CASE NO. H051549

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

HARRIET TOM, *et al.*,

Plaintiffs and Appellants,

v.

STANFORD HEALTH CARE,

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

On Appeal From Order of the Superior Court for the State of California, County of Santa Clara

Honorable Socrates Peter Manoukian
Case No. 20CV367303

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or parties to list in this Certificate per California Rules of Court, 8.208 other than the named parties in this action.

DATED: April 30, 2024 BROWN NERI SMITH & KHAN LLP

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I.

INTRODUCTION

Darrell Tom would have lived to see his son's graduation if Respondent Stanford Health Care ("Stanford") had valued his life over its own interests and admitted him to its intensive care unit ("ICU"). It failed to do despite Darrell's obvious need because one of Stanford's ICU's doctors had sexually harassed Darrell's daughter right by his bedside, and Stanford decided it was more important to keep the family out of intensive care than to save Darrell's life.[1] Yet, despite serious allegations brought by Darrell Tom's surviving relatives, widow Harriet Tom, son Nicholas Tom, daughter Andrea Tom, and his estate (collectively the "Plaintiffs" or the "Tom Family") and evidence in support thereof, the trial court below found that Stanford's California Code of Civil Procedure section 998 Offer was legitimate, along with other indefensible expenses.

[1] All internal alterations, quotation marks, footnotes and citations herein are omitted, and all emphasis is added unless otherwise noted.

The trial court did so by applying the wrong legal standard, looking at the wrong time period for assessment of the 998 Offer's authenticity. As common sense would have it, starting down the wrong path leads to the wrong destination. The actual standard to apply requires answering the question that, at the time the offeree proffered the 998 Offer, whether any realistic way it would be accepted by the offeree existed.

In this case, the answer is simply no. Darrell Tom had struggled with cancer for decades before his admission to Stanford's facility for a stem-cell transplant in November 2018. He had a wife and two children, a son and a daughter, all of whom had been intimately involved with his care and incredibly supportive. Despite Darrell's significant improvement and his cancer being undetectable after the transplant, he had a critical episode in March 2019, which, as Appellants' expert witness affirmed, he would have survived if he had been timely admitted to the ICU. Yet Stanford refused his admission, despite repeated requests from the family and Darrell's non-ICU physicians. Appellants' expert witness opined that this refusal was more

than beneath the standard of care—there was no possible medical reason not to admit Darrell. Stanford acted in reckless disregard to the dire consequence that followed, namely Darrell's wrongful death.

This refusal to offer critical care stemmed from an earlier reported incident. One of Stanford's ICU physicians responsible for Darrell's survival propositioned Darrell's daughter and legal decision-maker, forcing her to choose between threatening her father's lifesaving care and acquiescing to unwanted sexual activity. Stanford indisputably came to know this due to a report filed, against the family's wishes, by the Tom family's Stanford chaplain. Due to the incident, Stanford decided that it was more important for Darrell and his family to be kept out of the ICU than it was for Darrell to survive.

Under these circumstances, where at minimum the record indicates real belief by the Tom Family, it is unfathomable an offer of zero dollars and mere costs could ever be accepted, much less prior to depositions and expert discovery.

The additional costs awarded were for smaller costs that Stanford never justified under the appropriate legal standard either. Stanford improperly filed three motions for summary judgment, and then was awarded the fees for doing so. Stanford never justified its travel costs, and yet the costs were awarded to them. To the extent that the trial court did not tax costs, the Tom Family asks that the decision be reversed.

II.

STATEMENT OF FACTS

A. The Underlying Dispute

Darrell Tom was 63 when he died at the hands of Respondent Stanford Health Care. (8 JNCT 2145.)[2] At that time, he had successfully battled cancer for over 30 years. And, at the time of his death, his cancer had not returned following treatment—he was successfully recovering from

[2] On February 1, 2024, the Court of Appeal, Sixth Appellate District granted Appellant's request to designate the clerk's transcript used in a prior appeal and took judicial notice of the clerk's transcript filed in *Tom et al. v. Stanford Health Care*, Appellate Case No. H051074. Any reference made to this record will be cited as the Judicially Noticed Clerk Transcript ("JNCT").

complications from his transplant while hospitalized. (8 JNCT 2147.) He had a wife, Harriet, and two children, Andrea, and Nicholas, who joined together to help Darrell battle cancer every step of the way. Darrell was looking forward to Nicholas' upcoming high school graduation and had every reason to keep fighting. (8 JNCT 2147 ¶ 22.)

Sadly, rather than prioritize Darrell's treatment, one of Stanford's Intensive Care Unit ("ICU") doctors, Gundeep Dhillon, unethically propositioned Darrell's daughter, Andrea, right by Darrell's bedside. (8 JNCT 1828, 1883:9-22.) At the time, Darrell was unconscious, and Dr. Dhillon was the Stanford physician literally responsible for keeping Darrell alive. This sexual harassment was even more egregious and unethical because Andrea knew that refusing Dr. Dhillon's advances could negatively impact her father's care, which at this point was a matter of life and death. The ICU team had already made clear to the family that the ICU team decided whether and how much to treat Darrell regardless of the family's wishes. When Darrell's admission to the ICU became critical to his survival, Stanford made the

choice to let him die rather than provide him with the care he needed.

Darrell was first diagnosed with cancer (polycythemia vera) in 1993 after a wisdom tooth extraction. (13 JNCT 3869 ¶ 71.) He responded well to treatment consisting of the chemotherapy drug hydroxyurea in the 1990s, with his medical chart indicating that he "overall did well." (13 JNCT 3870 ¶ 71.) At the end of the decade and into the early 2000s, he was not recommended for a transplant by doctors at UCLA and the Seattle Fred Hutchinson Cancer Research Center in Seattle. (*Ibid*.)

By mid-2006, Darrell was still showing normal blood counts. *Id*. When he was checked six years later, he was still responding well to drug treatment, staying on hydroxyurea at the recommendation of his doctors. *Id*. In February 2013, Darrell was examined by Stanford Hematology and kept on the same therapy plan. (*Ibid*.) In May 2015, Stanford Hematology was still treating Darrell who continued to do well. (*Ibid*.)

However, his condition worsened in 2017 and he was diagnosed with myelofibrosis, a blood cancer, in June 2017.

In August 2017, He was put on a new chemotherapy drug which he started September 2017, and a stem cell transplant was recommended. (13 JNCT 3872-73 ¶ 71.)

Darrell was eventually admitted to Stanford's hospital on November 10, 2018, to receive his bone marrow transplant and related care. (13 JNCT 3828 ¶ 2.) Darrell had no advanced directive on file when admitted. (13 JNCT 3872-73 ¶ 74.)

Following his admission, Darrell received his transplant on November 16, 2018. (13 JNCT 3875 ¶ 74.) Afterward, he fell very ill and was intubated (a breathing tube was placed), sedated, a machine was used to help him breathe, and he was admitted to Stanford's ICU on November 22, 2018. (13 JNCT 3876 ¶ 76.) Darrell remained in the ICU from November 22, 2018 until he was discharged on January 4, 2019. (13 JNCT 3877 ¶ 77.)

During this first ICU admission, the Stanford ICU team informed the Tom family that they believed Darrell would never recover or be able to breathe on his own (13 JNCT at 3880 ¶ 82.) Nonetheless, the Tom family, mainly Harriet and Andrea who were Darrell's surrogate decision

makers, reiterated they wanted Darrell's wishes followed. Darrell wanted to have "everything done" to survive on December 4, 2018. (13 JNCT 3878 ¶ 80.) On December 7, 2018, there was another meeting in which Stanford again posited that further care resuscitation efforts would be futile, but the family held firm. (13 JNCT at 3880 ¶ 82.)

By December 18, 2018, the Stanford ICU team indicated that they believed their efforts were "medically ineffective," giving up on him, and telling the family that "we were (sadly) prolonging his dying process." (13 JNCT 3883 ¶ 84.) Nonetheless, "[h]is daughter [Andrea] expressed her desire to continue supporting him per his wishes." *Id*. Despite this, Stanford repeatedly recommended Darrell's transfer to comfort care, meaning that instead of providing "full care" to attempt recovery that care would focus on letting him die comfortably. *Id*.

Luckily for Darrell, his family refused to accept Stanford's proposed comfort care, and over the next couple of weeks Darrell improved steadily enough that by January 2, 2018 he was "able to follow commands". (13 JNCT 3887 ¶ 92.) He was extubated (the breathing tube came out) two

days later and Darrell was breathing on his own. (13 JNCT 3888 ¶ 94.) He was then sent out of the ICU and back to the hospital floor because he had improved so much. (13 JNCT *Id*. at 3877 ¶ 77.)

Darrell remained in the hospital, where his health was monitored by the bone marrow transplant (BMT) unit and others. (13 JNCT 3889 ¶ 95.) Afterward, he experienced bowel issues and Stanford recommended exploratory bowel surgery to investigate. (13 JNCT 3891¶ 97.) Darrell was admitted to surgery on January 23, 2019. (13 JNCT 3890-91 ¶ 97, 98.) He was then readmitted to the ICU following surgery. (13 JNCT 3892 ¶ 99.) He was reintubated (the breathing tube placed) on January 28, 2019. (13 JNCT 3892 ¶ 102.) He was extubated (the breathing tube removed) on February 14, 2019. (13 JNCT 3898 ¶ 112.)

It was during this second stint in the ICU that Darrell's attending physician Gundeep Dhillon sexually harassed Andrea. He propositioned her in front of her unconscious father while it was clear he held Darrell's life in his hands. (8 JNCT 1828, 1883:9-22.) Andrea knew that rejecting his advances could impact Darrell's care, but she

did reject them while promptly informing her mother, Harriet Tom, about what had happened. (8 JNCT 1828, 1883:9-22.)

When Andrea refused Dr. Dhillon's advances, she informed her mother, but they agreed to not report the incident to Stanford while Darrell remained in the hospital, out of fear that Stanford might retaliate. (8 JNCT 1828, 1883:9-22.) Harriet, nevertheless, reported it to the family's chaplain provided by Stanford because Harriet believed what she told the chaplain was confidential. (13 JNCT 3817 ¶ 19.) Harriet understood that the chaplain was involved to provide the Tom family with spiritual care, and Harriet even specifically directed the chaplain not to disclose the report to anyone. (13 JNCT 3817 ¶ 19.) Harriet, like Andrea, knew that Andrea refusing Dr. Dhillon's advances could have a life-or-death impact on Darrell. Against Harriet's wishes, the chaplain reported the harassment to Stanford. (13 JNCT 3817 ¶ 19.) Stanford quickly launched and concluded an investigation claiming no wrongdoing was found, but at the same time barring Dr. Dhillon from further contact with the Tom family. (13 JNCT 3817 ¶ 20.)

After being extubated and breathing once more on his own, Darrell improved dramatically and was again discharged from the ICU back to the hospital floor. Darrell could speak, leave his room, and he was showing interest in his family, particularly his son's upcoming graduation from high school in May. He expressed a great desire and excitement to see his son graduate. (8 JNCT 2116:7-9, 2117:11-12.)

While Darrell was consistently improving, in March, Darrell's respiratory status suddenly worsened in what, per Plaintiffs' ICU expert Dr. Murphy, should have been a temporary setback. (7 JNCT 2045–6) ("While Mr. Tom had several serious underlying health conditions, as noted in his autopsy report, none of these were inevitably lethal and none of them would inevitably cause asystole which was his immediate cause of death… In sum… aside from his acute episode on March 16, 2019, his underlying lung function was fundamentally getting better.")

Given the decline in his respiratory status, Darrell immediately needed ICU-level care. Essentially, Darrell was in a fragile condition after his transplant and months in the

hospital, so he could not afford any period of time without being able to breathe. (7 JNCT 2046.) ("Mr. Tom developed asystole [stopped heart function], and died, because he was inadequately monitored."). Dr. Murphy opined that Darrell clearly required a heightened level of care only available in the ICU, because if he was left for even a very short amount of time without his supplemental oxygen, and supplemental oxygen breathing devices are easily dislodged outside of the ICU, or if Darrell suffered from something as simple as a bloody nose without immediate attention, and Darrell was predisposed to bloody noses, these sorts of events would be life threatening without immediate intervention.

So long as Darrell's respiratory status was closely attended to, Dr. Murphy's view of the record was that Darrell would have survived. (7 JNCT 2046.) ("Had Mr. Tom been adequately monitored, which would have occurred in the ICU, he would not likely have gone into asystole on March 19, 2019, because acute events like aspiration and/or electrical cardiac decompensation would have been identified and addressed appropriately. ICU care would most likely have prevented the arrythmia that Mr. Tom

developed leading to asystole. If the arrythmia had developed, ICU care should have resolved it prior to its leading to asystole.").

But Stanford's ICU team refused to readmit Darrell despite being consulted repeatedly by the BMT team which understood he needed ICU-level care. Per both Andrea Tom and third-party witness Dr. Singh who directly overheard the call, Stanford's BMT fellow and the family's ostensible "champion" managing Darrell's care called the family when Darrell's respiratory status worsened to tell them that Darrell was going to be sent to the ICU, but that there were issues with them admitting him given the prior incident with Dr. Dhillon. (7 JNCT 1846-47, 1990-91.) Over the course of several days, the family repeatedly pled with Stanford to admit Darrell to its ICU but they were repeatedly rebuffed. (13 JNCT 3637-40.) Ultimately, Darrell's respiratory status suddenly worsened while no one was watching him, and he died without Stanford making any adequate attempt to save his life. In the end, Stanford simply let Darrell die, fully understanding this would be the result of their refusal to admit him to the ICU. (7 JNCT 1846-47, 1990-91.)

Despite these facts, as discussed below, the trial court determined that a section 998 offer for zero dollars and each side keeping their own costs was a serious offer, putting the Tom family on the hook for hundreds of thousands of dollars' worth of costs that Stanford spent in its defense. (2 CT 330-335.)[3]

B. Proceedings Below

1. Plaintiffs File a Lawsuit Against Stanford

The initial complaint was filed on June 15, 2020 by the Tom Family, comprised of Harriet Tom, Nicholas Tom, Andrea Tom, and the estate of Darrell Tom ("Appellants") against Stanford and Dr. Dhillon for the avoidable death of Darrell Tom, Harriet's husband and Nicholas and Andrea's father, under their care. (42 JNCT 12508.)

In the Complaint, Appellants alleged 15 causes of action against SCH and Dr. Dhillon: (1) Sexual harassment, (2) sexual discrimination, (3) willful misconduct, (4) professional negligence, (5) breach of fiduciary duty, (6)

[3] Any references to "CT" shall herein refer to the Clerk's Transcript prepared for the record on appeal in this case as designated in Appellant's December 28, 2023, amended designation. Two volumes were prepared.

negligent supervision and retention, (7) fraudulent concealment, (8) civil conspiracy, (9) interference with exercise of civil rights in violation of the Bane Act, (10) retaliation in violation of the health and safety code § 1278.5, (11) wrongful death, (12) survival actions, (13) intentional infliction of emotional distress, (14) negligent infliction of emotional distress, and (15) unfair competition (42 JNCT 12508.)

A key allegation is that Darrell's ICU doctor at Stanford sexually harassed Andrea, that this was the subject of a formal investigation, and it led to retaliation from the ICU team against the decedent. (42 JNCT 12511 ¶ 26.) The problem arose when Andrea Tom was visiting Darrell, who was critically ill in the ICU, and was present during a visit from Dr. Dhillon. (42 JNCT 12514 ¶ 48.) During this visit, Dr. Dhillon sexually harassed Andrea Tom, who reported it. (42 JNCT 12514 ¶ 49-51.) In retaliation, the doctors on the ICU team that could have saved Darrell's life refused to accept him back into the ICU causing his death. (42 JNCT 12511, ¶ 26.) As previously discussed, substantial evidence supports all these allegations.

Appellants filed an amended complaint on August 28, 2020. (42 JNCT 12530.) Appellants thereafter stipulated filing a second amended complaint. (42 JNCT 12582.) The gravamen of the complaint remained the same. (*See ibid.*)

2. Appellants' Key Allegations Proceed to Discovery

On November 20, 2020, Stanford filed a demurrer and motion to strike. (41 JNCT 12492-12507.) Essentially, Stanford argued that the sexual harassment claims could not be imparted to Andrea Tom while her father, the patient to whom the hospital owed a direct duty, was unconscious even though she had power of attorney at the time. (*See ibid.*) On March 19, 2021, the trial court dismissed claims 1, 2, 7, 8, 9, 12, 13 (as to Harriet and Nicholas only), and 14 without prejudice. (41 JNCT 12018-12031.)

Subsequently, on April 5, 2021, Appellants filed the Third Amended Complaint. (40 JNCT 11971-11997.) This complaint consisted of claims for (1) Sexual harassment, (2) sexual discrimination, (3) willful misconduct, (4) professional negligence, (5) breach of fiduciary duty, (6) negligent supervision and retention, (7) fraudulent

concealment, (8) civil conspiracy, (9) interference with exercise of civil rights in violation of the Bane Act, (10) retaliation in violation of the health and safety code § 1278.5, (11) wrongful death, (12) intentional infliction of emotional distress, (13) negligent infliction of emotional distress, and (14) unfair competition. (*Ibid*.)

On May 5, 2021, Respondent filed another demurrer and motion to strike allegations in the Third Amended Complaint. (40 JNCT 11869-11915.) On August 4, 2021, the trial court partially sustained that demurrer and granted portions of the motion to strike. (39 JNCT 11402-11422.) The trial court sustained the demurrer as to claims 1 and 2 for lack of standing, while the demurrer as to claims 7, 8, 9, 10, and 13 were sustained for failure to state a claim without leave to amend. (*See ibid*.) All other claims remained against both Stanford and Dr. Dhillon. The trial court also granted the motion to strike as to the complaint's Paragraphs 148, 185, 126, and the prayer for relief without leave to amend. (*Ibid*.)

Following the dismissal, the parties continued litigating the Fourth, Sixth, Seventh, Eleventh, Twelfth, and

Fourteenth Causes of Action. During litigation, the parties took extensive discovery, with each side hiring expert witnesses to analyze the adequacy of medical care provided in the case. The parties took several depositions of percipient and expert witnesses.

As part of its case, Appellants retained two medical expert witnesses, including an ICU and recovery expert Dr. Peter Murphy. (8 JNCT 2143-2157, 2143-2157.) Appellants deposed fact witnesses Dr. Gundeep Dhillon, Dr. Joshua Mansour, the BMT physician fellow who was the family's "champion" at Stanford, as well as ICU nurse Marie Cannella, Stanford chaplain Emily Linderman and Stanford nurse Ana Stafford.

Respondent, in turn, deposed all the living Appellants: Andrea, Harriet, and Nicholas Tom. In addition, Stanford deposed another fact witness, Dr. Nathan Singh.

3. Stanford Makes a 998 Offer and then a Subsequent Offer of Settlement

On October 12, 2021, Stanford made an offer under Code of Civil Procedure section 998 for $0.00, with each side to bear their own costs (the "998 Offer"). (1 CT 19-21.)

The statement of damages that the Tom family prepared shortly before, on January 20, 2021, listed actual damages of over $50 million. (1 CT 30.) Following Stanford's offer, there is no record of any response, allowing it to simply expire under the the standard 30-day period under Section 998. (Code Civ. Proc., § 998).

The next time that Stanford made a settlement offer, it was on March 23, 2023, for $10,000, before resolution of its summary judgment motions. (1 CT 26-27.)

4. Stanford Files Three Motions for Summary Judgment, Which the Trial Court Largely Grants

On December 20, 21, and 23, 2022, Stanford filed three concurrent motions for summary judgment, without leave of court to file an overlong memorandum in support of summary adjudication, and despite the combined three motions well exceeding the word limit for a motion for summary judgment.[4] (38 JNCT 11368, 22 JNCT 6471, 30 JNCT 8991.) The first sought to adjudicate the fourth and

[4] The Superior Court ruled this was a harmless error. (1 JNCT 199.)

eleventh causes of action, the other sought to adjudicate the sixth cause of action, and the remaining motion sought summary judgment on the remaining causes. (*See ibid*.)

Appellants filed an omnibus opposition with exhibits on March 7, 2023. Due to an issue with the exhibit upload into the Court's system, the hearing was continued from March 21, 2023 to April 4, 2023, to allow for Appellants to properly complete the record. (8 JNCT 2212.) During this period, Appellants completed the record by filing their complete evidence (which Respondent had since March 7, 2023, but the trial court did not). In addition, Appellants further supplemented the record with, *inter alia*, a sworn declaration and deposition testimony by Dr. Murphy, whose deposition was taken on March 24, 2023. (7 JNCT 2038-2054; 8 CT 2186.)

The trial court granted Respondent's motions (for the most part) on April 18. 2023 (1 JNCT 78), followed by a judgment on the same day. (1 JNCT 83-84.) In relevant part, summary judgment was granted on: (1) Third Cause of Action for Willful Misconduct for failure to raise an issue of material fact due to the evidence being irrelevant,

speculative, or inadmissible hearsay (1 JNCT 66-69); (2) Fourth Cause of Action for Professional Negligence based on the claimed inadmissibility of Appellants' expert declarations (1 JNCT 69-70); (3) Eleventh Cause of Action for Wrongful Death for the same reasons as the "professional negligence claim" (1 JNCT 73-74); (4) Twelfth Cause of Action for intentional infliction of emotion distress for the same reason as the "third cause of action" (1 JNCT 74-75), and (5) Fourteenth Cause of Action for unfair competition because it is contingent on the other claims, which were summarily judged (1 JNCT 75-76). Finally, the court also granted summary judgment as to the claim for punitive damages based on its finding that an employer cannot be liable for punitive damages for an employee's actions and lack of triable issues of fact (1 JNCT 76-78).

To immediately appeal summary judgment, Appellants stipulated to dismiss the surviving seventh cause of action, since the trial court insisted on it proceeding to trial by itself without awaiting the related appeal of the summary judgment decision, which would have been wasteful. (2 RT 38.)

5. Stanford Seeks Hundreds of Thousands of Dollars in Costs Following Grant of Summary Judgment

Following the trial court's resolution of the summary judgment motions, Stanford sought over $100,000 in costs, of which $82,874.02 were not recoverable in the following four categories (1) filing costs for filing three summary judgment motions, (2) travel costs for depositions, (3) internal copying costs relating to deposition subpoenas, and (4) post-998 Offer costs. (1 CT 10-15.) By far the largest were costs associated with hiring expert witnesses, travel costs, etc. that Stanford justified using Section 998 of the Civil Code, which were incurred following an offer made on October 12, 2021, of $0.00. (1 CT 10.)

On May 24, 2023, the Tom Family filed a motion to tax costs, seeking reversal of the costs for Stanford filing three motions for summary judgment instead of one, unreasonable travel costs, internal copying costs, and the bulk of costs, all costs incurred after the 998 Offer. (1 CT 7-38.)

Stanford filed an opposition on August 22, 2023. (1 CT 39.) The Tom Family replied on August 28, 2023. (1 CT 239.) The trial court issued its order on September 6, 2023. (2 CT 330.) The court only eliminated the internal copying costs, leaving the rest, including the bulk of the costs requested based on the finding that the 998 offer was legitimate. (2 CT 330-33.) As such, the Motion to Tax Costs was largely denied, with only $1,000 in fees shaved off, leaving $81,874.02 in remaining fees still to be charged. (2 CT 342.)

III.

STANDARD OF REVIEW

Under normal circumstances, examining the application of proper law to the facts, "[t]he standard of review on issues of attorney's fees and costs is abuse of discretion." (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512; *see Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821 a grant of attorneys' fees made at the court's "discretion" under 998 because the "token offer" made under section 998.)

Even under the abuse of discretion standard, the appellate court probes into the analysis and facts:

> "Our search for substantial evidence in support of the judgment 'does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created ... merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable ..., credible, and of solid value...." The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence"; inferences that are the result of mere speculation or conjecture cannot support a finding.'"

(*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512 [internal citations omitted.]) So, under this standard, "one must determine whether the evidence thus marshaled is substantial." (*Kuhn v. Department of General Services*, (1994) 22 Cal.App.4th 1627, 1633.)

In this case, the trial court applied the incorrect legal standard when examining the determination of post-998

Offer costs, and any application of the incorrect legal standard to facts is reviewed de novo. (*Sedlock v. Baird*, (2015) 235 Cal.App.4th 874, 884 [following application of the wrong rule, the appellate court shall "apply the independent standard of review in selecting the applicable law and applying that law to the facts of the case."]) This is because "the abuse of discretion standard does not allow trial courts to apply an incorrect rule of law. Consequently, a trial court's resolution of a question of law is subject to independent (i.e., de novo) review on appeal." (*Rubin v. Ross*, (2021) 65 Cal.App.5th 153, 161–62 [Quoting *County of Kern v. T.C.E.F., Inc.*, (2016) 246 Cal.App.4th 301, 316.])

The trial court applied the wrong rule of law in its analysis of post-998 Offer costs, so this Court should review this question de novo. (*See* 1 CT 332.) The appropriate timeframe to consider the validity of a 998 Offer is the time of the offer. (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th at p. 924 ["Whether a section 998 offer has a reasonable prospect of acceptance is a function of two considerations, both to be evaluated in light of the

circumstances at the time of the offer and not by virtue of hindsight."] [Internal quotations and citations omitted.])

The court did exactly the opposite, employing hindsight and setting the time of its analysis of acceptance of the offer *at the time of the summary judgment* motions *not* the 998 Offer. Its only explanation of its reasoning was, "Plaintiffs here do not argue that they had insufficient time to conduct discovery on the case. The rulings by this Court on the defense motion for summary judgment were filed on 18 April 2023, almost 3 years after the filing of the complaint, and six days before the last trial date. "Under [sic] these circumstances, this Court finds that the Code of Civil Procedure, § 998 was reasonable and made in good faith." (2 CT 341.) The evaluation of the state of discovery at the time of the summary judgment as the basis for the court's order is legal error applying the wrong legal standard, necessitating de novo review.

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IV.

ARGUMENT

A. Stanford's 998 Offer Was Inauthentic; Applying the Correct Legal Standard, Stanford Has No Right to Recover Its Post-Offer Costs

A 998 offer is made in good faith only if the offer is "'realistically reasonable under the circumstances of the particular case'" (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d at p. 698.) (quoting *Wear*, *supra*, 121 Cal.App.3d at p. 821.) In other words, an offer is only valid if it "carr[ies] with it some reasonable prospect of acceptance" (*Regency Outdoor Advertising, Inc. v. City of Los Angeles*, (2006) 39 Cal.4th at p. 531.)

A 998 offer must be offered in good faith as a true attempt to resolve a case via settlement, because it carries with it a major threat of significant costs, so "[a]pplying the 'stick' in such instances would [] encourage litigants to 'game the system by making ... offers they can reasonably expect the [offeree] will refuse,' allowing them 'to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees' and, if they are

plaintiffs, prejudgment interest. (*Vick v. DaCorsi*, (2003) 110 Cal.App.4th 206, 211 [citation omitted].)

This is exactly the windfall the trial court granted to the Stanford in this case, even though "The courts have uniformly rejected an interpretation of section 998 which would allow offering parties to ... 'game the system.'" (*Westamerica Bank v. MBG Industries, Inc.,* (2007) 158 Cal.App.4th 109, 129 [citation omitted].)

The evaluation of whether the 998 offer was made in good faith requires reviewing the offeree's situation *at the time it was made*, "not by virtue of hindsight." (See *Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 927 [citations omitted].) A good faith offer must be (1) "within the 'range of reasonably possible results" at trial, considering all of the information the offeror knew or reasonably should have known," and (2) "offeror [must] know that the offeree had sufficient information, based on what the offeree knew or reasonably should have known, to assess whether the 'offer [was] a reasonable one,' such that the offeree had a "fair opportunity to intelligently evaluate the offer." (*Id.* at p.

924–25.) 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. This second test is necessary because the Code of Civil Procedure section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer. (*Elrod*, *supra*, 195 Cal.App.3d at p. 699.) Assessing Stanford's Offer in the correct timeframe, it is clear that it fails to satisfy both conditions.

1. Stanford's Offer Was Not Reasonably Within the Range of Reasonable Possibilities At the Time It Was Made, Nor Was It Reasonable to Believe The Tom Family Would Accept It

"[I[f there is some reasonable possibility, however slight, that a particular defendant will be held liable, there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view

of the current cost of preparing a case for trial." (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821.) The guiding star of the analysis is that under the circumstances when the offer was made, 998 offers are only valid if they meet its purpose of encouraging the settlement of lawsuits before trial. (*T. M. Cobb Co. v. Superior Court*, (1984) 36 Cal.3d 273, 277, 280.)

Stanford's 998 offer, made October 12, 2021, was for nothing but costs. [Abbott Decl. ¶ 2, Ex. A] (1 CT 17). This followed numerous claims, including wrongful death, surviving dismissal. (39 JNCT 11421). This was on top of a third-party witness and Plaintiff Andrea Tom hearing a clear admission of wrongdoing from a Stanford doctor who directly told them on the phone that Darrel Tom was not allowed readmission to the ICU due to the ICU team's discomfort with the Tom Family despite it being medically necessary. (34 JNCT 10014-15, at 101:12-102:21; 34 JNCT 10016-17, at 103:22-104:4; 7 JNCT 1850-51, at 159:24-160:10 [testifying about Dr. Mansour's statement as providing that her father's "medical condition had deteriorated" and "he was going to need closer monitoring

that they could not provide on the bone marrow transplant unit" but he would not be admitted "to the medical ICU upstairs because of the incidences that had occurred with Dr. Dhillon"]; see also 7 JNCT 1990-91, at 128:2-129:17 [same communication to Dr. Singh].) . Moreover, the fact that SHC later offered $10,000 to settle the case demonstrates that there was at least some chance of liability after SHC made its $0 998 offer. (1 CT 26-27)

The overarching question remains: Did the Offeror, Stanford, have any expectation that the offeree, the Tom Family, would accept when they sought over $500 million in damages for the loss of a beloved father and husband. Even if the Court finds that liability was tenuous, "[a]lthough [] liability was tenuous indeed, having in mind the enormous exposure the trial court could find that [offeror] had no expectation that its offer would be accepted. From this it follows that the sole purpose of the offer was to make [offerree] eligible for the recovery of large expert witness fees at no real risk." (*Pineda v. Los Angeles Turf Club, Inc.*, (1980) 112 Cal.App.3d 53, 63.) As the Court in *Pineda* discussed, the amount sought is reasonably

dispositive irrespective of recovery. (See *Ibid.*; *Wear*, *supra*, 121 Cal.App.3d 818 [Following the same rule and holding that "We believe that the same situation obtains with respect to the token offer at issue."])

The damages the Tom Family sought reflected the emotional turmoil underlying an action for the wrongful death a of loving father and husband killed by the callousness of the very people they relied on and trusted the most. (40 JNCT 11971-11997.) Given the emotional element of this case, Stanford's offer is even less realistic. If one takes the Tom Family at their word, simply that they believe their allegations, Stanford callously and intentionally killed Mr. Tom. Under these circumstances, acceptance of a token offer is unimaginable. The bottom line is this is the same scenario here given the clear authentic belief motivating the Plaintiffs.

Therefore, the record is clear, instead, that at the time of the Offer, zero dollars was a completely unrealistic 998 offer that Stanford could not have reasonably expected "reasonable prospect of acceptance," from the Tom Family. (*Burch v. Children's Hospital of Orange County Thrift*

Stores, Inc., (2003) 109 Cal.App.4th 537, 548.) At the time of the offer, the record shows that they had firm convictions in their claim that there was retaliation.

2. Stanford Understood that the Tom Family Had Inadequate Information to Evaluate the 998 Offer

Stanford's 998 Offer is also invalid because it knew the Tom Family lacked enough information to give a "fair opportunity to intelligently evaluate the offer." (*Elrod v. Oregon Cummins Diesel, Inc.*, (1987) 195 Cal.App.3d 692, 699–700.) Stanford made the offer on October 12, 2021, shortly after its final motion to dismiss was decided. (43 JNCT 12602.)

"In assessing the information available to the offeree, courts are to look to all of the relevant circumstances." (*Licudine*, *supra*, 30 Cal.App.5th at p. 925–26.) As a basic rule of thumb, some factors to provide a little bit of guidance is to examine three factors (1) "how far into the litigation was the 998 offer made," (2) what information bearing on the reasonableness of the 998 offer was available to the offeree prior to the offer's expiration, and

(3) did the party receiving the 998 offer alert the offeror that it lacked sufficient information to evaluate the offer and, if so, how did the offeror respond? *Id.* at p. 925–26. However, it remains important to note any other factors that can indicate if the offer was premature and the Tom Family lacked information, which Stanford was aware of.

a. Stanford's 998 Offer Was Made Shortly After Pleading Stage Ended, Prior to All Depositions and Expert Discovery

Stanford made its offer, it was barely after the pleading stage, approximately a month after the pleadings had been fully litigated and Stanford filed an answer to the Tom Family's Third Amended Complaint. 43 JNCT 12602. This preceded critical discovery in the case indicating whether Stanford's witnesses would corroborate the events the Tom Family alleged, and whether expert witnesses had credible arguments against wrongful death, all of which occurred after the expiration of the offer on November 11, 2021. 1 CT 251 (deposition of Dr. Murphy, the Tom's expert doctor in March 2023), 43 JNCT 12663 (Plaintiffs listing deposition dates of Andrea Tom, Marieka Cannella, Emily

Linderman, Dr. Mansour, Nicholas Tom, and Harriet Tom, which are all after November 11, 2021); 7 JNCT 1948 (deposition of Dr. Singh), 7 JNCT 1999 (Stanford's responses to the Tom Family's second set of special interrogatories dated October 14, 2022); 7 JNCT 2006 (Stanford's responses to the Tom Family's second set of requests for production of documents dated October 14, 2022);.7 JNCT 2080 (deposition of Marieke Cannela). In other words, looking at the table of evidence that the Plaintiffs prepared for their own summary judgment motion, with the exception of Dr. Dhillon's deposition, all of the discovery occurred *after* the 998 Offer. (See 43 JNCT 12663.)

b. Stanford Knew It Withheld Critical Information from the Tom Family When It Made Its Offer

At the time of the offer on October 12, 2021, until its default expiration 30 days later, there was minimal "information bearing on the reasonableness of the 998 offer [] available to the offeree prior to the offer's expiration." *Ibid.* As illustrated in the prior section, there had been no

expert discovery, no fact depositions of key witnesses like Dr. Mansour who admitted to Andrea Tom on the phone that Mr. Tom was being wrongfully kept from the ICU despite it being medically necessary, the other witness to this conversation, Dr. Singh, nurses who might be able to corroborate the sexual harassment itself like Maria Cannella, and incomplete discovery.

At the time, the only evidence the Tom Family had was their own experiences. Stanford never argued that the Tom Family had no earnest belief that Stanford killed their husband and father. It is absurd to put oneself in the family's shoes, imagine they have conviction in their statements, and then imagine they would simply walk away for nothing.

The only basis that the Tom Family might have to not pursue the claim and accept the offer, therefore, would be if Stanford had some proof that they could not prove their claims. Stanford would argue they had such proof, as their summary judgment motion would indicate, but it is almost entirely predicated, based on their own argument, on evidence gathered *after* the 998 Offer. See 43 JNCT

12663. It is self-explanatory that if the statement of evidence relied on by Stanford consists almost entirely of post-998 Offer discovery, there was clearly inadequate information provided to the Tom Family to evaluate the 998 Offer.

c. Stanford Understood the Tom Family's Disgust With Its Offer, But Refused to Alleviate Any Concern

The final element that the Court in *Licudine* advised considering was any communication that a 998 Offer was too early, and a negative response after that. In this case, Stanford fully understood how passionate the Tom Family felt about the wrong they believed Stanford committed.

Thus, the Tom Family's silence ins response to the offer, in this context, was not a mere rejection, but a repudiation that was "otherwise objecting to the offer." (*Licudine v. Cedars-Sinai Medical Centeri,* (2019) 30 Cal.App.5th 918, 926, as modified on denial of reh'g [Jan. 24, 2019].) As such, weighing the core issue, namely how reasonably the offeror acts when it can tell that a party finds the offer insultingly inadequate, Stanford's "response

was less than forthcoming," by providing no further evidence or information to justify how its offer was not unreasonable anywhere in the record.

3. Other Factors Show Stanford's 998 Offer Was Premature

Unlike any case where a court determined a low offer was appropriate, Stanford did not prevail on every claim on summary judgment. The Tom Family chose to dismiss one of its claims, Seventh Cause of Action for Fraudulent Concealment, in order to accelerate appeal of the summary judgment. (1 JNRT[5] 53.) At minimum, Plaintiffs had highly qualified medical experts who testified at deposition and submitted declarations and reports stating that Stanford committed malpractice, and an admission from a doctor that the mistreatment of Mr. Tom was not simply negligent, but intentional and willful misconduct. (Abbott Decl. Ex. A, Ex. B; 1 JNCT 18-27).

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[5] On April 4, 2024, the Court of Appeal, Sixth Appellate District granted Appellant's request to designate the reporter's transcript used in a prior appeal and took judicial notice of the reporter's transcript filed in *Tom et al. v. Stanford Health Care*, Appellate Case No. H051074. Any reference made to this record will be cited as the Judicially Noticed Reporter's Transcript ("JNRT").

This appeal is currently numbered H051074 and at the time of filing this Brief, in also remains the briefing stage, and has not yet been scheduled for disposition. It is not the case that the Tom Family's claims were somehow frivolous either in conception or belief. As such, the 998 Offer never presented a realistic outcome.

Swearing to a damning party admission likewise indicates a real good faith belief in extremely serious claims. This alone makes it impossible for there to have been *no chance* to recover whatsoever, as required by law, and it makes it subjectively impossible to believe the Tom Family would accept a walkaway offer. The Tom Family had an admission by a physician to treatment below the standard of care, and the motive to intentionally mistreat him.. (34 JNCT 10014-15, at 101:12-102:21; 34 JNCT 10016-17, at 103:22-104:4; 7 JNCT 1850-51, at 159:24-160:10, 7 JNCT 1990-91, at 128:2-129:17.) This formed the basis for the surviving claims.

Given the totality of circumstances, Stanford's 998 Offer at minimum was not "realistic," (*Pineda*) and any costs granted thereunder constitute an unfair windfall.

Thus, the portion of the order granting post-998 Offer costs and expert fees should be reversed.

B. Stanford Should Not Be Awarded Costs For Failing to Follow Civil Procedure and Filing Three Summary Judgment Motions Regarding One Complaint To Subvert the Word Limit

It was not necessary for SHC to file three separate motions for summary judgment or incur three separate $500 fees for those motions, when it could have filed one longer motion. "An award of cost shall be subject to the following: (2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5,(c)(2).) On April 4, 2023, the Court ruled that it "would have granted an application by defendants to file longer motions," (8 JNCT 199) demonstrating that incurring an additional $1,000 in court fees was unnecessary.

Below, SHC never provided any argument on how it was necessary or reasonable to file three separate motions for summary judgment or incur three separate $500 fees for

those motions, when it could have filed one longer motion, merely arguing instead the length of argument was necessary. This misses the point. "An award of cost shall be subject to the following: (2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2).) At no time in opposition does SHC argue that it was reasonably necessary. (Opp. at 4:24-5:11; 1 CT 46-47.)

Instead, SHC first argues they were entitled to file multiple motions for summary judgment, which appears erroneous from a plain reading of the statute. Code Civil Procedure section 437 does not allow for multiple motions regarding the same complaint to be filed, and the Court never ruled it was actually acceptable to do so, merely that it "would have granted an application by defendants to file longer motions," (8 JNCT 199) demonstrating that incurring an additional $1,000 in court fees was unnecessary.

This means that SHC flouted the rule and filed three separate motions for no reason, since the Court explicitly

would have allowed it to file an overlong brief. Beyond that, it never asked or tried to find out, instead flouting common sense in motion practice, and driving up costs for no reason.

There is nothing "reasonably necessary" about filing three briefs when the Court below explicitly states it would have allowed one. At minimum, Stanford could and should have asked before unilaterally deciding to drive up costs.

C. Below, Stanford Never Explained How Travel Costs Were Reasonable

Stanford never argued the proper standard below to justify travel costs. It merely argued that travel costs are a legitimate cost, which was never challenged. However, costs "must be reasonably necessary to the litigation and reasonable in amount." (See *Thon v. Thompson*, (1994) 29 Cal.App.4th 1546, 1548.) Costs that are not reasonably necessary to conduct the litigation but are merely convenient or beneficial are not permissible. (Code Civ. Proc., § 1033.5, subd. (c)(2).)

Failure to raise a factual argument below waives it on appeal, as it requires a new factual assertion. *City of Merced v. American Motorists Inc. Co.* (2005) 126

Cal.App.4th 1316, 1327, 24 Cal.Rptr.3d 788 ["[s]ince this new theory involves an issue of fact ... and the facts to support the theory were not developed below, we find the argument was waived for failure to raise it in *359 the trial court"]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712, 152 Cal.Rptr. 65 ["[p]oints not urged in the trial court may not be urged for the first time on appeal"].). SHC fails to justify the cost. (See Opp. at 19-28; 1 CT 48.) SHC argues that it was "judicious" in selecting the physical depositions to attend but fails to note that at no time did its counsel travel to a deposition that Plaintiff was conducting in person. (Declaration of Ryan Abbott ("Abbott Decl."), ¶ 2; 1 CT 249.) As such, Stanford is not entitled to these costs either.

V.

CONCLUSION

For the foregoing reason, the Tom Family respectfully asks the Court to vacate the Superior Court's order and remand to the Superior Court with instructions to grant a new order taxing all the costs challenged in the Tom Family's Motion amounting to $82,874.02.

DATED: April 30, 2024 BROWN NERI SMITH & KHAN LLP

By: */s/ Ryan Abbott*
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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to Cal. Rules of Court, 8.204,(c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 7,802 words.

DATED: April 30, 2024 BROWN NERI SMITH & KHAN LLP

By: */s/ Ryan Abbott*
Ryan Abbott
Timothy G. Lamoureux
Attorneys for Plaintiffs and Appellants Harriet Tom, Estate of Darrell Tom, Andrea Tom, and Nicholas Tom

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 650 Town Center Drive, Suite 520, Costa Mesa, CA 92626.

On April 30, 2024, I served true copies of the following document described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

BY TRUEFILING NOTICE OF ELECTRONIC FILING: I served an electronic version of the above-referenced document via electronic mail through the Court's TrueFiling system to the parties identified below at the email addresses indicated.

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Brown Neri Smith & Khan LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

Honorable Socrates Peter
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Superior Court, State of California
County of Santa Clara
Department 20
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San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 30, 2024, at Costa Mesa, California.

Kaitlyn Alexander