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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RUTH IMOGENE MAUZEY et al., Plaintiffs and Respondents, v. WILLIAM B. MORSCHAUSER et al., Defendants and Appellants.	D070681, D070683 (Super. Ct. No. 04CC10040)

CONSOLIDATED APPEALS from a judgment and postjudgment order of the Superior Court of Orange County, Ronald Bauer, Judge. Reversed and remanded with directions.

Law Offices of Steven R. Young, William Zulch; Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Defendants and Appellants.

Werner Law Firm and Lee G. Werner for Plaintiffs and Respondents.

Defendant and appellant William B. Morschauser, an attorney, appeals from a judgment and postjudgment order granting a motion to tax costs following a jury trial on

plaintiffs and respondents Ruth Mauzey and Larry Mauzey's[1] complaint for professional negligence in connection with Morschauser's untimely filing of a petition to probate the will of Ruth's son. The jury returned a special verdict in Ruth's favor finding Morschauser was negligent, his negligence was a substantial factor in causing Ruth harm, and Ruth's damages were $183,000. In these consolidated appeals, Morschauser contends: (1) the trial court erred by denying his motion for judgment notwithstanding the verdict (JNOV) because there is insufficient evidence that he owed Ruth a duty of care, and neither the jury instructions nor special verdict enabled the jury to decide whether he acted as Ruth's attorney; (2) Ruth failed to establish causation or damages to a reasonable certainty; and (3) the court erred by ruling Morschauser's Code of Civil Procedure section 998 (hereafter section 998) settlement offer was improper or of no effect and granting Larry's motion to tax costs.

We agree the record in this case lacks substantial evidence of causation and damages proved to a reasonable certainty. We further agree that the trial court had no basis to reject Morschauser's settlement offer as invalid. Accordingly, we reverse the judgment and remand with directions set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

For our review of the jury's verdict generally, as well as the trial court's order denying Morschauser's motion for JNOV (but not for purposes of assessing his claim of instructional error, as we explain below), we state the facts in the light most favorable to

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1 We refer to the Mauzeys at times by their first names to avoid confusion, not out of disrespect.

Ruth, resolving all conflicts and indulging all reasonable inferences to support the judgment. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68; *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1459, fn. 1; *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1143-1144.)

Don Mauzey died in June 2002. His relatives initially did not find a will, and in July 2002, Morschauser, representing Don's daughter Kelly Mauzey, filed an intestate probate petition on her behalf. That petition was granted in February 2003 over a challenge by Kelly's brother James Mauzey to Kelly's appointment as the administrator. Thereafter, letters of administration issued to Kelly.

Don's will was eventually found in August 2003. It left the bulk of his approximately $2 million estate to his parents, with bequests of $100 each to Kelly and James, and various bequests to other relatives. Don's father had predeceased him. On August 7, 2003, Morschauser called Don's mother Ruth in Oklahoma to notify her about the will's discovery and asked her to meet with him in his office in California. Within a day or two, Don's brother Larry met with Morschauser at his office where they went through the will and its beneficiaries, and Morschauser told Larry that Morschauser would get him appointed the estate's executor, they would have to obtain a tax identification number and open an estate bank account, and Kelly would have to account for the estate and return everything she had taken or face a lawsuit. When Larry asked Morschauser if he needed to get a lawyer or if it was something Morschauser could do, Morschauser responded that it was something he could do. Larry told Morschauser that

as a family friend who was involved in the matter, he trusted him and he could do it and, as Larry put it, Morschauser "accepted that he would be our lawyer." Morschauser never told Larry he could not represent them because he had to get permission from Kelly. Larry understood Morschauser was to start right away to get the will into the court system and begin going through all the assets.

At some point that month, Larry hired attorney Steven Kray as a "backup" to Morschauser, who was to be in charge of all the probate matters, including probating and filing the will. Kray's role was to "help make sure things were getting done correctly," and Larry felt that between the two attorneys, everything would be done right. As he put it, he hired Morschauser to file the probate petition and Kray to "make sure things got done." Though Larry did not sign a written legal services agreement with Morschauser, according to Larry, Morschauser "said he would represent us, and I took him for his word because I trusted him." Larry understood Morschauser would be paid from the probate estate; Morschauser never sent him a fee bill, invoice or a letter asking to be paid, and neither Larry nor Ruth ever paid him any attorney fees.

In early September 2003, Ruth and Larry met with Morschauser for about an hour. Morschauser showed Ruth the will and explained it to her, telling her she would be appointed the executor. Ruth, however, wanted Larry to act as the executor and signed documentation prepared by Morschauser waiving her right to the appointment. According to Ruth, Larry asked Morschauser at that meeting if there was a deadline for filing the will; Morschauser responded they should not worry about it and he would take care of everything. Ruth understood this to mean that Morschauser "would be my

lawyer." Morschauser also told Ruth that if she needed anything to just give him a call. Morschauser never told them he could not help them due to a conflict of interest.

During that time, Morschauser told Larry that he and Ruth should consider settling with Kelly and James rather than filing the will. On October 6, 2003, Morschauser on Ruth's behalf sent a settlement offer to James's counsel offering James $30,000 in exchange for a release of all claims against Don's estate.

Morschauser lodged Don's will on December 3, 2003, and filed Larry's petition to probate the will the next day. However, following a probate court hearing in February 2004, Morschauser advised Larry that the court had disqualified him from representing Don's estate, Ruth or Kelly, and that Larry and Ruth should retain new counsel. He also told Larry that James had filed a will contest. Morschauser substituted out as Larry's attorney. Thereafter, Larry and Ruth hired new lawyers, respectively Carl Agren and Lee Werner.[2] Ruth initially agreed to pay Werner an hourly rate but in May 2005 she had incurred over $56,000 in fees and because expenses were mounting, Ruth signed a contingent fee agreement in which Ruth would pay Werner 30 percent of the amount of any recovery by way of settlement, arbitration award, judgment or otherwise, less the legal fees she had actually paid.

In the meantime, the probate court in June 2005 denied Larry's petition to probate the will because it was not filed within 60 days after he became aware of its existence.

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[2] Larry testified he paid attorney Agren $65,000, but the jury found that Morschauser's negligence did not cause him harm and awarded Larry zero damages. Larry does not challenge that award on appeal.

Ruth, represented by Werner, appealed the order denying the petition. Eventually, Morschauser located Don's brother Ronald Mauzey, who was a beneficiary of Don's will but incarcerated, and arranged at Morschauser's own expense to have a probate petition filed in October 2005 on Ron's behalf, which the probate court later ruled was timely.[3] In 2007, addressing Ruth's and James's consolidated appeals, the Court of Appeal affirmed the probate court's orders denying Larry's probate petition and granting Ron's probate petition. Ruth received distribution of the approximately $2 million that she was entitled to collect from Don's estate.

Larry and Ruth sued Morschauser and Kray for professional negligence, breach of contract and breach of fiduciary duty. In part, they alleged that Kray had been engaged to make sure a petition to probate the will was properly and timely filed. The action was stayed pending the outcome of the probate matter. Larry and Ruth entered into a settlement with Kray that was determined to be in good faith and dismissed the case against him before trial. The legal malpractice case thereafter proceeded to trial against Morschauser, and at the close of evidence, Larry and Ruth withdrew their claims for breach of contract and breach of fiduciary duty, having the jury decide only their professional negligence claim against him.

At trial, Werner testified that he represented Ruth from March 2004 to sometime in 2012 in connection with James's challenges to Larry's probate petition including Ruth's

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3 We take judicial notice of the prior nonpublished appellate opinion in this case, *Estate of Mauzey* (Nov. 21, 2007, E038344, E041215) for background purposes. (Evid. Code, §§ 451, subd. (a), 452, subd. (a).) That opinion, which was trial exhibit No. 67, is in the appellate record.

appeal of the order denying the petition, James's will contest, and general probate administrative matters. Werner prepared an accounting of his percentage of the total assets at the closing of the estate, explaining that out of total current assets of $2,039,629.71, 30 percent was approximately $611,000 "less the credit for the hourly fees that Ruth incurred from April 2004 through May 2005, *they weren't necessarily paid in that time period, they may have been paid later*. And then that number, that credit was reduced by the fees incurred on the surety bond matter coming up with the net credit and then ultimately the net attorney's fees," which amounted to $559,310.84. (Italics added.) Werner explained that Ruth sought to recover as damages only the time he spent on the probate petition matters "which include[s] the time probably from the beginning 2004 until the Supreme Court of California denied James Mauzey's petition for review in 2009," but not time spent for James's will contest or the general probate administration matters. He admitted it was a difficult task to characterize and allocate his fees, and stated the time calculation was not perfect, but he figured that 41 percent of his total hours (339.68 hours out of 826.78) were spent on the probate petition matters, and 41 percent of the contingent fee amounted to $250,874.45, plus costs of $2,664.88, for a total of $253,539.33 in damages.[4]

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4 Werner testified that he had spent a total of 826.78 hours on all of the matters and explained the mathematical computation: "My secretary took the amount of hours, 826.78, and determined that of the total hours, the probate hours being 339.68, constitute 41 percent of the total hours. Then the next computation she made was she took the amount of the total fee, which was $611,000 plus, times 41 percent and came up with the figure of $250,874.45." Werner added $2,664.88 in costs for a grand total of $253,539.33.

On cross-examination, Werner testified that Ruth actually received less than what she would have received from Don's estate because of the attorney fees she had to pay; he explained their fee agreement went from an hourly fee agreement to the contingent fee agreement in May 2005, and that some of the hourly fees incurred between 2004 and May 2005 stemmed from James's will contest. He agreed that James challenged both Larry's and Ron's probate petitions: his attorney "challenged everything," but stated if Larry's probate petition had been timely filed, James would have initially lost with no need to proceed with Ron's petition. According to Werner, James's initial success in defeating Larry's untimely petition gave James's counsel momentum: "[T]here is a momentum in a case when you are in it that long, and [James's attorney] thought that he really had something here because Larry's petition is time barred. And, frankly, you see if Larry's petition was done properly, there is no need to go to the prison to get Ron Mauzey." Yet, Werner agreed that James was motivated to challenge whatever was filed given that without a will, James would be entitled to $1 million, but under the will he was entitled to only $100, and Werner could not with any degree of certainty say that James would not have challenged the probate petition regardless of its timeliness, or that James would not have appealed even an entirely valid order. He admitted that even if Larry's petition had been granted, James could have taken an appeal of that order. He agreed that Ruth and Larry did not pay any costs for Ron's petition. Werner testified he was sure that had Larry's petition been timely filed, Ruth would have simply stuck with his hourly fee.

Following presentation of evidence, Morschauser unsuccessfully moved for a nonsuit on grounds there was no evidence he represented Ruth; plaintiffs had not proved

damages; and as a matter of law he owed no duty of care to Ruth. Thereafter, the court rejected Morschauser's request that it instruct the jury with CACI No. 405, regarding the plaintiffs' comparative fault. Morschauser also submitted a special verdict form asking the jury to decide whether he had an attorney-client relationship with either Ruth or Larry before October 7, 2003, and asking the jury to allocate among a number of persons, including Ruth and Larry, the percentage of responsibility for causing plaintiffs' harm. The court rejected Morschauser's proposed verdict form.

The jury returned a special verdict finding Morschauser was negligent and that his negligence caused Ruth $183,000 in damages, but caused Larry no damages. Accounting for the prior settlement with Kray, the court entered judgment in Ruth's favor in the sum of $133,000 and against Larry in Morschauser's favor.

Morschauser unsuccessfully moved for a new trial and also for JNOV on several grounds, including that Ruth's legal fees were not caused by his alleged negligence, and the jury did not make special verdict findings necessary to impose malpractice liability, such as findings that Morschauser had an attorney-client relationship with Ruth or that Ruth would have obtained a better result if he had acted as a reasonably careful attorney. Morschauser also filed a cost memorandum seeking to recover, among other costs, $25,221 in expert witness fees under section 998. Larry moved to tax those costs, arguing that Morschauser did not serve a proper section 998 offer to compromise on either plaintiff. The court ultimately granted Larry's motion taxing the expert fees (as well as $53.40 for expert parking).

Morschauser appeals from both the judgment and the postjudgment order granting Larry's motion to tax costs.

DISCUSSION

I. *Sufficiency of Evidence of Causation and Damages*

We begin with Morschauser's claims as to causation and Ruth's damages. Because we conclude his sufficiency of evidence challenge as to these elements has merit, we need not reach his challenge to denial of JNOV on the issue of duty.

Morschauser contends Ruth did not establish the fact or amount of her damages to a reasonable certainty, and further that there is insufficient evidence of causation. His challenge raises three underlying points: that Ruth did not establish his negligence caused the contingent fee she paid, that her damages were artificially inflated, and that the trial court erred by failing to instruct the jury as to the plaintiffs' comparative fault or use his proposed special verdict form addressing that issue. Addressing the first and third points, we agree Ruth did not establish causation or damages to a legal certainty, and the omission of a comparative fault instruction was independently prejudicial, requiring reversal and entry of judgment in Morschauser's favor.

A. *Standard of Review*

In reviewing the trial court's denial of Morschauser's motion for JNOV, we determine whether "any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion." (*Sweatman v. Department of Veterans Affairs*, *supra*, 25 Cal.4th at p. 68.) We "review the record de novo and make an independent determination whether there is any substantial evidence to support the jury's findings. [Citations.] . . .

[Citation.] The court must accept as true the evidence supporting the verdict, disregard conflicting evidence, and indulge every legitimate inference to support the verdict. [Citation.] If sufficient evidence supports the verdict, a reviewing court must uphold the court's denial of the JNOV motion." (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782.) This review standard, however, " 'does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment.' [Citation.] Substantial evidence is not synonymous with ' " 'any' evidence." ' [Citation.] To be substantial, the evidence must be credible and of solid value. [Citation.] 'While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding . . . .' " (*Casella v. SouthWest Dealer Services, Inc., supra,* 157 Cal.App.4th at p. 1144.)

"Where the evidence is not in dispute, or permits of only one conclusion, 'the determination of proximate cause [and damages] becomes a question of law.' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 172 [ordering entry of judgment for defendant where "the only conclusion to be drawn from [the] evidence is that the [plaintiffs] cannot establish either causation or damages"].)

B. *Legal Principles Pertaining to Legal Malpractice Causation and Damages*

To establish a cause of action for legal malpractice arising in a civil proceeding, Ruth was required to prove not only duty and breach, but also a proximate causal connection between the breach and the resulting injury, and actual loss or damage resulting from Morschauser's negligence. (*Coscia v. McKenna & Cuneo* (2001) 25

Cal.4th 1194, 1199; *Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1581; *Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at pp. 165, 169.) Causation and damages " 'are particularly closely linked,' " (*Namikas*, at p. 1582), and failure to prove either is fatal to recovery. (See *id*. at p. 1581.) Thus, " '[i]f the . . . negligent conduct does not cause damage, it generates no cause of action in tort. [Citation.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence.' " (*Filbin*, at p. 165.) " '[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable.' " (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048.)

Ruth was required to prove causation "according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice[.]" (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1235, 1241; *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1089.) She was required to show that "*but for* the alleged negligence of the defendant attorney, [she] would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner*, at p. 1241.) " 'It is not enough for [the plaintiff] to simply claim . . . that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages.' [Citation.] ' "Damage to be subject to a proper award must be such as follows the fact complained of as a *legal certainty*." [Citation.]' [Citation.] In other words, the plaintiff

must show that '[he] would *certainly* have received more money [or had to pay less] in settlement or at trial.' [Citations.] [¶] 'The requirement that a plaintiff need prove damages to "a legal certainty" is difficult to meet in any case. . . .' " (*Namikas v. Miller*, *supra*, 225 Cal.App.4th at p. 1582; see also *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1461-1462.)

Proving a more favorable outcome is usually done by the trial-within-a-trial method. (See *Viner v. Sweet*, *supra*, 30 Cal.4th at p. 1240, fn. 4; *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531.) "In conducting the 'trial-within-a-trial' of a legal malpractice case, 'the goal is to decide what the result of the underlying proceeding or matter *should have been*, an objective standard.' " (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 585-586, quoting 4 Mallen & Smith, Legal Malpractice (2006 ed.) § 33.1, pp. 926-927, fns. omitted; *Ambriz*, at p. 1531.) In *Viner*, the California Supreme Court stated: "In both litigation and transactional malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (*Viner*, at p. 1242.) The standard is an objective one. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, *supra*, 30 Cal.4th at pp. 1048-1049.) The trial-within-a-trial method " 'is the most effective safeguard yet devised against speculative and conjectural claims . . . . It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance.' " (*Jalali v. Root* (2003) 109 Cal.App.4th 1768, 1773-1774; see also *Viner*, at p. 1241.)

C. *There is Insufficient Evidence of a Causal Nexus Between Morschauser's Negligence and Ruth's Damages*

Morschauser contends Ruth did not prove his negligence was a but-for cause of the contingent fee that she paid to attorney Werner; that she did not establish his actions caused her harm as a legal certainty. In essence, Morschauser argues Ruth's entry into the contingent fee agreement with Werner was attributable to other factors: he points to Larry's testimony that Ruth changed to a contingent fee arrangement because her expenses were mounting and Ruth could not handle them, and Werner's testimony that he attributed 339.68 attorney hours on the probate petition matters and 487.8 hours on unrelated matters so as to allocate the percent of his contingent fee to actions necessary because of Morschauser's negligence. According to Morschauser, the testimony shows Ruth needed the new arrangement not just for Werner's time on the probate petition matters, but also for the will contest and general probate administration that were unrelated to Morschauser's actions. Morschauser points out Ruth had incurred approximately $56,000 in hourly fees as of May 2005, and argues that if she could not afford that amount, she could not have afforded to pay Werner for the other activities. Hence, Morschauser claims his conduct was not the but-for cause of her entry into the contingent fee arrangement and, by extension, the $183,000 in fees Ruth ultimately paid to Werner.

Preliminarily, though "[t]he loss or diminution of a right or remedy constitutes injury or damage" (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 744), Ruth makes no claim that she suffered the loss or diminution of her

right or remedy as to her beneficiary status, presumably because Ruth recovered her share of Don's estate via the petition filed by Ron. Ruth's sole damages claim is not that she lost her status as a beneficiary, but that she was required to pay more in attorney fees to protect her interests than she would have as a result of Morschauser's negligence, entitling her to fees under the so-called "tort of another" doctrine. Fees reasonably incurred and paid to a second attorney to correct errors committed by a prior attorney, or bring or defend an action against a third person, can constitute legal malpractice damages. (*Jordache Enterprises, Inc.*, at pp. 750-751; *Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 582; *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, 1470.) But the ensuing attorney fees must be a "direct result" (*Jordache Enterprises, Inc.*, at p. 751; *Sindell*, at p. 1470) of the attorney's negligence; that is, the evidence must show, for example, that correct action by the attorney would have "all but preclude[d] costly litigation . . . ." (*Sindell*, at p. 1470 [attorney's failure to obtain a waiver from client's wife resulted in estate beneficiaries having to defend an action by wife's children from a prior marriage, which would not have occurred but for the attorney's negligence].)

We agree the record presents multiple layers of uncertainty in the evidence as to causation and damages. As to causation, Ruth's evidence does not establish that the $183,000 in legal fees she eventually paid to Werner followed as a legal certainty from Morschauser's failure to timely file the petition to probate Don's will. We acknowledge that Werner broadly testified that Ruth paid more in attorney fees due to Morschauser's negligence than she would have if he timely filed the petition, and that Werner was "sure"

she would have simply kept an hourly fee arrangement with him in the absence of the negligence. It is true that the testimony of a single witness may be sufficient to constitute substantial evidence. (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191.) But when the witness bases his or her conclusion on factors that are speculative, remote or conjectural, or on assumptions not supported by the record, the conclusion " 'cannot rise to the dignity of substantial evidence' and a judgment based solely on that opinion 'must be reversed for lack of substantial evidence.' " (*Id*. at pp. 1191-1192.) And further, the possibility, or even the probability, that certain events would have happened will not support a claim for damages or furnish the foundation of an action for such damages. (*Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at p. 166; *Barnard v. Langer*, *supra*, 109 Cal.App.4th at p. 1461; *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518.)

Here, Werner's conclusion is grounded in speculation and conjecture. By all accounts, matters between James on the one hand, and Larry and Ruth on the other, were highly contentious. Werner agreed that James "challenged everything" and he conceded that whether or not the petition was timely filed, James would have filed a challenge to Don's will. This was particularly so given the fact, recognized by the trial court, James would receive only $100 under the will versus approximately $1 million without it. Indeed, Werner could not say to a legal certainty that James would not have fought the petition or filed appeals from any order adverse to him regardless of the petition's timeliness or validity. Concededly, a plaintiff "need not prove causation with absolute certainty" (*Viner v. Sweet*, *supra*, 30 Cal.4th at p. 1243), but Ruth was required to " ' "introduce evidence which affords a reasonable basis for the conclusion that it is more

likely than not that the conduct of [Morschauser] was a cause in fact of the result." ' " (*Ibid.*)

That standard is not met here. The evidence does not support a conclusion that Ruth's entry into the contingency fee agreement, a decision made in mid-2005 in view of the fact Werner's hourly fees had rapidly increased to over $56,000, was more likely than not a decision made as a result of Morschauser's negligence as opposed to disputes and substantial hourly fees that would have arisen regardless of Morschauser's conduct, including on James's will contest and other probate matters. Morschauser points out that Werner attributed over 480 hours of his time to matters not related to the untimely petition and, that as a result, Ruth's fees under an hourly arrangement just on those matters would have mounted to over $136,000 ($280 per hour multiplied by 487.1 hours). The evidence was that Ruth felt compelled to enter into the contingent fee agreement because the hourly fees had reached over $56,000, but they would have reached a much higher amount due to circumstances having nothing to do with Morschauser. The evidence permits only one conclusion: that Ruth would have reached the same breaking point and would have had to change to a contingent fee arrangement irrespective of Morschauser's negligence.

And as to damages, Werner's testimony that Ruth would have paid only his hourly fee had Morschauser timely filed the petition does not support the jury's $183,000 damage award. At the rate of $280 per hour, 339.69 hours of Werner's time amounted to approximately $95,000, which has no relation to the over $250,000 representing 41 percent of Werner's contingency fee. Ruth asks us to rely on the principle that where the

fact of damage is certain, the amount need not be calculated with absolute certainty. (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774.) But as we have summarized above, Ruth's entry into a contingent fee agreement did not follow as a legal certainty from Morschauser's negligence. And the measure of damage is not based on a reasonable, nonspeculative calculation. The law requires that "some reasonable basis of computation of damages be used . . . ." (*Ibid*.) Here, the jury's award of $183,000 in damages is based on the uncertain and speculative premise that Ruth would not have entered into the contingency fee agreement except for Morschauser's negligence, and thus the award was not proven with the requisite reasonable certainty. The underlying assumptions in Werner's testimony were inherently uncertain and speculative, given the fact that the only conclusion to be drawn was that James would have challenged any order made on Don's petition, and all of the other variables that entered into Ruth's decision to reach a contingent fee arrangement.

Ruth herself did not present evidence—direct or circumstantial—that she actually paid Werner hourly legal fees on the probate petition matters until the eventual closing of Don's estate, which was then governed by her and Werner's contingent fee agreement. Indeed, Werner testified that the fees incurred by Ruth at his hourly rate until May 2005 "weren't necessarily paid in that time period" but may have been "paid later."[5] It is only

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5 Nor did Larry testify that Ruth actually paid out-of-pocket attorney fees at Werner's hourly rate. He gave the following testimony on cross-examination: "Q[:] Have you paid the total hourly fees that Mr. Werner charged you? [¶] [Larry:] We reached a point when we changed from contingency over, we were given credit for those hourly fees towards the contingency . . . . [¶] Q[:] Do you remember how much you

speculation to conclude Ruth suffered damage in the form of hourly attorney fees she paid directly to Werner to remedy the untimely petition, and speculation is not evidence. (*Wise v. DLA Piper LLP (US), supra*, 220 Cal.App.4th at p. 1188.)

Though Morschauser appears to argue the jury's damage award was excessive, an argument made in connection with his new trial motion, we do not reach the argument in view of our conclusion that Ruth did not prove causation or damages to a legal certainty. Ruth had her day in court and marshalled the best case she could, with all her evidence in the record, but the only conclusion from that evidence is that she cannot establish either causation or damages to the requisite certainty. (Accord, *Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at p. 172.) " 'Under these circumstances, it is proper for us to direct that judgment be entered in favor of [Morschauser] to avoid any additional expense.' " (*Ibid*.)

D. *Refusal to Instruct the Jury on Comparative Fault to Reduce Ruth's Damages*

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have actually paid out-of-pocket for the hourly fees before it converted to a contingency? [¶] [Larry:] I don't have that number for you right now, I'm sure it will be shared later, but I don't have it in front of me now." Though Larry testified there were fees before the contingency that were billed and paid, he could not recollect the amounts paid on the hourly fees or even state a range, other than it was more than $10,000: "Q[:] What I hear you saying, it is more than $10,000 that you paid, actually wrote a check for? [¶] [Larry:] Well, there would be invoices that accumulated well over $20,000, I just don't have the exact amount you are talking to me about on the hourly fee. [¶] Q[:] I am not asking you about how much was invoiced, I'm asking about how much you wrote a check for to pay for attorney's fees that were billed to you on an hourly basis? And if I understand you correctly, it is more than 10 or you don't remember? [¶] [Larry:] I don't have the number in front of me, no, sir." When asked if Ruth would know how much was paid, Larry said: "No, I would look at the invoices and I would ask my mom to send me out a check for it, then I would take the check with the invoices and mail them in." Though Larry testified that the fees were reflected on Werner's invoices, he conceded that the hours and charges on the invoices were "blacked out."

We further conclude that the trial court's failure to instruct the jury on the doctrine of comparative fault prejudiced Morschauser, particularly in view of the state of the evidence discussed above.

At trial, Morschauser proposed the trial court instruct the jury with CACI No. 405, which would have explained his claim of Ruth and Larry's comparative negligence.[6] When asked to identify the evidence of Ruth and Larry's fault, Morschauser's counsel pointed out they were concurrently represented by attorney Kray, and that Kray's negligent advice should be attributed to them. The court suggested that Morschauser sought to ascribe another defendant's negligence to the plaintiffs, but not his own, to which Morschauser's counsel stated: "He was their lawyer, Your Honor. Undisputed testimony. And there was testimony about the advice he gave that was improper." The court responded: "I will not give that instruction."

Morschauser asserts this omission was error. He points out that the court mentioned his defense of comparative fault to the jury without further explanation, yet he was entitled to the instruction as Ruth and Larry both were negligent in failing to follow

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6 As proposed by Morschauser, CACI No. 405 provided: "William Morschauser claims that Ruth Mauzey or Larry Mauzey's own negligence contributed to their harm. To succeed on this claim, William Morschauser must prove both of the following: [¶] 1[.] That either Ruth Mauzey or Larry Mauzey was negligent; and [¶] 2[.] That Ruth Mauzey or Larry Mauzey's negligence was a substantial factor in causing their harm. [¶] If William Morschauser proves the above, Ruth Mauzey and Larry Mauzey's damages are reduced by your determination of the percentage of Ruth Mauzey and Larry Mauzey's responsibility. I will calculate the actual reduction." Morschauser's proposed special verdict form asked the jury to "state the percentage responsibility for causing Plaintiffs' harm" and listed Steven Kray, attorney Werner, Ruth, Larry and Morschauser, in addition to other persons involved in the matter.

his advice to hire another attorney to file the probate petition when Morschauser told them he had a conflict; he maintains that had they instructed attorney Kray or another attorney to file the petition, it would have been timely filed by October 7, 2003, avoiding Ruth's claimed damages.

In response, Ruth only argues that comparative fault principles "*as set forth in Civil Code [section] 1431.2 . . .* do not apply to attorney malpractice cases where only economic damages are sought by the plaintiff." (Some italics added.) She asserts Morschauser's comparative fault instruction was inapplicable because she did not seek noneconomic damages. But Civil Code section 1431.2—otherwise known as Proposition 51—modifies the system of joint and several liability of *defendants* for damages. (See *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 323; *Bostick v. Flex Equipment Company, Inc.* (2007) 147 Cal.App.4th 80, 89.) As Morschauser points out, it has no application to the doctrine of comparative fault as it pertains to a *plaintiff's* fault or negligence.

1. *Standard of Review*

To assess Morschauser's claim of instructional error, we view the evidence in the light most favorable to him, as he offered the refused instruction and was entitled to have the jury instructed on all theories presented that are supported by the evidence and pleadings. (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572 (*Soule*); *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 475.) "Parties have the 'right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence, whether or not that

evidence was considered persuasive by the trial court.' " (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607.) But instructional error in a civil case is not grounds for reversal unless it is probable the error prejudicially affected the verdict. (*Soule*, at p. 580; *Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953, 983.) A miscarriage of justice occurs if it is reasonably probable that the appealing party would have obtained a more favorable result had the instructional error not occurred. (*Alamo*, at p. 476; accord, *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1371 ["Instructional error in a civil case is not ground[s] for reversal unless it is probable the error prejudicially affected the verdict"].) In determining whether instructional error was prejudicial, a reviewing court "should consider not only the nature of the error, 'including its natural and probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Rutherford*, at p. 983.) "We independently review a claim of instructional error, as the underlying question is one of law, involving the determination of applicable legal principles." (*Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1319.)

2. *Comparative Fault Doctrine*

The comparative fault doctrine applies to legal malpractice claims. (Cf. *Theobald v. Byers* (1961) 193 Cal.App.2d 147, 150; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 530.) That doctrine provides "a partial defense to a tort claim that the plaintiff's own 'fault' was a contributing cause of the injury for which the plaintiff seeks damages."

(*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 418.) It "is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine 'is a flexible, common sense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss." ' " (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233, quoting *Knight v. Jewett* (1992) 3 Cal.4th 296, 314.) Thus, where a plaintiff's conduct combines with a defendant's conduct to produce an injury, the plaintiff may be properly charged with comparative negligence. (Cf. *Curties v. Hill Top Developers, Inc.* (1993) 14 Cal.App.4th 1651, 1655-1656.)

3. *A Comparative Fault Instruction Was Warranted by the Evidence*

Here, the court instructed the jury that comparative negligence was one of Morschauser's defenses, without further explaining the doctrine or its application in any way.[7] Thus, though the jury was told of the defense, it had no legal standard by which to consider and apply it.

And the state of the record and evidence, viewed in Morschauser's favor, supported Morschauser's request for a comparative fault instruction. At trial,

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[7] The court instructed the jury: "The following claims remain for you to resolve in your deliberations. We have, of course, Larry Mauzey's claim for professional negligence, to which William Morschauser alleges comparative negligence and failure to mitigate as affirmative defenses. And we have Ruth Mauzey's claim which is, again, one for professional negligence to which the defendant alleges comparative negligence of the plaintiff, and failure to mitigate or minimize the damages asserted."

Morschauser testified that in his first conversation with Larry after the discovery of Don's will, he explained the terms of the will and told Larry that he and Ruth would have to do something and find themselves an attorney. As Morschauser characterized it, he only represented Don's estate and was ensuring no one damaged its assets, and when he spoke with Larry he merely talked about the condition of the estate's affairs and complied with his "responsibility to tell the proposed will executor that he needs to come in and get the files and get moving on it." Morschauser denied that Larry brought up the question of legal representation for him and Ruth; to the contrary, Morschauser testified that he told Larry that he could not represent Larry or Ruth as individuals until he got a signed waiver from Kelly, and they needed to find their own attorney. Morschauser also testified that in late August 2003, he called Larry and told him Kelly would not authorize Morschauser to file a probate petition. He denied that Larry ever told him in telephone conversations to file the will. On September 8, 2003, Kray instructed Morschauser to do no further research or work on the matter until Kray instructed him otherwise or an emergency arose, in which case Kray wanted Morschauser to contact him. Larry admitted that Kray was also responsible to ensure the filing of Don's will was done correctly, and Morschauser testified that it was Larry and Kray who "blew it." Thus, the evidence, viewed in Morschauser's favor, shows that Kray's inaction contributed to the untimely filing of Don's will.

Under these circumstances, negligence by attorney Kray could properly be imputed to Ruth to reduce her recovery via the comparative fault doctrine. (See *Holland v. Thacher* (1988) 199 Cal.App.3d 924, 929-930 ["principles of agency permit the

successor attorney's negligence to be imputed to the client-plaintiff to reduce his or her recovery through application of comparative fault principles"]; *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker* (2000) 82 Cal.App.4th 768, 773; *California State Auto. Assn. Inter-Ins. Bureau v. Bales* (1990) 221 Cal.App.3d 227, 231.) *Holland* permits imputation of a successor attorney's negligence to establish a contributory negligence defense; that is, a former attorney sued for malpractice may reduce damages by the amount the successor attorney contributes to or exacerbates the initial harm. In sum, the absence of CACI No. 405 essentially deprived Morschauser of a viable defense that could have reduced his damages liability. (See *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on relevant prejudice standard in *Soule, supra*, 8 Cal.4th at p. 580; see also *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285; *Andrews v. Barker Bros. Corp.* (1968) 267 Cal.App.2d 530, 536-537.)

4. *The Error Was Prejudicial on This Record*

Here, it is probable the instructional error prejudicially affected the verdict. The "natural and probable effect" of the error on Morschauser's "ability to place his full case before the jury" was substantial—he was effectively deprived of the opportunity to present a contributory negligence defense to the jury. (*Soule, supra*, 8 Cal.4th at p. 580.) He was not able to ask the jury to factor attorney Kray's instruction in September 2003 to Morschauser to cease all activity on Don's estate or Kray's own failure to ensure the timely filing of Don's will, and the jury was given an inaccurate yardstick for measuring the scope of Morschauser's duty to Ruth and Larry. The evidence certainly supported a finding that Kray, who was acting on Larry's behalf on Don's estate matters, was in part

responsible for the handling of Don's estate. Nevertheless, the jury was not told to weigh Kray's actions or inactions when assessing Ruth's share of the fault. Given the deficiencies in the evidence as to Ruth's damages, we must conclude it is reasonably probable the jury would have reached a different damages conclusion had it been properly instructed on the application of Morschauser's comparative fault defense.

II. *Order Granting Larry's Motion to Tax Expert Witness Fees as Costs*

In moving to tax Morschauser's $25,221 in claimed expert witness fees, Larry argued the offer was invalid because it was not authorized by Morschauser's representative, and defective as "not made pursuant to the terms of the statute." Larry submitted the declaration of Morschauser's prior counsel, Stephen Monson, who averred that he did not sign or authorize Morschauser's section 998 offers to compromise, which were in the form of letters to Ruth and Larry's counsel on attorney Monson's letterhead. In opposition to Larry's motion, Morschauser objected to Monson's declaration on grounds it violated the attorney-client privilege and Monson's duty of confidentiality. Morschauser also asserted that Monson had authorized Morschauser's secretary to sign and serve the offers. During arguments on the matter, the trial court suggested that the offers were not "quantifiable in the sense that [they] can be enforced." Ultimately, it ruled Morschauser's section 998 settlement offers were unauthorized and improper and thus of no effect. It granted the motion to tax the $25,221 in expert witness fees.[8]

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8 The trial court's minute order states that "[e]videntiary objections are sustained." It is not clear whether the court referred to Morschauser's objections, but it appears based

Morschauser contends the trial court erred by its ruling. He maintains the attorney-client privilege precluded Monson from disclosing their conversations and his advice, and Monson had an affirmative duty to claim the privilege. Morschauser argues his own disclosures of their conversations did not waive the privilege because he was compelled to do so to rebut Larry's motion. Morschauser further contends Monson's declaration was irrelevant in any event: that section 998 imposes no requirement that a party's attorney sign or authorize the offer and, thus the offer was valid in the absence of Monson's signature and authorization. Finally, Morschauser argues the offer was in proper form because its nonmonetary terms—that Larry dismiss his action with prejudice and all motions be withdrawn—are specific and readily enforceable without interpretation, as well as an automatic consequence of dismissal. He asks this court to reverse the order and direct the trial court to award his expert witness fees.

Plaintiffs respond that the court had discretion to deny Morschauser his expert witness fees; that Morschauser is not entitled to an award of such fees as a matter of right. They also argue his section 998 offer was "improper" because it was not signed, authorized, or "served by Morschauser's proper representative . . . ." Finally, they argue Morschauser's over $25,000 in claimed expert costs were exorbitant and unreasonable in view of his claims at trial.

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on the court's remarks at the hearing that it accepted Monson's declaration to the extent he averred he did not sign or authorize the section 998 letters.

A. *Legal Principles and Standard of Review*

Section 998 provides in part: "Not less than 10 days prior to commencement of trial . . . , any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (§ 998, subd. (b).) A section 998 offer is deemed withdrawn if it is not accepted before trial or within 30 days after it is made. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 726-727, citing § 998, subd. (b)(2).)

If a defendant makes a section 998 offer and the plaintiff does not accept it and fails to obtain a more favorable judgment, the plaintiff shall pay the defendant's costs from the time of the offer. (§ 998, subd. (c)(1).) In addition, the court in its discretion may require the plaintiff to pay the postoffer fees of the defendant's expert witnesses that were actually incurred and reasonably necessary in preparing for or during trial. (*Ibid.*)[9]

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9 As of January 1, 2016, subdivision (c)(1) of section 998 was amended to provide that the court's discretion to award costs of the services of expert witnesses extends only to "postoffer [expert] costs," that is, expert fees incurred *after* the section 998 offer was made. (Stats. 2015, ch. 345, § 2, eff. Jan. 1, 2016; see *Toste v. CalPortland Construction*

By the statute's terms, a valid section 998 offer must (1) be in writing, (2) include a statement of the proposed judgment or award's terms and conditions, and (3) contain a provision that allows the offeree to accept the offer by signing a statement so stating. (§ 998, subd. (b); *Rouland v. Pacific Specialty Ins. Co.* (2013) 220 Cal.App.4th 280, 285; see *Berg v. Darden*, *supra*, 120 Cal.App.4th at p. 733.) Also, a valid offer may "include nonmonetary terms and conditions, but it must be unconditional. [Citation.] '[F]rom the perspective of the offeree, the offer must be sufficiently specific to permit the recipient meaningfully to evaluate it and make a reasoned decision whether to accept it, or reject it and bear the risk he may have to shoulder his opponent's litigation costs and expenses. [Citation.] Thus, the offeree must be able to clearly evaluate the worth of the extended offer.' " (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050.) "[N]o ' "magic language" ' or specific format is required for either an offer or acceptance under section 998." (*Rouland*, at p. 288, quoting *Berg*, at pp. 731-732.) Nor is there any requirement that the offer be accompanied by a formal proof of service. (*Berg*, at pp. 732-734.)

We assess the validity of a section 998 offer de novo, as a matter of statutory interpretation. (*Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at p. 331; *Rouland v. Pacific Specialty Ins. Co.*, *supra*, 220 Cal.App.4th at p. 285; see *Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1271.) Applying fundamental rules of statutory construction, we must attempt to ascertain the intent of the Legislature so as to effectuate the purpose of

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(2016) 245 Cal.App.4th 362, 375.) The amendment applies to cases pending on appeal. (*Toste*, at p. 376.)

the law. (*Berg v. Darden*, *supra*, 120 Cal.App.4th at pp. 726-727.) "[W]e interpret the mandatory requirements of the statute without regards to what occurred in this particular case or the tactics of a party." (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 1004.)

B. *Morschauser's Section 998 Offer Was Procedurally Proper*

Under the above principles, we agree with Morschauser that the trial court had no legal basis to conclude his letter offer was invalid or of no effect in view of statutory requirements. Section 998 contains no requirement that the offer be authorized or signed by the offeree's counsel, but as Morschauser points out, it *does* require that the *acceptance* be written and "shall be signed by counsel for the accepting party . . . ." (§ 998, subd. (b).) That the Legislature requires counsel's signature for acceptance, but not for the offer, indicates it intended no such requirement for the offer in the statute. Plaintiffs otherwise make no claim that the offer is not written, or lacks either a statement of terms and conditions or a provision allowing acceptance, the procedural requirements mandated by section 998. They do not argue on appeal that the offer is invalid as conditional (see *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 1129), incapable of valuation (see *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764-765), or not made in good faith (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262). Such an offer may validly propose dismissal of an action with prejudice, as Morschauser's offers did here. (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 470; see also *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1084-1085; *Berg v. Darden*, *supra*, 120 Cal.App.4th at

pp. 729-730; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1055; *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 905-906.)

We do not consider plaintiffs' contention that Morschauser's expert fees are excessive and unreasonable. They made no such argument in their motion to tax costs or any other briefing related to costs and the court's minute order does not address the amount or reasonableness of the claimed costs. The issue is forfeited for appellate review because plaintiffs failed to raise it below. We will not consider points raised for the first time on appeal, and which the trial court did not have an opportunity to address. (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143; accord, *Litt v. Eisenhower Medical Center* (2015) 237 Cal.App.4th 1217, 1224.)

Our conclusion does not entitle Morschauser outright to an order awarding him his expert witness costs. Because the trial court ruled that the offer was invalid and of no effect, it necessarily did not exercise its discretion to award some, all or none of Morschauser's claimed expert witness costs. (§ 998, subd. (c)(1).) The court's failure to exercise its discretion is itself an abuse of discretion, as is its decision resting on an error of law. (*Sanford v. Rasnick, supra*, 246 Cal.App.4th at p. 1133; *Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 114.) Such an error generally requires reversal, as we cannot say whether Morschauser would have obtained a more favorable result had the court exercised its discretion. (Cf. *S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016.) Under the circumstances, we remand the matter to the trial court to conduct a new

hearing and exercise its discretion on Morschauser's claim for expert witness fees as costs. (*Sanford*, at pp. 1133-1134.)

DISPOSITION

The judgment is reversed and remanded and trial court directed to enter judgment in William B. Morschauser's favor. On remand, the court shall conduct a new hearing on Morschauser's Code of Civil Procedure section 998 offer to compromise and exercise its discretion with respect to Morschauser's claim of expert witness fees as costs. Morschauser shall recover his costs on appeal.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.