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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

WELLS FARGO ADVISORS, LLC,

Plaintiff and Appellant,

v.

ALDRICH J. FERNANDEZ,

Defendant and Respondent.

E055058

(Super.Ct.No. RIC1101062)

**OPINION**

APPEAL from the Superior Court of Riverside County. John W. Vineyard,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jones, Bell, Abbott, Fleming & Fitzgerald, G. Thomas Fleming III, William M.  
Turner, Samuel E. Endicott, Asha Dhillon, and Neil M. Katsuyama for Plaintiff and  
Appellant

Law Offices of Benjamin L. Meeker and Benjamin L. Meeker for Defendant and  
Respondent.

Appellant Wells Fargo Advisors, LLC (Wells Fargo) appeals from a judgment  
confirming an arbitration award (Code Civ. Proc. §§ 1294 & 904.1, subd. (a)(2)). The

arbitration decided a claim filed by respondent Aldrich J. Fernandez against Wachovia Securities, LLC, a predecessor of Wells Fargo. Fernandez filed his claim to recover funds lost in his brokerage account due to alleged breach of fiduciary duty by his broker. The arbitration was held before a panel appointed by the Financial Industry Regulatory Authority (FINRA) and was heard in accordance with FINRA's rules and procedures. The FINRA panel denied the claims made by Fernandez in their entirety and denied "[a]ny and all relief not specifically addressed herein . . . ."

Wells Fargo eventually filed a petition to confirm the arbitration award. The trial court subsequently confirmed the award as a judgment.

Wells Fargo then filed a memorandum of costs totaling \$29,479. Of that sum, \$18,955 was claimed for expert witness fees allegedly due under Code of Civil Procedure section 998 (section 998). Fernandez filed his motion to strike and tax costs, and the trial court granted the motion in part by striking the claim for expert witness fees.

On appeal, Wells Fargo argues that the trial court erred in striking its claim for expert witness fees. Since a valid section 998 offer was made and refused while the arbitration was pending, the issue presented is whether expert witness fees under section 998 may be recovered as costs in a court proceeding that confirms the arbitration award as a judgment.

Wells Fargo primarily relies on *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 Cal.4th 133. Fernandez primarily relies on *Maaso v. Signer* (2012) 203 Cal.App.4th 362. Before discussing these cases, we turn to the issue of the proper standard of review.

## I

### STANDARD OF REVIEW

Wells Fargo acknowledges that cost awards under Code of Civil Procedure sections 1032 and 1033 are generally reviewed under an abuse of discretion standard of review. It cites *El Dorado Meat Co. v. Yosemite Meat & Locker Service Inc.* (2007) 150 Cal.App.4th 612, 617. Abuse of discretion is obviously the applicable standard when the trial court is in a better position than a reviewing court to determine a reasonable amount of costs or fees to be awarded. (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 315.) More specifically, a determination of a reasonable expert witness fee award under section 998 is a discretionary determination by the trial court, which is reviewed under an abuse of discretion standard. (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 513; *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 121.) Accordingly, Fernandez argues that the abuse of discretion standard should be applied to the issues in this case.

Wells Fargo contends, however, that a de novo standard of review is applicable here because the issue presented is a question of law, that is, whether an expert witness fee claimed under section 998 may be claimed as a cost after a petition to confirm an arbitration award is granted. It cites *Rodriquez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1117.

De novo review is generally appropriate when the reviewing court is in as good a position as the trial court to decide the applicability of legal principles to the facts found

by the trial court. “If . . . the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently. [Citation.]” (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) We agree with Wells Fargo that the issue here is primarily a legal issue, and we therefore apply a de novo standard of review.

## II

### RECOVERY OF EXPERT WITNESS FEES UNDER SECTION 998

Section 998, subdivision (d) provides: “If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff’s costs.”

Fernandez does not dispute the assertions by Wells Fargo that it made him a valid and enforceable offer under section 998, that he refused it, and that he therefore may be liable for expert witness fees. He contends, however, that a request for expert witness fees should have been made to the arbitration panel and that the panel’s award denying “[a]ny and all relief not specifically addressed herein” precluded an award of expert witness fees by the court, which confirmed the same award.

*Pilimai* primarily held that an arbitration required under the uninsured motorist statute (Ins. Code, § 11580.2) is a contractual arbitration subject to the provisions of the California Arbitration Act. (*Pilimai v. Farmers Ins. Exchange Co.*, *supra*, 39 Cal.4th at p. 137.) It also held that an award of costs under Code of Civil Procedure section 998 could exceed the coverage limits of the insurance policy, that prejudgment interest was not available, and that costs could include deposition and exhibit preparation expenses. (*Pilimai*, at p. 137.)

Wells Fargo cites a sentence from the discussion of deposition and exhibit preparation costs: “[I]t is apparent that once the conditions of [section 998] are met, a defendant may be required to pay expert witness fees incurred during arbitration.” (*Pilimai v. Farmers Ins. Exchange Co.*, *supra*, 39 Cal.4th at p. 149.) But here there is no issue as to the liability of Fernandez for expert witness fees. The only question is whether the fees were recoverable in the trial court following approval of a petition for confirmation of the arbitration award.

Wells Fargo argues that it was unable to make a request for section 998 fees to the arbitrators because section 998, subdivision (b)(2) provides that an offer that is not accepted is deemed withdrawn and “cannot be given in evidence upon the trial or arbitration.” Relying on this subsection, Wells Fargo argues that the panel was unaware of the section 998 offer when it made its award, and after entering the award the arbitrators lost jurisdiction over the case. Wells Fargo thus took the only avenue

available to it by including expert witness fees in the cost bill it submitted to the trial court.

Two questions are presented by this argument. The first is whether the inclusion of such expert witness fees in the cost bill was an avenue open to Wells Fargo. The second is whether the failure of Wells Fargo to submit a request for expert witness fees under section 998 to the arbitrators barred a later request to the trial court.

The arbitration award in *Pilimai* was silent on the issues of costs and prejudgment interest. (*Pilimai v. Farmers Ins. Exchange Co.*, *supra*, 39 Cal.4th at p. 137.) Both parties filed petitions to confirm the arbitrator's decision. In his petition, Pilimai requested costs, including expert witness fees due under section 998. The trial court found that Pilimai was entitled to recover such costs but limited recovery to the amount of the policy limits. The appellate court reversed, finding that Pilimai was entitled to recover costs and prejudgment interest in excess of the policy limits. It directed the trial court to enter a new judgment for the policy limits plus costs and prejudgment interest. (*Pilimai*, at pp. 138-139.) Our Supreme Court affirmed the appellate court's award of other costs but reversed the award of prejudgment interest. The Supreme Court remanded the case to the trial court to determine the proper cost award. (*Id.* at pp. 151-152.)

In the court's discussion of costs, the Supreme Court noted that Farmers agreed that expert witness fees were recoverable under section 998, subdivision (d). (*Pilimai v. Farmers Ins. Exchange Co.*, *supra*, 39 Cal.4th at p. 148.) The court therefore focused on

deposition and exhibit-preparation costs and did not discuss the issues presented by the argument of Wells Fargo in this case. (*Id.* at pp. 138-139.) Thus, although the procedure advocated by Wells Fargo was used by one party in *Pilimai* without objection by the other party, the procedure itself was not approved by the Supreme Court. We therefore find that *Pilimai* is not dispositive here. “An opinion is not authority for a point not raised, considered, or resolved therein.” (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57.)

Wells Fargo also attacks the trial court’s reasoning in distinguishing *Pilimai* and holding it inapplicable. Under settled precedent, however, the trial court does not err if it is right for the wrong reason. (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

Turning to the second question, we agree with Fernandez that the case of *Maaso v. Signer*, *supra*, 203 Cal.App.4th 362 is persuasive. Maaso asserted a medical malpractice claim against Signer. Maaso made a section 998 offer before the arbitration. Signer rejected the offer. A subsequent arbitration award in favor of Maaso was in excess of the offered amount. (*Maaso*, at pp. 366-368.) However, the award was vacated on grounds it was procured by “undue means.” (*Id.* at p. 368.)

A second arbitration was ordered and held. During the second arbitration proceedings, Maaso’s counsel advised the arbitrators that Maaso had previously made a section 998 offer that was rejected by Signer, without stating the amount of the offer. Maaso did not request that the arbitrators rule on the issue of section 998 costs or seek to present evidence on the issue. The arbitrators subsequently awarded Maaso an amount in

excess of the section 998 offer, plus “[c]osts and fees in accordance with the arbitration agreement.” (*Maaso v. Signer, supra*, 203 Cal.App.4th at p. 369.)

Maaso then filed a petition to confirm the award. He also filed a cost bill, which included a request for section 998 costs. The trial court granted the petition and held a hearing on the cost bill. It subsequently decided that all costs associated with the arbitration, including section 998 costs, “were within the sole purview of the arbitrators and not the court.” (*Maaso v. Signer, supra*, 203 Cal.App.4th at p. 369.)

Maaso appealed, contending the trial court erred in refusing to award him section 998 costs and prejudgment interest. (*Maaso v. Signer, supra*, 203 Cal.App.4th at p. 369.) The appellate court rejected the contention and held that Maaso was not entitled to section 998 costs and prejudgment interest because he had not requested the arbitrators to award those costs to him. (*Maaso*, at p. 377.) Although the arbitrators were aware of the section 998 issue, the arbitrators merely awarded “costs and fees in accordance with the arbitration agreement.” (*Maaso*, at p. 377.)

Wells Fargo first seeks to distinguish *Maaso* by arguing that, in this case, the arbitrators were unaware of its section 998 cost claim because section 998, subdivision (b)(2) provides that such offers cannot be given in evidence. But we agree with Fernandez that the section merely prevents the claim from being offered into evidence. It does not prevent the person claiming entitlement to a section 998 award from raising the issue with the arbitrators, as was done in *Maaso*. The arbitrators were unaware of the claim because the person asserting the claim, Wells Fargo, failed to make them aware of

it. Having not done so, Wells Fargo cannot reassert the claim later by submitting a cost bill for section 998 costs after the arbitration award has been confirmed.

More important, whether the claim was submitted to the arbitrators or not, the arbitration award specifically provided that “any and all relief not specifically addressed herein, is denied.” This award was subsequently confirmed by the trial court. The request of Wells Fargo for additional relief in the form of section 998 costs contradicts both the award and the trial court’s confirmation of the award.

Wells Fargo also cites a discussion of this issue in Knight et al., California Practice Guide: Alternative Dispute Resolution (The Rutter Group 2011) ¶ 5:402.14, page 5-275: “The arbitrator must be informed, however, of the rejected CCP Sec. 998 offer prior to making a final award in order to impose any applicable costs ‘penalties’ (see below).” The following comment points out that the statute does not state how the notification is to be made and suggests that the arbitrators should determine whether a section 998 offer was made and rejected before making a final award. (Knight, *supra*, ¶ 5:402.15, p. 5-276.) The discussion is not helpful to the position of Wells Fargo because it supports the argument that the arbitrators must be informed of the offer.

*Maaso* was decided after the discussion in the California Practice Guide, and it sheds some light on the issues presented here. First, it held that “[u]nder the statutory scheme, a party’s failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award. [Citations.] Unless a statutory basis for vacating or correcting an award exists, a reviewing court

“shall confirm the award as made . . . .” [Citation.]’ [Citation.] The court concluded: ‘Such an interpretation of the applicable statutes promotes the Legislature’s determination that there is a “strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.”’ [Citation.] As a general rule, parties to a private arbitration impliedly, if not expressly, agree that the arbitrator’s decision will be both binding and final and thus the arbitrator’s decision “should be the end, not the beginning, of the dispute.” [Citation.] Allowing a party to request that the trial court make an award that was within the scope of the arbitration but not pursued in that forum is inconsistent with the policies underlying the statutory private arbitration scheme.’ [Citation]” (*Maaso v. Signer, supra*, 203 Cal.App.4th at p. 378.)

Second, the *Maaso* court stated: “Additionally, it makes sense that only the arbitrator decides section 998 costs incurred in arbitration because an award of expert witness costs, and the amount, is discretionary under section 998. ‘[N]ot only is the determination as to the amount [of attorney fees and costs] properly within the purview of the arbitrator, but we observe it is the arbitrator, not the trial court, which is best situated to determine the amount of reasonable attorney fees and costs to be awarded for the conduct of the arbitration proceeding.’ [Citation.]” (*Maaso v. Signer, supra*, 203 Cal.App.4th at p. 379.)

Fernandez asks the proper question: “How could the lower court (or now, this Court), which had no involvement in the arbitration whatsoever, make a determination as to whether it was reasonably necessary to hire numerous experts regarding a standard

