

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

INGRID OLSON, as Successor in
Interest, etc.,

Plaintiff and Appellant,

v.

NORTH AMERICAN COMPANY FOR
LIFE AND HEALTH INSURANCE,

Defendant and Respondent.

E051827

(Super.Ct.No. INC037361)

OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Affirmed in part, reversed in part with directions.

Daniels, Fine, Israel, Schonbuch & Lebovits, Paul Fine, Scott Brooks; The Law Offices of Ian Herzog, Evan D. Marshall, Ian Herzog and Justin Ehrlich for Plaintiff and Appellant.

Reed Smith, Margaret M. Grignon, Robert D. Phillips, Jr., and Brandon W. Corbridge for Defendant and Respondent.

Ingrid Olson, successor in interest under Code of Civil Procedure section 377.31 to Ernst Hammermueller, plaintiff and appellant (hereafter Olson), appeals from the trial court's postjudgment cost award to defendant and respondent, North American Company for Life and Health Insurance (hereafter NAC). Olson contends first that she only became successor in interest for the limited purpose of NAC's appeal from a judgment entered in favor of Ernst Hammermueller who died while the appeal was pending, and therefore she is not liable for NAC's litigation costs. Second, Olson contends that even if she became a party to the trial court proceedings, as Hammermueller's successor in interest she is not liable for costs under Code of Civil Procedure section 998.¹ Finally, she contends if she is liable for costs under section 998, the trial court failed to rule on the objections she raised in her motion to tax NAC's claimed expert witness fees and therefore those costs must be stricken.

We agree with Olson's second claim. Therefore, we will reverse the trial court's order awarding costs to NAC under section 998.

¹ All further statutory references are to the Code of Civil Procedure unless indicated otherwise.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent factual and procedural details are not in dispute. Olson's father, Ernst Hammermueller, sued NAC, among other things, for fraud in connection with his purchase of NAC annuities. A jury found in favor of Hammermueller and awarded him a multimillion dollar verdict. NAC appealed (case No. E041640). Hammermueller died while the appeal was pending. Olson filed a statement in this court under section 377.32 to appear as Hammermueller's successor in interest and continue the appeal. We granted that request, and eventually resolved the appeal in favor of NAC. Because NAC had moved in the trial court for judgment notwithstanding the verdict, we held the trial court should have granted that motion. As a result, we reversed the judgment in favor of Hammermueller and directed the trial court on remand to enter judgment in favor of NAC.

After judgment was entered in its favor on remand, NAC filed a memorandum of costs in the trial court requesting more than \$138,000 in trial related expenses, including expert witness fees of more than \$102,000 that NAC claimed as a result of Hammermueller's failure to accept its offer of compromise under section 998. Olson objected and moved to strike the costs bill on the ground that NAC had not substituted a real party in interest for decedent Hammermueller, purportedly as required by section 377.41, and its attempt to join Olson as a judgment debtor was invalid. In the alternative, Olson sought to tax NAC's costs on the ground among others that the costs it claimed under section 998 as a result of Hammermueller's failure to accept NAC's offer of

compromise are penalties and as such do not survive Hammermueller's death. In addition, Olson argued that NAC claimed various costs to which it was not entitled and therefore those costs should be taxed.

The trial court disagreed with Olson and denied her motions. As a result, the trial court awarded costs to NAC of \$138,256.85, as requested in its memorandum of costs.

DISCUSSION

1.

EFFECT OF MOTION UNDER SECTION 377.31 TO BE SUBSTITUTED AS DECEDENT'S SUCCESSOR IN INTEREST

As set out above, Olson first contends as she did in her trial court motion to strike NAC's cost memorandum that she is not liable for NAC's trial court costs because she only became Hammermueller's successor in interest on appeal in case No. E041640. The issue in this appeal is whether by becoming Hammermueller's successor in interest during NAC's appeal, Olson also became his successor in interest for the purpose of paying his costs of litigation on remand to the trial court as a result of our reversal of the judgment in Hammermueller's favor. That issue raises only a question of law. We review purely legal questions independently. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

Section 377.31 provides, "On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the

decedent's successor in interest." Section 377.11, as pertinent here, defines "decedent's successor in interest" as "the beneficiary of the decedent's estate," which in turn means the sole beneficiary under the decedent's will, if the decedent died leaving a will (§ 377.10, subd. (a)) or if the decedent died without leaving a will, "the sole person or all of the persons who succeed to a cause of action" (§ 377.10, subd. (b)). In the declaration that accompanied her motion in case No. E041640 to substitute herself in place of Ernst Hammermueller, her deceased father, Olson stated that she is the "sole heir and successor in interest" to her father. She does not dispute that status in this appeal.

Olson argues, however, that the trial court award of costs is, in effect, an independent action against Hammermueller's estate or successor in interest, and as such requires that the properly designated representative be joined in the trial court proceeding. In other words, Olson contends that she only became her father's successor in interest for purposes of the appeal and that NAC must separately join her, or her father's estate, in the trial court proceeding in order to recover its costs. Because NAC did not do that, Olson contends the trial court should have granted her motion to strike NAC's memorandum of costs.

The only authority Olson cites to support her claim that a substitution for purposes of appeal does not also effect a substitution in the trial court is *Reay v. Heazelton* (1900) 128 Cal. 335, which involves a convoluted procedural history including multiple appeals during the course of which the original party and his substituted representative both

died.² In that context, the Supreme Court held that the costs claim was barred by the pertinent statute of limitations and declined to address other issues, including whether Mabel's substitution on appeal also served to make her a party in the trial court. (*Id.* at pp. 337-338.) Despite its decision not to address the issue, the Supreme Court nevertheless stated, "in passing[,] it may be well to say that, notwithstanding an order of substitution may have been made in this court, the regular and orderly method of procedure would be to procure upon proper showing a like substitution in the superior court. The propriety, if not the necessity, of such procedure must become manifest when it is considered that there will be thus avoided vexatious questions, such as are here presented, of the responsibility for costs, and of the effect which a judgment, such as was entered, may have as a lien upon the property of the personal representative who may be

² Treadwell was a plaintiff in intervention in a quiet title action. He prevailed in the trial court. While the case was on appeal, he died and his wife, Mabel, as the executrix of his estate, was substituted in his place. The judgment in favor of Treadwell was reversed on appeal and the intervention action dismissed. Nevertheless, Mabel "was allowed to defend the action in the trial court" in the name of the two originally named defendants. (*Reay v. Heazelton, supra*, 128 Cal. at pp. 336-337.) Reay sought costs after the remittitur issued. Mabel appealed from the trial court's order denying her application either to strike or retax the cost bill. (*Id.* at p. 337.) That appeal was dismissed after the Supreme Court determined the order was not appealable. Mabel, as executrix, successfully defended the quiet title action even though "no substitution of her in place of [her deceased husband] was ever entered in the superior court." Mabel then died, and "George Heazelton, was appointed executor of her estate; a claim for the amount of the costs, with accrued interest, was presented and rejected, and this action was instituted for their recovery." (*Ibid.*)

found chargeable with costs and whose name yet appears nowhere in the judgment books.” (*Reay v. Heazelton*, *supra*, at p. 338.)³

Although Olson bases her appeal on the above quoted, century-old obiter dictum, she has not established its procedural or factual relevance.⁴ Procedurally, rule 8.36(a) of the California Rules of Court requires that we notify the superior court of our ruling on a motion to substitute a party on appeal.⁵ Olson has not demonstrated that a similar procedure existed in 1900. Former rule 48(a), the predecessor to rule 8.36(a), of the California Rules of Court, specified the opposite procedure: “Whenever a substitution of parties to a pending appeal is necessary, it shall be made by proper proceedings instituted for that purpose in the superior court. On suggestion thereof and the presentation of a certified copy of the order of substitution made by the superior court, a like order of substitution shall be made in the reviewing court.” (Cal. Rules of Court, rule 48(a) (2004 ed.), as amended eff. Jan. 1, 1973.) We assume the quoted rule is based on the procedure cited in *Reay v. Heazelton*. That procedure no longer applies. Moreover, the Supreme Court based its decision in part on the fact that the superior court docket did not contain

³ Olson also cites *Fay v. Steubenrauch* (1903) 138 Cal. 656, 657-658, which relies on *Reay v. Heazelton*, *supra*, for the proposition that substitution should be made in the trial court.

⁴ We long ago acknowledged that “Supreme Court dicta [are] not to be blithely ignored. Indeed, such dicta [are] said to be ‘persuasive’ [citation] and to ‘command[] serious respect.’ [Citations.]” (*Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212 [Fourth Dist., Div. Two].)

⁵ Our order granting Olson’s motion was included in the opinion attached to the remittitur. Therefore the opinion constituted notice to the superior court.

any mention of Mabel Treadwell, or her representative, Heazelton. (*Reay v. Heazelton*, *supra*, 128 Cal. at p. 337.) Olson's name appears in the register of actions in this case, albeit in the context of our order denying her petition for rehearing.

Her contrary claim notwithstanding, Olson joined the lawsuit for all purposes when this court granted her motion under section 377.31 to substitute herself as successor in interest to the decedent, plaintiff and appellant Ernst Hammermueller. NAC was not required to join Olson as a party in the trial court, nor was it required to join a representative of Hammermueller's nonexistent estate in order to recover its costs of litigation.

We next address Olson's claim that she is not liable for statutory costs of litigation.

2.

SUCCESSOR IN INTEREST LIABILITY FOR COSTS OF LITIGATION

A. Costs in General

Olson contends Hammermueller's estate, rather than she personally, is liable for the statutory costs of litigation. Olson bases her claim on cases that were prosecuted or defended in a representative capacity by the administrator or executor of the estate of a deceased party to the litigation. (See *South v. Wishard* (1958) 165 Cal.App.2d 8; *O'Malley v. Carrick* (1930) 108 Cal.App. 520.) The authority Olson relies on is inapplicable here because Olson did not substitute herself as the representative of her deceased father's estate; she substituted herself in place of her deceased father as his

successor in interest. “A person who acts as a decedent’s successor in interest, ‘step[s] into [the decedent’s] position,’ as to a particular action. [Citation.]” (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 905; see also Ross, Cal. Practice Guide: Probate (The Rutter Group 2007) ¶ 15:281.1, p. 15-75 [if estate is not probated, successor in interest may prosecute action for his or her own benefit].) Because Hammermueller would have been liable for costs, Olson as his successor in interest is also liable for statutory costs.

B. Section 998 Costs in Particular

Olson contends that even if she is liable for NAC’s ordinary statutory costs of litigation, she is not liable for costs under section 998 because those costs constitute a penalty, and as such should not be imposed on anyone other than the actual litigant. We agree with Olson.

“Section 998 sets forth a statutory framework under which any party to a lawsuit may serve upon any other party not less than 10 days prior to commencement of trial a written offer to compromise which, if accepted, allows judgment to be taken in accordance with the terms and conditions set forth in the offer. (§ 998, subd. (b)(1).) This framework also provides for mandatory and discretionary cost penalties against a party who rejects a valid and reasonable offer and thereafter fails to obtain a ‘more favorable judgment.’ (§ 998, subds. (c), (d); Civ. Code, § 3291.) The general parameters of this penalty feature are set forth in subdivision (a) of section 998, which provides that ‘[t]he costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.’” (*Bodell Construction Co. v. Trustees of Cal. State University*

(1998) 62 Cal.App.4th 1508, 1517, fns. omitted.) The purpose of section 998 “is plain. It is to encourage settlement by providing a strong financial disincentive to a party – whether it be a plaintiff or a defendant – who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.)” (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

The statutory purpose of encouraging settlements is not promoted by awarding section 998 costs against a successor in interest who did not join the litigation until after the settlement offer was rejected. Olson succeeded to Hammermueller’s interest in this lawsuit after the trial was complete and NAC’s appeal was pending. She did not have any involvement in and therefore no control over the litigation process, including whether to accept NAC’s section 998 offer. Saddling Olson with NAC’s postsettlement offer costs would not promote the settlement of lawsuits. It would arguably confirm the reasonableness of NAC’s settlement offer but such confirmation, standing alone, is not a policy section 998 was intended to promote. Under the circumstances of this case, a cost award against Olson under section 998 is akin to a punitive damage award. Such an award against a decedent is prohibited, now by statute (see § 377.42) and before its enactment, by case law (see *Evans v. Gibson* (1934) 220 Cal. 476, 490 [“Since the purpose of punitive damages is to punish the wrongdoer for his acts, accompanied by [an]

evil motive, and to deter him from the commission of like wrongs in the future, the reason for such damages ceases to exist with his death.”]).

Accordingly, we conclude when, as in this case, a party to litigation dies before costs under section 998 have been awarded against the deceased party, the deceased party’s successor in interest is not liable for those costs. That conclusion disposes of Olson’s final claim, which challenges the amount of expert witness fees the trial court awarded to NAC. Those fees were awarded under section 998, subdivision (c)(1) and therefore were incorrectly awarded to NAC.

DISPOSITION

The order denying Olson’s motion to strike all costs NAC claimed under section 998 in its memorandum of costs is reversed. The matter is remanded to the trial court with directions to grant that motion and to strike all costs NAC claims in its memorandum of costs under section 998. Otherwise, the cost award is affirmed.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P.J.

We concur:

KING
J.

CODRINGTON
J.