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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

ARTHUR HAUZER,

Plaintiff and Appellant,

v.

TIMOTHY C. WATSON, M.D., et al.,

Defendants and Respondents.

F062019

(Super. Ct. No. 08CECG04390)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Ericksen, Arbuthnot and David J. Frankenberger for Plaintiff and Appellant.

Baker Manock & Jensen, Dirk B. Paloutzian and Corban J. Porter for Defendants and Respondents.

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Plaintiff and appellant Arthur Hauzer sued defendants and respondents Timothy C. Watson, M.D. and Sierra Pacific Orthopaedic Center Medical Group, Inc. (collectively defendants) for medical malpractice. During discovery, defendants made Code of Civil Procedure section 998<sup>1</sup> offers to compromise for a waiver of costs, which Hauzer did not

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<sup>1</sup> All undesignated statutory references are to the Code of Civil Procedure.

accept. At trial, a jury found in defendants' favor. Hauzer brought a motion for a new trial, but by the time hearing was held, the trial court determined it had lost jurisdiction to decide the motion. Hauzer also brought a motion to tax the expert witness fees defendants claimed as costs as a result of their section 998 offers, arguing the offers were unreasonable and not made in good faith, which the trial court denied.

On February 14, 2011, Hauzer filed a notice of appeal appealing from the October 1, 2010 judgment and an order after judgment. On March 17, 2011, he filed an amended notice of appeal appealing from the December 14, 2010 order denying the motion for new trial and the January 18, 2011 order denying the motion to tax costs. Hauzer argues (1) the trial court erred in determining it lost jurisdiction to rule on the new trial motion and, in any event, he established grounds for a new trial, and (2) the defendants were not entitled to recover costs pursuant to section 998 because their settlement offers were made in bad faith and were reasonably rejected.

After the parties filed their briefs in this case, this court invited them to submit supplemental briefs addressing whether the notice of appeal Hauzer filed on February 14, 2011 was filed timely so as to permit us to review the merits of the motion for new trial. (See, e.g., *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 849 [“because the timeliness of an appeal poses a jurisdictional issue, we must raise the point sua sponte”].) We conclude that Hauzer's notice of appeal from the judgment, by which he asks us to review the denial of the motion for new trial, was not timely filed, and therefore dismiss that appeal. We affirm the order denying the motion to tax costs.

### **BACKGROUND**

In December 2008, Hauzer filed a complaint against defendants for medical malpractice, alleging that Dr. Watson diagnosed him with degenerative disc disease and performed the following three surgeries: (1) a low back decompression and fusion surgery; (2) removal of a displaced capstone cage and re-fusion of part of the spine; and (3) removal of hardware and decompression of the spine. After an MRI revealed

significant and unanticipated post-operative problems, Dr. Watson referred Hauzer to a neurosurgeon, who performed posterior spinal and interbody fusions. Hauzer alleged that defendants breached the standard of care in the treatment of his back problems, and caused him damage including severe limitation of his range of motion, the likelihood he would never be able to return to his chosen occupation, and possible future medical care and treatment for his lower back.

On February 1, 2010, defendants filed a motion for summary judgment, supported in part by a declaration from Rick Delamarter, M.D. A hearing was set for April 14, 2010. On March 30, 2010, Hauzer filed his opposition to the motion, supported by testimony and evidence from his retained standard of care expert, John J. Regan, M.D.<sup>2</sup>

On April 5, 2010, defendants each made an offer to compromise pursuant to section 998, in which they offered a mutual waiver of statutory costs incurred to date in exchange for a dismissal with prejudice in their favor. In the offers defendants stated the offers were made in good faith because consultation with expert witnesses obtained to date established Hauzer's treatment at all times complied with the standard of care and nothing either defendant did or failed to do injured Hauzer. Hauzer did not accept the offers, which expired 30 days later. (§ 998, subd. (b)(2) [offer not accepted within 30 days after it is made is deemed withdrawn].)

The case proceeded to a jury trial. After eleven days of trial and deliberations, the jury returned a unanimous verdict in favor of defendants, finding they were not negligent in Hauzer's care and treatment.<sup>3</sup> Judgment was entered on September 27, 2010, which

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<sup>2</sup> Neither the summary judgment motion nor the opposing papers are part of the appellate record. Hauzer's attorney stated at the December 7, 2010 hearing on the motion to tax costs that the motion was calendared for hearing in March 2010, but defense counsel withdrew the motion after receiving the opposition. According to the court docket, defense counsel took the motion off calendar on April 9, 2010.

<sup>3</sup> Hauzer's attorney stated at the hearing on the motion to tax costs that the trial court denied a motion for nonsuit made at the conclusion of Hauzer's case.

states that by virtue of the jury's verdict, Hauzer is to take nothing on his complaint from defendants and defendants shall recover from Hauzer their "costs of suit as permitted by law and pursuant to the timely filing of a memorandum of costs." Defendants served notice of entry of judgment on October 1, 2010.

## **DISCUSSION**

### I. Motion for New Trial

Hauzer contends the trial court erred in failing to issue a substantive order granting his motion for new trial. He asserts the trial court did not lose jurisdiction to consider his new trial motion and asks us to review the merits of the motion. He requests that we issue an order either granting him a new trial or, in the alternative, a hearing in the trial court on his new trial motion. We conclude the trial court lost jurisdiction to consider his new trial motion 60 days after defendants served notice of entry of judgment, and his subsequent notice of appeal from the judgment, filed more than 30 days after the new trial motion was denied by operation of law, is untimely.

Hauzer filed his notice of intention to move for a new trial on October 18, 2010, and the motion and supporting documents on November 16, 2010. At the December 14, 2010 hearing on the new trial motion, the trial court determined it had lost jurisdiction to rule on the motion, as over 60 days had elapsed since defendants served notice of entry of judgment, and declined to rule on the motion.

Hauzer filed a notice of appeal on February 14, 2011, which states he is appealing from the judgment entered October 1, 2010, an order after judgment under section 904.1, subdivision (a)(2), and as authorized by section 1033.5, and California Rule of Court, rule "3.1700."<sup>4</sup> After defendants filed an amended judgment on February 17, 2011, which added \$106,130 of costs awarded pursuant to their memorandum of costs, Hauzer filed an amended notice of appeal on March 17, 2011. In the amended notice of appeal,

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<sup>4</sup> All rule references are to the California Rules of Court.

Hauzer states he is appealing from (1) the December 14, 2010 order denying the motion for new trial, and (2) the January 18, 2011 order denying the motion to tax costs.

While Hauzer purports to appeal from the order denying his motion for new trial, it is well established that “an order denying a new trial motion is not separately appealable.” (*City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819-820.) Instead, the denial of a new trial motion is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transp. Author.* (2005) 35 Cal.4th 15, 18-19; *Hamaski v. Flotho* (1952) 39 Cal.2d 602, 608.) Although his amended notice of appeal states he is appealing from the order denying the motion for new trial, his original notice of appeal, filed February 14, 2011, states he is appealing from the October 1, 2010 judgment. The issue is whether the February 14, 2011 appeal from the judgment was filed timely, so as to allow us to review the merits of his new trial motion.

Since defendants served Hauzer with a notice of entry of the September 27, 2010 judgment on October 1, 2010, Hauzer normally would have had 60 days from October 1, or until November 30, 2010, to file a notice of appeal from the judgment. (Rule 8.104, subd. (a)(2).) While Hauzer asserts the September 27, 2010 judgment was not a final one, since it was amended on February 17, 2011 to add costs the trial court awarded defendants following its denial of Hauzer’s motion to tax costs, we disagree. The judgment served on October 1, 2010 was final, as it disposed of all of Hauzer’s claims. (See *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 [“judgment is the final determination of the rights of the parties [citation] “when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.””]; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582 & fn. 3 [order completely resolving all issues between the parties was final and appealable despite remaining question of prevailing party costs and attorney fees award].) Where a judgment is modified merely to add costs, the original judgment is not substantially changed and the

time to appeal from it is not affected. (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222; *Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 951.)<sup>5</sup>

The 60-day period to file an appeal may be extended when a valid notice of intention to move for a new trial is filed. (Rule 8.108, subd. (b).) If the motion for new trial thereafter is denied, the time to appeal is extended by the earliest of the following time periods: (1) 30 days after the superior court clerk or party serves an order denying the motion or a notice of entry of that order; (2) 30 days after denial of the motion by operation of law; or (3) 180 days after entry of judgment. (Rule 8.108, subd. (b)(1).)

As the trial court found, and we confirm, the motion for new trial was denied by operation of law on November 30, 2010. As stated above, notice of entry of judgment was served on October 1, 2010, and Hauzer filed his notice of intention to move for a new trial on October 18, 2010. Section 660 limits the trial court's power to rule on a motion for a new trial to a 60-day period commencing with service of notice of entry of judgment or, if no such notice is given, from the initial notice of intent to move for a new trial. (§ 660;<sup>6</sup> *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899 [“After the

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<sup>5</sup> Hauzer does not cite any authority that supports his contention that the judgment served on October 1, 2010 did not become final until it was amended on February 17, 2011. The cases he does cite, *Millsap v. Hooper* (1949) 34 Cal.2d 192, 195; *People v. Cherry Highland Properties* (1999) 76 Cal.App.4th 257, 261, disapproved in part by *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 fn. 5; *Meskeil v. Culver City Unified School Dist.* (1970) 12 Cal.App.3d 815, 824 (*Meskeil*); and *Brennan v. Spanach* (1968) 266 Cal.App.2d 350, 353, do not address this issue.

<sup>6</sup> Section 660 provides, in pertinent part: “Except as otherwise provided in Section 12a of this code, the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court. . . .”

court is presented with a motion for a new trial, its power to rule on the motion expires at the end of the 60-day period provided by section 660. . . . If no determination is made within the 60-day period, the motion is deemed to have been denied.”].)

Section 660’s time limits “are mandatory and jurisdictional, and an order made after the 60-day period purporting to rule on a motion for new trial is in excess of the court’s jurisdiction and void.” (*Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101; see *Westrec Marina Management, Inc. v. Jardine Ins. Brokers* (2000) 85 Cal.App.4th 1042, 1048 [no jurisdiction to grant a new trial 61 days after service of notice of entry of judgment]; *In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 150-151 (*Marriage of Liu*) [when notice of entry of judgment not served, trial court lacked jurisdiction to grant new trial 78 days after notice of intention to move for new trial filed].) Thus, the trial court may not grant relief either under the provisions of section 473 or by means of a *nunc pro tunc* order. (*Siegal, supra*, 68 Cal.2d at pp. 101-102.)

Because the 60-day time limit is jurisdictional, it cannot be extended at the trial court’s discretion. (*Jones v. Sieve* (1988) 203 Cal.App.3d 359, 369.) Otherwise, “the purpose and effect of section 660 would be nullified and the power of the court to rule on a motion for a new trial would be extended indefinitely.” (*Id.* at p. 370.) For the same reason, the 60-day time limit “may not be changed by consent, waiver, agreement, or acquiescence.” (*Meskill, supra*, 12 Cal.App.3d at p. 825; see *Tabor v. Superior Court* (1946) 28 Cal.2d 505, 507 [“it is not within the power of the litigants to invest the court with jurisdiction to hear and determine the motion for a new trial by consent, waiver, agreement or acquiescence”].)

Here, the 60-day period for the trial court to rule on the motion for new trial began to run on October 1, 2010, when defendants served notice of entry of judgment, and expired on November 30, 2010. Since the trial court failed to rule on the motion during that time period, it was denied by operation of law on November 30, 2010. Hauzer’s assertion that the 60-day period to rule did not commence until he filed his notice of

intention to move for a new trial on October 18, 2010 fails because defendants served notice of entry of judgment before he filed his notice of intent. (§ 660; see *Marriage of Liu, supra*, 197 Cal.App.3d at p. 151 [60-day period begins to run from the date notice of intention to move for new trial was filed where no prior notice of entry of judgment was given by the clerk or the parties].)

Hauzer claims it was not his fault the motion was not heard within 60 days of service of the notice of entry of judgment, as he timely filed the motion and it was the court clerk who set the hearing date to accommodate the trial court's schedule. Even if the failure to timely decide the new trial motion is fully attributable to the trial court's mistake, however, Hauzer is charged with knowing the law and procedure. (See *Hughes v. De Mund* (1924) 195 Cal. 242, 244 [“[w]here a motion for new trial is automatically denied by force of the statute the appellant is deemed to have notice thereof as of the date of the expiration of the statutory period”].) Hauzer could have filed an ex parte motion, supported by appropriate legal authority, informing the court it must rule within 60 days. (See *Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 523-524.) If the trial court thereafter refused to timely rule on its motion, Hauzer would have had ample time to file a timely appeal from the judgment and pursue other appropriate relief.

Since the motion for new trial was denied by operation of law on November 30, 2010, rule 8.108, subdivision (b)(1)(B) extended the time to appeal 30 days, to December 30, 2010. Hauzer's notice of appeal, however, was not filed until February 14, 2011, and is therefore untimely. (See *ECC Const., Inc. v. Oak Park Calabasas Homeowners Ass'n* (2004) 118 Cal.App.4th 1031, 1036.) The failure to file a timely notice of appeal from the judgment means that we have no jurisdiction to review the merits of his new trial motion. (Rule 8.104(b); *Estate of Hanley* (1943) 23 Cal.2d 120, 123 [court has no discretion to consider untimely appeal].) Accordingly, we dismiss the appeal from the judgment, which includes the purported appeal from the denial of the motion for new trial.

## II. Motion to Tax Costs

Hauzer argues the trial court erred in awarding expert witness fees because defendants' section 998 offers to waive costs were made in bad faith and without any reasonable expectation they would be accepted.

### A. Trial Proceedings

Defendants submitted a memorandum of costs seeking recovery of \$106,130 in costs; the largest item claimed was \$77,527 in expert witness fees. Hauzer filed a motion to tax costs, arguing defendants were not entitled to their expert witness fees under section 998 because their offers were not made in good faith, as they were not served until 15 months into the litigation, when Hauzer had incurred significant costs prosecuting the action, and defendants were aware Hauzer had retained a standard of care expert, Dr. Regan, who was prepared to testify at trial that Dr. Watson had breached the relevant standard of care and caused Hauzer damage. Hauzer asserted there was always a reasonable probability, however slight, that defendants would be held liable at trial, therefore there was no chance he would accept the "token" section 998 offers for a mutual waiver of costs.

In opposition, defendants argued Hauzer failed to meet his burden to establish the offers were unreasonable, as there was never a reasonable probability Hauzer would prevail at trial and the offers were reasonable when made. Defense counsel stated in his declaration that when the offers were made, defendants had incurred "significant costs," such as filing, deposition and expert fees, and retained the services of experts, including Drs. Carragee and Delamarter, who would testify that Dr. Watson met the applicable standard of care and did not cause or exacerbate Hauzer's pre-existing back condition. Defense counsel was aware Hauzer had a pre-existing, work-related back injury, to which defense experts attributed Hauzer's pain and functional mobility problems, and Hauzer was unlikely to recover damages for future medical care, as his worker's compensation

records showed he had an open medical award which covered medical treatment related to his low back problems.

Defense counsel further asserted that Dr. Regan's declaration submitted in opposition to the summary judgment motion was conclusory, offered no real evidence or facts to support his opinions, and did not cause defense counsel to question Dr. Delamarter's opinions. According to defense counsel, Dr. Regan's August 10, 2010 deposition testimony confirmed his declaration's lack of factual foundation, and Dr. Regan failed to examine post-operative x-rays or note Dr. Watson's reasons contained in the medical records for removing the hardware. Defense counsel stated there was no evidence Dr. Watson prevented Hauzer from returning to work as a carpenter, as Dr. Watson told Hauzer before surgery that it was unlikely surgery would allow him to return to that occupation. Moreover, Hauzer should have known that no doctor had cleared him to return to work as a carpenter following his 2004 work-related injury and he sought a disability determination from Dr. Donald Ross immediately after reporting he was pain free.

In reply, Hauzer pointed out there was no evidence before the court to show the costs defendants had incurred when they made their section 998 offers. Hauzer asserted that when the offers were made, he knew he had a favorable expert opinion regarding the standard of care, defendants would not be able to defeat his case on summary judgment, he had enough evidence to get to a jury, and he would be able to put over one million dollars in mostly economic damages "on the proverbial board" at trial. In his declaration, Hauzer's attorney stated he had believed Hauzer had at least a 50 percent chance of prevailing at trial and a better than even chance of recovering over one million dollars. Hauzer's attorney further stated that Dr. Delamarter also had offered unsubstantiated conclusions in support of the summary judgment motion and defense counsel admitted he had "dumped" Dr. Delamarter because he was unable to support those conclusions in time for his deposition and trial. Defense counsel responded to this last assertion by

submitting a declaration in which he explained that Dr. Delamarter was not “de-designated” as an expert witness because he was unable to offer testimony consistent with his declaration and defense counsel never told Hauzer’s attorney why Dr. Delamarter was “de-designated.”

The trial court issued a tentative decision denying the motion. After a hearing on December 7, 2010, the trial court took the matter under submission. On January 18, 2011, the trial court adopted the tentative ruling as its final order and denied the motion.

In its written ruling, the trial court found the section 998 offers were not without value and were not token offers made to obtain costs should defendants prevail at trial, as defendants had incurred substantial costs by hiring several experts, conducting considerable discovery, and filing a summary judgment motion, and would incur further costs if the case went to trial. The trial court also found the offers were reasonable because the parties were aware defendants had several experts who were willing to testify defendants did not violate the standard of care or cause Hauzer’s damages, and provided strong evidence to rebut Hauzer’s claims. The trial court explained the mere fact Hauzer’s expert had expressed a contrary opinion did not necessarily establish he had a reasonable likelihood of prevailing at trial or the offers were unreasonable, as the expert’s testimony was not compelling enough to allow Hauzer to prevail at trial. The trial court further found Hauzer had little chance of recovering significant damages for future medical expenses given his open medical worker’s compensation award or establishing liability for his inability to return to work in light of his pre-existing medical condition and evidence he would be unable to work as a carpenter regardless of the surgical outcome. Consequently, the trial court found the offers were realistic under the circumstances and there was no reason to conclude they were made in bad faith simply for the purpose of collecting expert fees. !(CT 231)!

## B. Analysis

Section 998 provides for a discretionary award of expert witness fees under certain circumstances to a party whose pretrial offer to compromise is rejected. As is relevant to this case, the statute states: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer. In addition, . . . the court . . . in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial . . . , or during trial, . . . of the case by the defendant.” (§ 998, subd. (c)(1).)

“The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be ‘realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . .’ [Citation.] The offer ‘must carry with it some reasonable prospect of acceptance. [Citation.]’ [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees.” (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263 (*Jones*).)

A modest or token offer, however, may be reasonable if an action is completely lacking in merit. (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 471 (*Hartline*); *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 (*Nelson*).) “There is no per se violation of the good faith requirement just because the offer does not tender a net monetary sum. [Citation.] In a particular case, a waiver of costs may be an offer of significant value.” (*Hartline, supra*, 132 Cal.App.4th at p. 471.) Where, as here, “a party obtains a judgment more favorable than its pretrial offer, [the offer] is presumed to have

been reasonable and the opposing party bears the burden of showing otherwise.” (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338-339; accord, *Hartline, supra*, 132 Cal.App.4th at p. 471.)

We review the trial court’s award of expert witness fees under section 998 for abuse of discretion. (*Jones, supra*, 63 Cal.App.4th at p. 1262.) “‘Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court.’ [Citation.] ‘In reviewing an award of costs and fees under Code of Civil Procedure section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal.’ [Citation.] “‘The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’” (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 185-186.)<sup>7</sup>

Hauzer fails to satisfy his burden of demonstrating a clear abuse of discretion in this case. Hauzer claims the section 998 offers were unreasonable and not offered in good faith because when they were made, there was a reasonable probability the case would go to a jury and defendants would be found liable since he had retained a standard of care expert, Dr. Regan, who was prepared to testify that defendants breached the relevant standard of care and caused him damage, and defendants did not reasonably expect him to accept the offers. He asserts he successfully rebutted the presumption that

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<sup>7</sup> We note that Hauzer asserts the appropriate standard of review is de novo because the trial court’s error derives from its interpretation of section 998. Hauzer’s claims of error on appeal, however, have nothing to do with the interpretation of section 998, and instead involve challenges to the trial court’s findings that the offers were made in good faith and were reasonable. Accordingly, we apply the abuse of discretion standard of review. (*Jones, supra*, 63 Cal.App.4th at p. 1262.)

the offers were reasonable when made because he knew he had an excellent chance of getting his case to the jury and every reason to believe the case would turn on a “coin flip” as to which standard of care expert the jury ultimately would find to be more credible.

The record on appeal, however, does not support Hauzer’s attempt to overcome the presumption of reasonableness established by defendants’ prevailing at trial. (*Jones, supra*, 63 Cal.App.4th at p. 1264 [appellate court is not obliged to ignore the fact that the respondent prevailed at trial, noting the trial result constitutes “‘prima facie evidence that the offer was reasonable’” and the burden is on the appellant to prove otherwise].) Because Hauzer failed to designate reporter’s transcripts from the trial, and designated very little to be included in the clerk’s transcript, the only evidence before this court consists of declarations submitted by Hauzer’s attorney and defense counsel in support of their respective positions on the motion to tax costs, along with some exhibits that include portions of Dr. Regan’s deposition testimony. While these self-serving declarations attempt to address the strengths or weaknesses of each sides’ expert testimony, they are insufficient to permit an evaluation of the strength of Hauzer’s case and, consequently, the reasonableness of defendants’ offers to compromise for a waiver of costs. Significantly, the expert declarations submitted in support and opposition to the summary judgment motion, which presumably would have been part of the basis for defendants’ offers, are not in the appellate record.

Hauzer has failed to supply this court with sufficient evidence upon which to base a finding that the trial court abused its discretion in determining that defendants’ section 998 offers were reasonable and in good faith. Unlike the trial judge, we are unable to independently evaluate the strength of Hauzer’s case based on what Hauzer knew, or should have known, on April 5, 2010. Without the ability to review the evidence presented by both sides, it would be speculative to make that assessment ourselves or to reject the judgment of the trial court, who presided over the jury trial and presumably was

well aware of the relative merit of the parties' positions. (*Jones, supra*, 63 Cal.App.4th at p. 1264; *Nelson, supra*, 72 Cal.App.4th at p. 136.)

**DISPOSITION**

Hauzer's appeal from the October 1, 2010 judgment is dismissed. The order denying the motion to tax costs is affirmed. Defendants shall recover their costs on appeal.

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Gomes, J.

WE CONCUR:

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Levy, Acting P.J.

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Detjen, J.