avoid those penalties by settling later on. (Opn.-21-22.)

First, nothing suggests that section 998 seeks to encourage *early* settlements at the expense of depriving parties of the flexibility needed to investigate their case and settle closer to trial. (See § II.C, *ante*; *Wilson, supra,* 72 Cal.App.4th at pp. 390-391 ["Although settlements achieved earlier rather than later are beneficial to the parties," the "public policy in favor of settlement primarily is intended to reduce the burden on the limited resources of the trial courts"].)

Second, even if that were the case, plaintiffs already have ample reason to carefully review and accept early 998 offers. The early 998 offer sets a benchmark that the party must exceed in any adjudication to avoid section 998's penalties—something that plaintiffs must seriously consider given that there's no guarantee

that another settlement opportunity will arise at all, let alone one that will provide the plaintiff with more favorable terms.

There's no need to penalize parties who reconsider their prior reluctance to settle just to further encourage parties to consider early settlement offers. The Opinion's concerns about gaming the system are overstated, especially since trial courts have the discretion to eliminate any unreasonably incurred fees.

4. The Opinion's concerns about a defendant's willingness to make multiple offers are unfounded.

The Opinion reasons that if section 998's penalties do not apply in future settlements, defendants who have made an early 998 offer will have no incentive to make another offer later on. (Opn.-21-22.) It claims, for instance, that a defendant who's "confident that the plaintiff is unlikely to secure a more favorable judgment through continued litigation, would lose the benefit (and leverage) of cost shifting by settling [and] would have little incentive not to go to trial." (*Ibid.*)

Not so. Defendants have many reasons to continue to make 998 offers:

First, by making an early 998 offer, the defendant gets an advantage in future settlement negotiations because the plaintiff will decide whether or not to accept that subsequent settlement offer knowing that if he opts to go to trial, he may be deprived of all costs and fees accrued. To the extent that the defendant is very likely to secure a more favorable result at trial, that only

provides the defendant with further leverage in the subsequent settlement negotiations—and a settlement could *contractually* require that 998's penalties partially or fully apply. It makes no sense to force parties, in all cases, to negotiate around section 998's penalties.

Second, even if he's confident in his chances at trial, a defendant cannot know with certainty whether a plaintiff will secure a more favorable judgment. New case law may arise. An important witness might become unavailable. A court may not see the law the way the defendant sees it. And if the defendant guesses wrong, the consequences are high for him, too: In addition to a sizable damages award, the defendant will have to pay *both sides'* compensable post-offer costs and/or fees, including those at the trial—where the bulk of costs and fees accrue.

Here, for instance, the settlement guaranteed that Hyundai would not have to incur fees for the hundreds of hours that the estimated three-week trial would have consumed—which would likely far exceed the fees the trial court awarded for work performed up until the settlement. (See 2-AA-777 [hours credited].) Making a subsequent settlement offer ensured that there was *no chance* that Hyundai would have to incur those fees.

Third, however confident the defendant is about his chances at trial, he still cannot know whether a trial court will ultimately find the first 998 offer valid and reasonable. Serving a second 998 offer provides the defendant another opportunity either to settle the case on terms the defendant finds acceptable,

or to ensure that he can benefit from section 998's cost-shifting penalties should the case go to trial.

5. The Opinion never confronts the unintended consequences of its reasoning.

The Opinion acknowledges the Dissent's concerns that a rule that 998's penalties apply to cases that settle might create "unintended consequences"—referring to the Dissent's observations that the Opinion's reading would lead to absurd results that undermine section 998's purposes. (See Opn.-22.) Specifically, the Dissent was concerned that penalizing parties who settle will:

- "[D]iscourage a plaintiff who previously rejected a 998 offer from later making a non-section 998 settlement offer for less than the previously rejected section 998 offer in response to newly discovered evidence or any subsequent change in the law bearing on the defendant's culpability"; and
- Cause uncertainty when courts are forced to confront complex questions about whether a rejected settlement offer is more or less favorable than another one made at a different point in the litigation and that is subject to a host of non-monetary terms.

(See Dis.-17-21.)

The Opinion never explains why the Dissent's warnings about the implications of the Opinion's broad reasoning are wrong; the Opinion states only that these concerns "are far afield

of the question we decide today" and can be addressed in future cases. (Opn.-22.) But the unintended consequences are real, and the fact that the Opinion has no answer to them highlights that section 998 should not operate as the Opinion holds.

The Legislature surely didn't pass section 998 to replace the time that courts spend on trials with piecemeal litigation on *which types of settlements* will trigger 998's penalties or whether a rejected offer is more or less favorable than one that was made at a different point in the litigation and that's subject to non-monetary terms not found in a judgment for a sum certain. (See *Martinez*, *supra*, 56 Cal.4th at p. 1021 [encouraging "bright line" interpretations of 998 that avoid "inject[ing] uncertainty into the section 998 process"].)

CONCLUSION

Section 998 was enacted to encourage parties to settle *at any time before trial*, even after initial settlement talks fall through. The Opinion wrongly penalizes plaintiffs for reaching such a settlement. The Court should reverse.

Date: January 8, 2024

KNIGHT LAW GROUP LLP
Roger Kirnos

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman
Alana H. Rotter
Joseph V. Bui
Katarina Rusinas

By: */s/ Cynthia E. Tobisman*
Cynthia E. Tobisman
Attorneys for Plaintiffs and Respondents
OSCAR J. MADRIGAL and AUDREY MADRIGAL

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(4), I certify that this **OPENING BRIEF ON THE MERITS** contains **13,993 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: January 8, 2024

/s/ Cynthia E. Tobisman
Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business and email addresses are 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, mallen@gmsr.com.

On January 8, 2024, I hereby certify that I electronically served the foregoing **OPENING BRIEF ON THE MERITS** through the Court's electronic filing system, TrueFiling. I certify that all participants in the case who are registered TrueFiling users and appear on its electronic service list will be served pursuant to California Rules of Court, rule 8.70. The filing of this document through e-Filing will also satisfy the requirements for service on the Court of Appeal rule 8.212(c)(2):

****** SEE ATTACHED SERVICE LIST ******

I further certify that participants in this case who are not registered TrueFiling users are served by mailing the foregoing document by First-Class Mail, postage prepaid, to the following:

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER
10820 Justice Center Drive
Post Office Box 619072
Roseville, California 95661-9072
[Case No. SCV0038395]

Executed on January 8, 2024 at Los Angeles, California.

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

/s/ Maureen Allen
Maureen Allen

Oscar J. Madrigal, et al. v. Hyundai Motor America

SERVICE LIST

THETA LAW FIRM, LLP
Soheyl Tahsildoost, Esq.
st@thetafirm.com
Kainoa K. Aliviado, Esq.
ka@thetafirm.com
15901 Hawthorne Boulevard, Suite 270
Lawndale, California 90260

SJL LAW, P.C.
Julian G. Senior, Esq.
julian@sjllegal.com
841 Apollo Street, Suite 300
El Segundo, California 90245-4769

NELSON MULLINS RILEY & SCARBOROUGH LLP
Jennifer T. Persky, Esq.
Jennifer.Persky@nelsonmullins.com
19191 South Vermont Avenue, Suite 900
Torrance, California 90502
Attorneys for Defendant and Appellant
HYUNDAI MOTOR AMERICA

THE ARKIN LAW FIRM
Sharon J. Arkin, Esq.
sarkin@arkinlawfirm.com
1720 Winchuck River Road
Brookings, Oregon 97415
Attorney for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
Roger A. Dreyer, Esq.
rdreyer@dbbwc.com
20 Bicentennial Circle
Sacramento, California 95826
Pub/Depublication Requestor

ATTORNEY AT LAW
Fred J. Hiestand, Esq.
fred@fjh-law.com
3418 Third Ave., Suite 1
Sacramento, California 95817
Counsel for Amicus Curiae
THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA