

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

KRISTEN BALDWIN,

Plaintiff and Respondent,

v.

MIRIAM ORTIZ et al.,

Defendants and Appellants.

G045347

(Super. Ct. No. 30-2009-00120781)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Reversed and remanded.

Law Office of Tioni A. Phan, Tioni A. Phan and Grace Ogburn for Defendants and Appellants.

Law Offices of Kyle Scott and Kyle J. Scott for Plaintiff and Respondent.

* * *

We conclude for the reasons discussed in our opinion that the trial court erred in declaring the amended judgment void. We therefore reverse the trial court's postjudgment order vacating the amended judgment, and remand for the court to reinstate that amended judgment.

I

FACTS

This action arose from a 2006 automobile accident. Plaintiff and respondent Kristen Baldwin filed suit against defendants and appellants Miriam Ortiz and Alex Ortiz. In July 2009, defendants made an offer to compromise the dispute for \$5,500 in exchange for a dismissal and general release under Code of Civil Procedure, section 998. (All statutory references are to the Code of Civil Procedure.) Trial commenced in October 2010 and the jury returned a verdict for \$3,046.40 in favor of plaintiff.

Chronology After Trial

November 1, 2010	Plaintiff filed a memorandum of costs totaling \$3,011.38.
November 12, 2010	Defendants filed a notice to tax costs, arguing \$2,606.38 be taxed, because they were incurred after defendants served the offer to compromise.
December 7, 2010	Judgment was entered.
December 20, 2010	Defendants filed a memorandum of costs in the amount of \$8,878.40 for postoffer costs and expert witness fees with the doctors' bills attached.
January 14, 2011	The court heard the motion to tax costs, and made a finding the \$5,500 offer to compromise was not a token offer. The court granted the motion to tax plaintiff's costs in the amount of \$1,369.04. In its ruling, the court specifically stated: "Because defendants have not submitted any cost

memorandum at this time, there is no basis for an off-set.”

During argument, the court asked defendants counsel whether or not an “opposing memorandum of costs” would be submitted. Defendants’ lawyer stated to the court: “I believe one was filed, your Honor. What we’ll do is we’ll go ahead and submit a proposed amendment to the judgment with our motion because I expected the pending motion to tax and/or strike but none was forthcoming, so we’ll prepare that.”

January 19, 2011

Notice of entry of judgment served.

January 26, 2011

Defendants filed another memorandum of costs, identical to their December 20 memorandum but without the attachments.

March 11, 2011

Amended judgment prepared by defendants was signed by the court and filed. Unlike the judgment entered the previous December 7, the amended judgment stated: “On December 20, 2010, this Defendant filed her Memorandum of Costs in the amount of \$8,878.40, pursuant to CCP §998. Plaintiff never filed her motion to strike and/or tax Defendant’s Memorandum of Costs. [¶] WHEREFORE . . . IT IS ORDERED, ADJUDGED AND DECREED: [¶] 1. The prior judgment is amended as follows: The Defendant, Miriam Ortiz is awarded costs in the amount of \$8,878.40. [¶] 2. The plaintiff is awarded her costs in the amount of \$1,642.34, including her judgment of \$3,046.40, for a total of \$4,688.74. [¶] 3. Defendants, Miriam Ortiz have recovered from plaintiff, Kristin Baldwin, the sum of \$4,189.66, with interest thereon at a legal rate of 10% per annum from the date of the judgment until paid, together with costs and disbursements.”

April 19, 2011

Plaintiff filed a motion to set aside a void judgment.

May 20, 2011

The court ruled as follows: “Plaintiff Baldwin’s Motion to Set aside Void Judgment is **Granted**; The defendants failed to file an appropriate motion with the court to determine its costs per CCP 998. The amended judgment of March 11, 2011, does modify the rights of the plaintiff and did not correct a clerical error. Rochin is the controlling authority. The court lost jurisdiction to award the defendant[s’] costs 15 days after Entry of judgment on January 21, 2011. . . . However, this defendants’ Memo of Costs had not been considered by the court at the hearing on the Motion to Tax Plaintiff’s Costs on January 11, 2011, and was not placed before the court by motion for a determination of the appropriate costs to be awarded under CCP 998. The court did not have jurisdiction to sign the amended judgment on March 11, 2011, and it is void.”

June 7, 2011

Defendants filed a notice of appeal. In the notice, the box “Judgment after jury trial” is checked regarding from what defendants appeal. The following additional language is added: “Partial Appeal from Original Judgment-Page 3: Defendant[s’] Costs left blank-Reinstated 5/20/11.” Defendants also appealed from the order vacating the amended judgment.

June 20, 2011

Defendants filed in the trial court a motion for an offset/augment of the damages awarded to plaintiff. Plaintiff’s opposition to the motion argues the trial court lost jurisdiction to award defendants costs 15 days after the

January 21, 2011 notice of entry of judgment. The court's ruling states: "The issue regarding whether Defendants are entitled to costs under C.C.P. § 998 is the heart of the issue on appeal and is not merely collateral. Judge Perk's 5/20/11 minute order (the subject of the appeal) states that the 'defendants failed to file an appropriate motion with the court to determine its costs per C.C.P. § 998,' and that the 'court lost jurisdiction to award the defendants' costs 15 days after entry of judgment on January 21, 2011.' [¶] This order voided the amended judgment. [¶] The civil action is stayed pending the resolution of the appeal pursuant to C.C.P. § 916."

II

DISCUSSION

Timeliness of Appeal

In her letter brief, plaintiff contends defendants' appeal is untimely. She states the notice of entry of judgment was served by her on January 19, 2011 and the notice of appeal was not filed until June 7, 2011. But the defendants also appealed from the trial court's order vacating the amended judgment, and it is that order that is the subject of this appeal.

In re Marriage of Micalizio (1988) 199 Cal.App.3d 662, is useful here. In *Micalizio*, judgment was entered on April 29, 1986 and an amended judgment was entered on July 1, 1986. The July 1 judgment was declared void on November 21, 1986, and Robert Micalizio appealed from the April 29 judgment on January 5, 1987. The *Micalizio* court stated: "We conclude that the amended judgment of July 1, 1986, even though void, superseded the first judgment and remained in effect as the operative judgment, suspending the time to appeal from the first judgment, until the amended

judgment was declared void in the trial court's minute order of November 21, 1986. When the right of appeal is suspended, an appeal may be taken within the time provided by law after the right is restored. [Citations.] Robert had no right to appeal from the April 29, 1986 judgment while the amended judgment was in place. The reinstated judgment was a new judgment for purposes of appeal, and the time for filing a notice of appeal from that judgment began to run from the date the second judgment was declared void in the trial court." (*Id.* at pp. 671-672.)

A notice of appeal must be filed 60 days after the party filing the notice of appeal is served with a document entitled "Notice of Entry" of judgment. (Cal. Rules of Court, rule 8.104(a)(2).) A direct appeal may be taken from an order vacating a final judgment. (§ 904.1, subd. (a)(2); *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 80.) Here, the Ortizes' notice of appeal identified the order vacating the judgment as the basis for their appeal. Because the Ortizes filed their notice of appeal 18 days after the trial court vacated the amended judgment, the appeal from that order is timely.

Placing Issue of Expert Costs Before the Court

There does not appear to be any hard and fast rule regarding how a defendant gets the issue of recovering expert witness costs under section 998 before the court. In *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, the defendant made a motion. In *Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, the court stated: "Nor did the trial court err in awarding expert witness costs claimed in a cost bill rather than a noticed motion. Code of Civil Procedure section 998 grants the trial court discretion to award expert witness fees to a qualifying prevailing party. The fees may be claimed in a cost bill; there is no rule requiring a noticed motion. [Citations.]" (*Id.* at p. 27.)

Here the record demonstrates defendants filed their cost bill on December 20, 2010, and that the court appeared ready and willing to take up the issue on January 14, 2011, during the hearing on the motion to tax plaintiff's cost bill. While court rules require a memorandum of costs to be filed within 15 days after the mailing of the notice of entry of judgment, absent prejudice, courts routinely treat prematurely filed cost bills as being timely filed. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 880; Cal. Rules of Court, rule 3.1700(a)(1).)

At that January 14 hearing, the court began making the discretionary section 998 decisions by finding defendants' offer was not a token offer. But when the court asked the defense lawyer whether or not a memorandum of costs would be submitted, instead of clearly informing the court that it had been, the lawyer dissuaded the court from proceeding further on the expert fee issue by stating, in a rather confused fashion, that both a motion and an amended judgment would be filed: "I believe one was filed, your Honor. What we'll do is we'll go ahead and submit a proposed amendment to the judgment with our motion because I expected the pending motion to tax and/or strike but none was forthcoming, so we'll prepare that."

Defendants did not file a motion to tax costs as their next step, however. Instead, they filed another cost bill and then an amended judgment. That amended judgment gave them all they wanted by including an award of \$8,878.40 to defendants.

Plaintiff had several opportunities to file a motion to tax those costs, but did not. True, the Ortizes' lawyer could have been more articulate in explaining that Baldwin failed to contest the submitted cost bill, but the fact remains Baldwin never challenged the Ortizes' cost bill. Nor did Baldwin raise a challenge when the Ortizes' lawyer on January 26 filed a cost bill identical to the one they initially filed in December 2010. Baldwin therefore waived her right to challenge the Ortizes' recovery of their expert witness fees and postoffer costs. "The 'failure to file a motion to tax costs constitutes a waiver of the right to object. [Citation.]' [Citation.]" (*Douglas v. Willis* (1994) 27

Cal.App.4th 287, 289; see also *Santos v. Civil Service Bd.* (1987) 193 Cal.App.3d 1442, 1447.) “After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk must immediately enter the costs on the judgment.” (Cal. Rules of Court, rule 3.1700(b)(4).)

Ministerial/Discretionary Act

Defendants contend they timely requested their section 998 expert witness costs, an offset pursuant to section 998 is mandatory and, since their claim for expert witness costs was uncontested, it was a ministerial act for the clerk to enter the expert witness costs claimed in their memorandum of costs. Plaintiff, on the other hand, argues the court must make a discretionary order regarding the award of attorney fees under section 998.

Normally the trial court must exercise its discretion to determine whether to award expert witness fees under section 998. (§ 998, subd. (c)(1) [“the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . by the defendant”].) The trial court, however, is not called on to exercise its discretion when a party waives its objections to a cost bill by failing to file a timely motion to tax. When this occurs, the court clerk has a ministerial duty to “immediately” enter the claimed costs on the judgment, including section 998 expert witness fees. (Cal. Rules of Court, rule 3.1700(b)(4); *Williams v. Santa Maria Joint Union High Sch. Dist.* (1967) 252 Cal.App.2d 1010, 1014.) Here, the trial court amended the judgment to award Miriam Ortiz her expert witness fees and postoffer costs, which exceeded Baldwin’s recovery. (See § 998, subd. (e) [“If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and the judgment or award shall be entered accordingly”].) This is also a ministerial act, involving nothing more than a simple mathematical calculation. No exercise of judicial judgment is involved because Baldwin

waived any objection to the Ortizes' cost bill. (See *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237 [court retains power to correct clerical errors in a judgment that has been entered].) Thus, the Ortizes were entitled to an amended judgment under section 998, subdivision (e), which reflected the recovery of their expert witness fees and postoffer costs. The trial court did not exceed its jurisdiction by entering the amended judgment, and therefore erred in declaring the amended judgment void.

III

DISPOSITION

The order vacating the amended judgment is reversed. The matter is remanded for the trial court to reinstate the amended judgment. Regarding costs on appeal, we do not award defendants their costs because the confusion in the trial court resulted from their not clearly informing the court a cost bill had been filed when the court inquired. Each party to bear its own costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.