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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

W. JEFFREY ROBINS,

Plaintiff and Appellant,

v.

REGAL ENTERTAINMENT GROUP,

Defendant and Respondent.

G039205

(Super. Ct. No. 05CC03759)

O P I N I O N

Appeal from an amended judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Law Offices of Steven R. Young and Jim P. Mahacek for Plaintiff and Appellant.

Yoka & Smith, Christopher E. Faenza and Kelly M. Douglas for Defendant and Respondent.

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Three brothers, W. Jeffrey Robins (Jeffrey), Gregory J. Robins (Gregory), and Richard D. Robins (Richard), filed an action against Regal Entertainment Group (Regal) in connection with the death of their father, William R. Robins (decedent).¹ Each of the three sought relief for wrongful death and survival causes of action. Gregory and Richard settled before trial. Regal made a Code of Civil Procedure section 998 statutory offer to compromise to Jeffrey, who did not accept the offer. Jeffrey continued to trial, in both his individual capacity and his capacity as successor in interest to the decedent. Regal prevailed. The court granted Regal's motion for attorney fees and denied Jeffrey's motion to strike costs. Jeffrey appeals, contending the costs award violates Code of Civil Procedure section 1026, subdivision (b) and the offer to compromise was invalid, because it was made without apportioning the amount offered as between each of his two capacities and because it was unreasonable in amount. We reject his arguments and affirm.

At the time of trial, Jeffrey was the only remaining plaintiff, pursuing the various causes of action on his own behalf. We reject the argument that he was representing his two brothers, in addition to himself, inasmuch as the two brothers had settled their claims and the first amended complaint had made clear that they were pursuing all causes of action, including the survival causes of action. We also reject the argument that Jeffrey was representing Christopher J. Wingard (Wingard), a beneficiary under the decedent's will. Wingard had expressed disinterest in obtaining damages from Regal and, in any event, Jeffrey had represented to the court, both in the first amended complaint and in his declaration in support thereof, that the three brothers were the only persons entitled to pursue a survival action. Inasmuch as Jeffrey was pursuing all causes of action on his own behalf, we see no reason why the application of either Code of Civil

¹ “Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]” (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

Procedure section 1026, subdivision (b) or Code of Civil Procedure section 998 should bar an award of attorney fees and costs in this matter. Furthermore, the trial court did not abuse its discretion in finding that the offer to compromise was reasonable in amount when made.

I

FACTS

Jeffrey, individually, Jeffrey as successor in interest to the decedent, Gregory, and Richard, filed a complaint for general negligence, premises liability, products liability, violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), violation of the California public accommodations and disabled persons laws (Civ. Code, § 54 et seq.), survival, and wrongful death, against Regal and certain others. The first amended complaint alleged that, on March 9, 2004, the 83-year-old decedent fell on an escalator at a movie theater and that the fall resulted in his death on June 21, 2004.

Gregory and Richard settled their claims against Regal for \$50,000 apiece before trial. Regal made a statutory offer to compromise (Code Civ. Proc., § 998), for \$50,001, to Jeffrey, individually and as successor in interest to the decedent. Jeffrey let the offer lapse. Following a jury trial, judgment was entered against Jeffrey, individually and as successor in interest to the decedent, and in favor of Regal.

Regal filed a motion for attorney fees, which Jeffrey, individually and as successor in interest to the decedent, opposed. Jeffrey, individually and as successor in interest to the decedent, filed a motion to strike costs.

The trial court granted the motion for attorney fees and denied the motion to strike costs. An amended judgment was entered awarding \$250,666.89 in fees and costs, plus interest, against Jeffrey, individually and as successor in interest to the decedent, and in favor of Regal. This amount included \$164,649.50 in attorney fees and \$70,712.87 in expert witness fees. Jeffrey appeals.

II
DISCUSSION

A. Preliminary Matters:

(1) Augmentation of the record—

On January 8, 2008, the parties stipulated to augment the record on appeal with Regal's supplemental brief re motion for attorney fees. We granted that request.

On February 7, 2008, Regal filed a motion to augment the record on appeal with three items: (1) a reporter's transcript of proceedings before the court taking place on September 21, 2006; (2) Jeffrey's declaration dated June 8, 2005; and (3) an e-mail dated February 2, 1998 from "JeffR" to "grobins." Jeffrey filed an opposition to Regal's motion to augment, asserting that none of the three items in question were "placed before the Court below" in the parties' respective briefing on the posttrial motions. He ultimately acknowledged that the items were put before the trial court at some point in the proceedings. However, he maintains that this court should not consider the items because the parties did not ask the trial court to consider them in connection with the posttrial motions. In addition to his relevancy challenge, Jeffrey asserts that Regal was tardy in requesting the augmentation and that this was reason enough to deny its motion. Inasmuch as Jeffrey has conceded that the items were presented to the trial court, irrespective of whether any party referred to these items in their briefing on the posttrial motions, we grant Regal's February 7, 2008 motion to augment.

In response to this court's request for further briefing, the parties each filed a motion to augment the record, to support the assertions contained in their respective supplemental briefs. In its August 15, 2008 motion, Regal sought to augment the record with 14 items, presented as exhibits A through N. All of the items had been put before the trial court with the exception of the items appearing as exhibits K, M and N. Exhibit K is a portion of a transcript of the August 30, 2005 deposition of Jeffrey. Exhibits M and N are redacted copies of the settlement agreements with Gregory and Richard.

Because of a confidentiality clause contained in the settlement agreements, the copies were redacted as to certain information otherwise appearing therein. Regal provided complete, unredacted copies of exhibits M and N conditionally under seal, and requested that the court order the sealing of the record with respect to those documents. This court gave Jeffrey an opportunity to object to the motion to augment. No objections were timely filed. Regal's August 15, 2008 motion to augment is granted as to exhibits A through J, and L. The motion is denied as to exhibits K, M and N. The request to seal the record is denied.

In his August 18, 2008 motion to augment, Jeffrey sought to have the record on appeal augmented with five items—the original complaint in this matter, his February 23, 2005 declaration, Regal's demurrer to the original complaint, Regal's motion to strike portions of the original complaint, and the court's May 23, 2005 minute order on the demurrer and the motion to strike. This court gave Regal an opportunity to object to the motion to augment. No objections having been received, Jeffrey's August 18, 2008 motion to augment is granted.

(2) Supplemental briefing—

By order of July 29, 2008, this court requested that the parties provide supplemental briefing on certain matters enumerated therein. The deadline for filing a supplemental letter brief was August 15, 2008.

On August 18, 2008, Jeffrey presented a supplemental letter brief for filing. The untimely supplemental letter brief was received by the court, but not filed. The court gave Regal an opportunity to object to the filing of Jeffrey's supplemental letter brief. No objection having been received, the clerk of the court is directed to file the supplemental letter brief.

B. Parties and Causes of Action:

(1) Introduction—

An initial matter of great import to the analysis of the legal issues is an understanding of the parties and the causes of action they pursued in the underlying litigation. Jeffrey contends that each of the three brothers pursued a wrongful death cause of action, but that only he pursued the remaining causes of action, as successor in interest to the decedent. Central to his claims on appeal is the assertion that when Regal settled with his brothers, it settled only their wrongful death claims. Jeffrey says that following the settlement, he, in his individual capacity, continued to pursue his own wrongful death cause of action, and in addition, he, in his capacity as successor in interest, continued to pursue the remaining causes of action. He presently contends that he pursued those remaining causes of action on behalf of not only himself, but also each of his brothers, as well as Wingard. As we shall show, Jeffrey's characterization of the situation is not well supported by the record.

(2) Declarations—

In order to maintain the action as successors in interest, Jeffrey, Gregory and Richard were each required to file an affidavit or declaration pursuant to Code of Civil Procedure section 377.32. In his declaration filed at the time the first amended complaint was filed, Jeffrey represented that there was no pending proceeding in California for the administration of the decedent's estate. In addition, he stated: "Pursuant to Code of Civil Procedure, Section 377.11, I, along with the other Plaintiffs in this action, my siblings, GREGORY J. ROBINS and RICHARD D. ROBINS, are the successors in interest and beneficiaries of the estate of decedent, WILLIAM R. ROBINS and thereby I and they succeed to the Interest of WILLIAM R. ROBINS in this action. I bring the Survival Action as Decedent WILLIAM R. ROBINS' Successor in Interest.

[¶] . . . No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding.”² (Underscoring omitted.)

Gregory and Richard each filed substantially similar declarations. Gregory declared in part: “Pursuant to Code of Civil Procedure, Section 377.11, I, along with the other Plaintiffs in this action, my siblings, W. JEFFREY ROBINS and RICHARD D. ROBINS, are the successors in interest and beneficiaries of the estate of decedent, WILLIAM R. ROBINS and thereby *I and they succeed to the interest of WILLIAM R. ROBINS* in this action.” (Italics added; underscoring omitted.) Richard likewise declared in part: “Pursuant to Code of Civil Procedure, Section 377.11, I, along with the other Plaintiffs in this action, my siblings, W. JEFFREY ROBINS and GREGORY J. ROBINS, are the successors in interest and beneficiaries of the estate of decedent, WILLIAM R. ROBINS and thereby *I and they succeed to the interest of WILLIAM R. ROBINS* in this action.” (Italics added; underscoring omitted.)

(3) *Status of brothers—*

(a) *first amended complaint*

These declarations are consistent with the representations all three brothers made in their first amended complaint. In section 12 (a) of their first amended complaint, the brothers declared: “Plaintiffs, W. JEFFREY ROBINS, GREGORY J. ROBINS and RICHARD D. ROBINS, are the only surviving heirs of decedent, WILLIAM R. ROBINS. All heirs are joined as Plaintiffs herein.” They also declared: “Plaintiffs are

² Code of Civil Procedure section 377.11 defines the term “‘decedent’s successor in interest’” as “the beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.” The term “‘beneficiary of the decedent’s estate’ means: [¶] (a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under the decedent’s will.” (Code Civ. Proc., § 377.10, subd. (a).)

the only individuals entitled to pursue a claim for wrongful death and a survival action as the result of the death of decedent, WILLIAM R. ROBINS.”

As the foregoing shows, in the first amended complaint, the three brothers clearly claimed to be the only ones entitled to succeed to the interests of the decedent and to maintain a survival action. They maintained this position throughout the body of their first amended complaint. The first amended complaint specifically identified Jeffrey, an individual, Jeffrey, as successor in interest to the decedent, Gregory, and Richard, as the damaged parties pursuing the general negligence cause of action (the first cause of action), the premises liability cause of action (the second cause of action), the products liability cause of action (the third cause of action), the claim for violation of the Unruh Civil Rights Act (the fourth cause of action), and the claim for violation of the California public accommodations and disabled persons laws (the fifth cause of action).

In addition, page 47 of their first amended complaint, pertaining to the survival cause of action (the sixth cause of action), states in pertinent part: “Plaintiffs, W. JEFFREY ROBINS, an individual, and W. JEFFREY ROBINS as Decedent WILLIAM R. ROBINS’ Successor in Interest, GREGORY J. ROBINS and RICHARD D. ROBINS, allege that Defendants . . . are liable to Plaintiffs for other reasons and the reasons for the liability are as follows: [¶] (a) Plaintiffs reallege Plaintiffs’ First, Second, Third, Fourth and Fifth Causes of Action and each and every part thereof, as though set forth in full herein.” On page 48 of their first amended complaint, each of Jeffrey, an individual, Jeffrey, as successor in interest to decedent, Gregory, and Richard, demanded judgment, including actual, special, compensatory, statutory and treble damages, and civil penalties, with respect to their survival cause of action.

In sum, while the first amended complaint formally identified only Jeffrey as acting in two separate capacities, it nonetheless repeatedly made clear that each brother was pursuing every single cause of action, including specifically the survival cause of action, and seeking relief with respect to every single one. This being the case, it is a

stretch to claim that when two brothers settled all of their claims in the litigation with Regal, they did in reality preserve their rights under six out of seven causes of action.

(b) settlements

Jeffrey doesn't think so. He attached the declarations of each of his two brothers to his reply to the opposition to his motion to strike. In those posttrial declarations, each brother declared: "I understood, at the time I accepted Regal's out-of-court settlement offer of \$50,000, that this was to settle my wrongful death claim only, and that I would continue to benefit [from] any settlement from the survival action because such a settlement would go to my father's estate." The matter of their personal beliefs aside, we cannot verify the actual terms of the settlement agreements, because they are not part of the record on appeal. Regal explains that the settlement agreements contain confidentiality clauses and thus were not made a part of the trial court record.

However, Regal represents that Gregory and Richard settled each and every cause of action. It cites the transcript of the September 21, 2006 hearing before the trial court. That transcript indicates that in settling with Regal, Gregory and Richard knew that they were foregoing the right to pursue additional claims. At the hearing, the court asked the settling brothers whether they understood "that by entering into this settlement agreement, [they were] giving up the effects of Civil Code section 1542."³ It said: "You're not going to be allowed to bring any more claims, causes of action, suits in law or equity out of the facts that form the basis of this complaint against Regal Do you understand that?" The brothers replied in the affirmative. In other words, when they settled, they settled. They were done. Only Jeffrey was left in the suit. Nothing else makes sense. It is unfathomable that Regal would agree to settle only the wrongful death

³ Civil Code section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

cause of action, essentially leaving the remaining six causes of action in tact, when the first amended complaint made clear that each brother pursued each cause of action.

(4) Status of Wingard—

(a) original complaint and demurrer

The record on appeal being devoid of information with respect to Wingard, we requested supplemental briefing as to his involvement in the litigation. Through supplemental briefing and augmentation of the record, we learned that Wingard had been named as a nominal defendant in the original complaint. The complaint asserted that Wingard had a right to pursue the action pursuant to Code of Civil Procedure section 377.60,⁴ but that he was named as a defendant under Code of Civil Procedure section 382⁵ “because he [was] unwilling to be joined as a plaintiff in this action.” The complaint further stated that Wingard’s “[c]onsent to be joined was sought and refused.”

Regal filed a demurrer contending, inter alia, that no facts had been alleged showing that Wingard had standing to participate in the litigation. In their opposition to the demurrer, Jeffrey, Gregory and Richard stated that Wingard had been served with the summons and complaint, but had chosen not to participate in the action. The court sustained the demurrer with leave to amend. The first amended complaint was thereafter filed without reference to Wingard.

⁴ Code of Civil Procedure section 377.60 identifies the persons who may bring a wrongful death cause of action.

⁵ Code of Civil Procedure section 382 provides: “If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”

(b) Wingard's testimony

As it turns out, Wingard testified at trial. He characterized the decedent as his grandfather and said that the decedent essentially raised him as a son. The parties describe Wingard as the decedent's stepgrandson. When he testified, Wingard made clear that he did not want to be a plaintiff in the lawsuit or to sue in the action. Furthermore, he expressed his understanding that if Jeffrey prevailed at trial he would receive no share of the judgment.

(c) posttrial pleadings

After Jeffrey lost at trial, and Regal sought six figures in attorney fees and costs, he came to claim that he was the personal representative not only of himself and his two brothers, but also of Wingard. According to Regal, Jeffrey never claimed to act in a fiduciary capacity until after trial. Jeffrey raised the matter of Wingard in his reply to the opposition to his motion to strike costs, then clarifying that there were four beneficiaries of the decedent's estate, not just the three brothers. As an exhibit to his reply, Jeffrey provided a copy of the November 22, 2003 codicil to the decedent's will, wherein the decedent left his estate in equal shares to Richard, Jeffrey, Gregory and Wingard.

All indications are that Jeffrey proceeded through trial representing that he and his brothers were the only successors in interest, but that his brothers had settled. Only after Jeffrey as the remaining plaintiff lost at trial, did he claim to represent Wingard, and with an apparent purpose—to avoid paying costs. There was no indication before the judgment was entered that Jeffrey intended to share any of his winnings with Wingard, or that he felt any legal obligation to do so. Indeed, a successor in interest is “not appointed to represent the interest of . . . absentee plaintiffs, but merely [steps] into [the decedent's] position as to the survivor actions” (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 509; 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].)

Against this backdrop of information, we turn to the legal issues Jeffrey raises.

C. Applicable Statutes:

In this case, several statutes come into play. The first is Code of Civil Procedure section 1032, subdivision (b), which generally permits a prevailing party to recover costs as a matter of right. Regal is clearly the prevailing party entitled to costs. The second applicable statute is Code of Civil Procedure section 1033.5, which permits a prevailing party to recover attorney fees and expert witness fees as costs when those fees are allowed by statute. (Code Civ. Proc., § 1033.5, subs. (a)(10)(B) & (b)(1).) Here, questions arise as to whether attorney fees are allowed by Civil Code section 55,⁶ given Jeffrey's status as a successor in interest, and whether expert witness fees are permitted under Code of Civil Procedure section 998, subdivision (c)(1), given the form and content of Regal's statutory offer to compromise.

Jeffrey contends that Code of Civil Procedure section 1026, subdivision (b) bars the imposition of attorney fees in this context. He also argues that the Code of Civil Procedure section 998 offer was invalid, so the imposition of expert witness fees is also improper. We address the interpretation of Code of Civil Procedure section 1026, subdivision (b) first.

⁶ Civil Code section 55 provides: "Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, . . . may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees." Here, the first amended complaint sought an injunction pursuant to Civil Code section 54 et seq., pertaining to the access of disabled persons to public places.

(1) Code of Civil Procedure section 1026—

Code of Civil Procedure section 1026 provides: “(a) Except as provided in subdivision (b), in an action prosecuted or defended by a personal representative, trustee of an express trust, guardian, conservator, or a person expressly authorized by statute, costs may be recovered as in an action by or against a person prosecuting or defending in the person’s own right. [¶] (b) Costs allowed under subdivision (a) shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense.”

Jeffrey emphasizes that he brought all causes of action other than the wrongful death cause of action as a successor in interest—which he characterizes as a personal representative. He insists that Code of Civil Procedure section 1026, subdivision (b) prohibits an award of costs against him. He explains that because he is acting as a fiduciary and there is no evidence of mismanagement or bad faith, any award of costs could be levied only against the decedent’s estate, not against him personally.

Clearly, Jeffrey is pursuing all causes of action other than the wrongful death cause of action as “a person expressly authorized by statute,” within the meaning of Code of Civil Procedure section 1026, subdivision (a). The statutory authorization in question is found in Code of Civil Procedure sections 377.10 et seq., pertaining to survival actions.⁷ The question then is the significance of Code of Civil Procedure section 1026, subdivision (b) in the situation at hand.

⁷ Code of Civil Procedure section 377.20, subdivision (a) provides: “Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person’s death, but survives subject to the applicable limitations period.” Section 377.30 states: “A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent’s successor in interest, . . . and an action may be commenced by the decedent’s personal representative or, if none, by the decedent’s successor in interest.”

The parties cite only one case addressing the application of Code of Civil Procedure section 1026, subdivision (b) to a person pursuing a survival action under Code of Civil Procedure section 377.10 et seq. That case is *Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898. In *Exarhos*, a grandson filed an action against a bank, claiming to be his grandmother's successor in interest with respect to certain bank accounts. (*Id.* at pp. 900-901.) The bank filed a demurrer, which the court sustained without leave to amend. The court held that, because a proceeding was pending for the administration of the grandmother's estate, the grandson was precluded from pursuing the action as a successor in interest. (*Id.* at pp. 901-902.) The court held the grandson liable for attorney fees, based on the attorney fee provision contained in the bank account signature card. (*Id.* at p. 902.) The appellate court affirmed. (*Id.* at pp. 903, 910.)

In a petition for rehearing, the grandson argued that the attorney fee award violated Code of Civil Procedure section 1026. (*Exarhos v. Exarhos, supra*, 159 Cal.App.4th at p. 907.) The appellate court first stated that the grandson had waived the argument, since he raised it for the first time in his petition for rehearing. (*Ibid.*) The court chose to address the legal issue in any event. (*Id.* at pp. 907-908; see *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 908 [court may address issue first raised on appeal when issue presents question of law applied to undisputed facts]; *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1303, fn. 15.)

The *Exarhos* court construed the grandson, a purported successor in interest pursuant to Code of Civil Procedure sections 377.30 and 377.32, as one prosecuting the action as “a person expressly authorized by statute,” within the meaning of Code of Civil Procedure section 1026, subdivision (a). (*Exarhos v. Exarhos, supra*, 159 Cal.App.4th at p. 908.) The court then stated that Code of Civil Procedure section 1026, subdivision (b) did not bar the imposition of costs against the grandson, as successor in interest to the grandmother. (*Ibid.*) The court explained that the grandson, “as an alleged

successor in interest, did not act in a representative capacity in this case, other than perhaps to represent himself. (See *Peterson, supra*, 154 Cal.App.4th at p. 509 [party acting in role of successor in interest was not acting in ‘representative capacity’ but rather ‘stepped into [decendent’s] position as to the survivor actions and prosecuted claims on . . . own behalf’].) Thus, assuming that section 1026, subdivision (a) [applied] in [the] case, the costs were chargeable to [the grandson] as the ‘party represented’ pursuant to section 1026, subdivision (b), even in the absence of a finding of bad faith.” (*Exarhos v. Exarhos, supra*, 159 Cal.App.4th at p. 908.)

Applied to the facts before us, *Exarhos v. Exarhos, supra*, 159 Cal.App.4th 898 shows that the trial court properly permitted fees to be awarded against Jeffrey, as successor in interest. Jeffrey fervently disagrees. He urges this court to disregard the authority of *Exarhos*. First of all, he maintains that the portion of *Exarhos* addressing Code of Civil Procedure section 1026 is purely dictum. Second of all, he insists that the case was simply wrongly decided. Jeffrey argues that since he was “a person expressly authorized by statute” to prosecute the action, within the meaning of section 1026, subdivision (a), he must be within the class of persons intended to be protected against the imposition of costs, by the application of section 1026, subdivision (b). In other words, he argues that he was in essence acting in his capacity as a personal representative or fiduciary on behalf of not only himself, but also his two brothers and Wingard. Because there was no evidence of either mismanagement of the estate or bad faith on his part, he was shielded from the imposition of costs by section 1026, subdivision (b), he says.

The question of dictum notwithstanding, Jeffrey has given us no reason to reject the reasoning of *Exarhos v. Exarhos, supra*, 159 Cal.App.4th 898 as applied to these particular facts. In the first amended complaint and in his Code of Civil Procedure section 377.32 declaration in support thereof, Jeffrey represented that only he and his brothers, not Wingard, succeeded to the decedent’s rights. Two of the three brothers

settled before trial. As we have explained, by settling their claims under the first amended complaint, the brothers necessarily settled their survival claims, since, as noted previously, all three brothers pressed each cause of action under the first amended complaint and all three of them requested relief with respect to each survival cause of action. Therefore, once Gregory and Richard settled all their claims under the first amended complaint, that left only Jeffrey pursuing his individual cause of action for wrongful death, and his survival causes of action, as successor in interest to the decedent, having stepped into the decedent's shoes. The argument that Jeffrey acted as a representative of Wingard is disingenuous, given the sustaining of the demurrer to the original complaint due to the inclusion of Wingard as a party, the filing of the first amended complaint without the naming of Wingard as a party, and the testimony of Wingard to the effect that he did not want to sue Regal and he understood that by failing to participate in the litigation he would collect no share of any judgment in favor of Jeffrey.

In this particular context, we agree that Jeffrey “did not act in a representative capacity in this case, other than perhaps to represent himself. [Citation.]” (*Exarhos v. Exarhos, supra*, 159 Cal.App.4th at p. 908.) Since he represented only himself, costs were properly charged against him as the “party represented,” within the meaning of Code of Civil Procedure section 1026, subdivision (b). (*Exarhos v. Exarhos, supra*, 159 Cal.App.4th at p. 908.)

(2) *Code of Civil Procedure Section 998—*

(a) *validity of unapportioned offer*

“Under section 998, until 10 days before 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.’ (§ 998, subd. (b).)” (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 504.) “If the offer is not accepted within 30 days or before trial, it is deemed withdrawn. (§ 998, subd. (b)(2).)”

The failure to accept an offer has consequences for a plaintiff who does not obtain a more favorable result at trial. In that event, the plaintiff cannot recover its postoffer costs, must pay the defendant's costs from the time of the offer, and may be held liable . . . for a reasonable sum to cover the defendant's expert witness fees. (§ 998, subd. (c)(1).)" (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 504, fn. omitted.)

Jeffrey claims that even though Regal made a statutory offer to compromise that he did not accept, and Regal prevailed at trial, Code of Civil Procedure section 998 does not operate to make him liable for Regal's expert witness fees because the statutory offer to compromise was invalid. This is so, he maintains, because Regal failed to apportion the offer between his two capacities. Case law dispels this argument.

In *Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th 498, a husband and wife filed a lawsuit against manufacturers, suppliers and users of asbestos products, alleging that the husband's asbestosis and lung cancer were caused by exposure to asbestos. They sought damages for the husband's personal injuries and for the wife's loss of consortium. The husband died before the litigation concluded. The wife, under a second amended complaint, continued to pursue her claim for loss of consortium, and also added a survivor claim as the husband's successor in interest, and a wrongful death claim as the husband's legal heir. (*Id.* at p. 501.) Defendant John Crane, Inc. made a Code of Civil Procedure section 998 offer to compromise, addressed to the wife in her three capacities, i.e., her individual capacity, her capacity as successor in interest, and her capacity as legal heir. John Crane, Inc. offered to waive costs, including expert witness fees, in exchange for a dismissal with prejudice. The wife let the offer lapse. (*Id.* at p. 502.)

John Crane, Inc. prevailed at trial and filed a memorandum of costs seeking expert witness fees and costs. (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 503.) The wife filed a motion to tax costs, asserting that there were in reality three plaintiffs and that the statutory offer to compromise was invalid because it failed to

provide an allocation as to each of the three plaintiffs. (*Id.* at pp. 503-504.) The trial court awarded approximately \$72,000 in costs. (*Id.* at p. 504.) The appellate court affirmed. (*Id.* at p. 501.)

In so doing, the *Peterson* court said: “In general, “a section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them.” [Citations] There is an exception to this rule: where there is more than one plaintiff, a defendant may still extend a single, joint offer, conditioned on acceptance by all of them, if the separate plaintiffs have a ‘unity of interest such that there is a single, indivisible injury.’ [Citation.]” (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 505.) The court further stated: “In determining de novo whether John Crane’s offer was valid for purposes of section 998, we consider first how many parties the offer addressed. If more than one, we would consider whether the section 998 offer was apportioned among the offerees and not conditioned on all of them accepting it; and, if this standard was not met, whether the offer was nonetheless valid because the offerees had a unity of interest.” (*Id.* at pp. 505-506.)

The *Peterson* court concluded that the statutory offer to compromise was addressed to only one party. (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at pp. 506-507.) In reaching this conclusion, the court noted: “Section 998 provides that ‘any party may serve an offer . . . upon any other *party* to the action’ to allow judgment in accord with the statute. [Citation.]” (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 506.) In determining the meaning of the statute, the court observed: “The relevant plain and commonsense meaning of the word ‘party’ is ‘[a]n individual concerned in a proceeding’ such as ‘a person who is concerned in an action or affair.’ [Citation.] A ‘party,’ therefore, is a person—not a cause of action, primary right, or legal capacity, but a *person*.” (*Id.* at p. 507, fn. omitted.) The court further explained that the

wife's "multiple capacities merely reflected why she, as a singular party, had standing to assert different types of claims. [Citation.]" (*Ibid.*)

Jeffrey insists that *Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th 498 was wrongly decided, and therefore does not control the outcome of this case. He takes issue with the *Peterson* court's conclusion that the wife's role as a successor in interest was not a representative capacity. (*Id.* at p. 509.) Jeffrey says *Peterson* is contrary to case law that makes clear a successor in interest acts in a representative capacity distinct from his or her individual capacity. However, the *Peterson* court aptly distinguished cases addressing successors in interest in other contexts, such as when a person timely files a wrongful death action in his or her individual capacity but untimely files an amended complaint containing a survivor cause of action. (*Id.* at pp. 508-509.) We need not belabor the discussion.

The *Peterson* court also distinguished cases where a single offer was made to multiple offerees who were different people, conditioned on the acceptance by each offeree, such that one offeree could not accept if another did not. (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at pp. 507-510.) In *Peterson*, the wife, although she acted in different capacities, was the only person who had to decide whether to accept the offer or not. The court stated that, while in contexts where a single offer was made to multiple persons it could be impossible, because of the lack of allocation among them, to tell whether any one of those persons did better at trial than he or she would have had the settlement offer been accepted, that concern was absent in the case before it where the offeree was a single person, albeit acting in multiple capacities. It was clear that the wife would have fared better had she accepted the offer to compromise. (*Id.* at p. 510, fn. 11; see also *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747.)

Jeffrey has not convinced us that the analysis of *Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th 498 is faulty. However, even were we to disagree with the viewpoint of the *Peterson* court that one person is necessarily one party for the purposes

of Code of Civil Procedure section 998, whether or not that person is pursuing causes of action in more than one capacity, we would nonetheless agree with the result of the case. Where the one remaining party to the litigation, although appearing in more than one capacity, has a unity of interest in each of those capacities, a statutory offer of compromise made to that one party is valid even if not apportioned among the separate capacities. (*Peterson v. John Crane, Inc.*, *supra*, 154 Cal.App.4th at pp. 505-506; cf. *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 630.)

Here, when Jeffrey received Regal's offer to compromise, he was representing neither his brothers, who had settled, nor Wingard, who had declined to pursue Regal. Consequently, Jeffrey in his two capacities had a unity of interest—his own—in evaluating Regal's offer. Under the circumstances, the offer as framed was not invalid just because it was unapportioned between Jeffrey, in pursuit of the wrongful death cause of action, and Jeffrey, in pursuit of the remaining causes of action.

(b) reasonableness of offer

Jeffrey also contends that the statutory offer to compromise was not valid because it was not reasonable. As he points out, it has been held that: “[I]n order to accomplish the legislative purpose of encouraging settlement of litigation without trial [citation], a good faith requirement must be read into section 998. In other words, the pretrial offer of settlement required under section 998 must be realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement” (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821.)

“Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The burden is therefore properly on plaintiff, as offeree, to prove otherwise.” (*Elrod v. Oregon Cummins Diesel*,

Inc. (1987) 195 Cal.App.3d 692, 700.) “Whether a section 998 offer is reasonable must be determined by looking at circumstances when the offer was made. [Citation.]”

(*Id.* at p. 699.) Jeffrey thinks this clinches it.

Gregory and Richard settled for \$50,000 apiece. Jeffrey maintains that it could not possibly have been realistically reasonable to expect that he would settle for only \$1 more. But of course, Jeffrey premises his argument on the notion that his brothers settled only their wrongful death claims, for \$50,000 apiece, and preserved their rights to share in the proceeds of a survival action. So, as Jeffrey sees it, were he to have accepted the offered \$50,001 in settlement, he would have been accepting \$50,000 for his wrongful death claim and only \$1 for the survival claims. He also claims that there was a \$32,045.69 medical lien that would in effect have reduced his settlement amount to only \$17,955.31.

Jeffrey’s attention is misfocused. He seems to argue that a defendant’s offer is unreasonable unless it is made in an amount a particular plaintiff favors. This is not the case.

“As a general rule, the reasonableness of a defendant’s offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known *to the defendant*. . . . If an experienced attorney or judge, standing in defendant’s shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. [Citation.] ¶ If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant’s information was known or reasonably should have been known to plaintiff.” (*Elrod v. Oregon Cummins Diesel, Inc.*, *supra*, 195 Cal.App.3d at p. 699, fn. omitted.)

Because Regal has made a prima facie showing that its offer was reasonable, the burden falls upon Jeffrey to demonstrate to the contrary. (*Elrod v. Oregon Cummins Diesel, Inc., supra*, 195 Cal.App.3d at p. 700.) In addressing the two-step test to assess the reasonableness of an offer, Jeffrey must first show that “the offer [did not] represent[] a reasonable prediction of the amount of money, if any, [Regal] would have to pay . . . following a trial” (*Id.* at p. 699, fn. omitted.) Information pertaining to the amounts Gregory and Richard settled for was not a predictor of the amount of money Regal would have to pay following trial. In other words, the information did not bear upon either the likelihood that Regal would be held liable at all, or the amount Regal would likely have to pay if held liable, given the facts surrounding the decedent’s accident or the application of apposite laws.

The record reflects that information regarding the \$32,045.69 medical lien was known before the offer to compromise was made. That is the only information we have in any way bearing upon the amount of money Regal would likely have had to pay if held liable at trial. Assuming the medical lien arose out of services provided in connection with injuries the decedent suffered on Regal’s premises, it was an indicator that the decedent suffered at least \$32,045.69 in damages due to the accident. However, Regal’s offer exceeded the amount of the medical lien by \$17,955.31. We have no information to indicate that the total amount of the offer did not constitute “a reasonable prediction of the amount of money, if any, [Regal] would have to pay [Jeffrey] following a trial” given the parties’ knowledge of the medical lien and any other relevant information known to both Regal and Jeffrey, such as any information bearing upon the likelihood that Regal would prevail at trial. (*Elrod v. Oregon Cummins Diesel, Inc., supra*, 195 Cal.App.3d at p. 699.)

“[W]hether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court. [Citation.]” (*Elrod v. Oregon Cummins Diesel, Inc., supra*, 195 Cal.App.3d at p. 700.) “The trial court was entitled to

infer [reasonableness] from the jury verdict.” (*Ibid.*) “In this case, no abuse of discretion has been shown.” (*Ibid.*)

(c) requirement of Seever hearing

Finally, Jeffrey contends that the court erred in failing to hold a *Seever* hearing to determine whether the costs awarded under Code of Civil Procedure section 998 were unreasonable given his financial situation. (See *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1561-1562.) However, as Regal points out, Jeffrey failed to request a *Seever* hearing in the trial court. “We need not resolve the potential application of *Seever* to the matter at hand, because [Jeffrey] did not raise the issue in the trial court. As a general rule, issues not raised in the trial court cannot be asserted for the first time on appeal.” (*Peterson v. John Crane, Inc., supra*, 154 Cal.App.4th at p. 515.)

D. Attorney Fees:

The trial court having awarded attorney fees to Regal pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(10)(B) and Civil Code section 55, Regal requests that this court award attorney fees on appeal pursuant to the same statutes. “[I]t is established that fees, if recoverable at all—pursuant either to statute or parties’ agreement—are available for services at trial *and on appeal.*” (Italics added.) [Citations.]” (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) Regal is entitled to its attorney fees on appeal. “Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees” [Citation.]” (*Black Hills Investments, Inc. v. Albertson’s, Inc.* (2007) 146 Cal.App.4th 883, 896.) Accordingly, the matter is remanded to the trial court for determination.

III

DISPOSITION

The amended judgment is affirmed. Regal shall recover its attorney fees and costs on appeal. The matter is remanded to the trial court for a determination of the

amount of such attorney fees and costs.

Regal's February 7, 2008 motion to augment the record is granted. The documents attached to that motion shall be deemed a part of the record on appeal.

Regal's August 15, 2008 motion to augment the record is granted in part and denied in part. The documents attached to that motion as exhibits A through J and L shall be deemed a part of the record on appeal. The documents attached to that motion as exhibits K, M, and N shall be excluded from the record on appeal. The clerk of the court is directed to file the original certified reporter's transcripts for the proceedings that took place on September 21, 2006, February 21, 2007 and February 22, 2007.

Regal's August 15, 2008 request to seal the record is denied. The clerk of the court is directed to return the documents that Regal provided conditionally under seal on August 15, 2008.

Jeffrey's August 18, 2008 motion to augment is granted. The documents attached to that motion shall be deemed a part of the record on appeal.

The clerk of the court is directed to file Jeffrey's supplemental letter brief received on August 18, 2008.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.