LISA M. WAGY, etc., Plaintiff and Appellant, v. JAMES FRANKLIN BROWN et al., Defendants and Appellants.

No. C014767.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

24 Cal. App. 4th 1*; *29 Cal. Rptr. 2d 48*; *1994 Cal. App. LEXIS 311*; *94 Cal. Daily Op. Service 2553*; *94 Daily Journal DAR 4847

April 11, 1994, Decided

PRIOR HISTORY: **[***1]** Superior Court of El Dorado County, No. PV91-0701, Eddie T. Keller, Judge.

DISPOSITION: The order that defendants pay $250 in attorney fees is reversed. To the extent the order striking plaintiff's cost memorandum relates to plaintiff's request for prejudgment interest, it is affirmed. In all other respects plaintiff's appeal is dismissed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a personal injury action that was the subject of judicial arbitration, the arbitrator awarded plaintiff damages in an amount equal to plaintiff's previous offer of compromise, which defendants had rejected, and ordered the parties to bear their own costs. Neither party requested a trial de novo, and a judgment was entered on the award. Thereafter, plaintiff filed a memorandum of costs in the superior court seeking service and deposition fees ordinarily awarded to the prevailing party (*Code Civ. Proc., §§ 1032, 1033.5*), and prejudgment interest pursuant to *Code Civ. Proc., § 998*, and *Civ. Code, § 3291* (prejudgment interest where defendant rejects plaintiff's offer of compromise and plaintiff obtains more favorable judgment). She also moved for attorney fees pursuant to *Code Civ. Proc., § 2033, subd. (o)* (costs incurred in proving matter not admitted by opposing party in request for admissions). The trial court struck plaintiff's memorandum requesting costs as the prevailing party and prejudgment interest, but granted plaintiff's request for attorney fees incurred in proving defendants' negligence. (Superior Court of El Dorado County, No. PV91-0701, Eddie T. Keller, Judge.)

The Court of Appeal reversed the order to the extent it required defendants to pay attorney fees, and affirmed it to the extent it struck plaintiff's cost memorandum concerning prejudgment interest; in all other respects, the court dismissed plaintiff's appeal. The court held that the trial court erred in granting plaintiff's motion for attorney fees under *Code Civ. Proc., § 2033, subd. (o)*, since, although defendants denied a request for admissions that they were negligent, they thereafter admitted, for purposes of arbitration only, that they were negligent, which obviated the necessity for proof of that issue, and attorney fees plaintiff incurred in preparing that issue for trial or arbitration were not equivalent to fees incurred in proving the truth of the matter for purposes of an award under the statute. The court also held that the trial court's order, to the extent it struck plaintiff's cost memorandum, was not appealable as an order made after an appealable judgment (*Code Civ. Proc., § 904.1, subd. (a)(2)*), since the arbitrator had ordered the parties to bear their own costs, and plaintiff did not request a trial de novo on that order. The court further held, however, that the trial court's order was appealable to the extent it denied plaintiff prejudgment interest under *Code Civ. Proc., §*

998, and *Civ. Code, § 3291*, since plaintiff's entitlement to prejudgment interest did not vest until the trial court's judgment was entered and thus the arbitrator could not have ruled on that issue. The court further held that although *Code Civ. Proc., § 998*, and *Civ. Code, § 3291*, apply to judicial arbitration proceedings, plaintiff was not entitled to prejudgment interest thereunder, since the judgment entered on the arbitration award was for the exact amount of the rejected offer of compromise, with each party to bear its own costs, and thus it was not more favorable to plaintiff than the rejected offer. (Opinion by Puglia, P. J., with Sparks and Sims, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Costs § 20--Attorney Fees--Fees for Proving Matter Not Admitted in Request for Admissions. --In a personal injury action, following entry of judgment for plaintiff on a judicial arbitration award, the trial court erred in granting plaintiff's motion for attorney fees pursuant to *Code Civ. Proc., § 2033, subd. (o)*, which provides for an award of costs, including attorney fees, incurred by a party in proving any matter where the proof is necessitated by the opposing party's denial of a request for admissions. Although defendants denied a request for admissions that they were negligent, they thereafter admitted, for purposes of arbitration only, that they were negligent, which obviated the necessity for proof on that issue. Accordingly, attorney fees incurred by plaintiff in preparation for trial or arbitration were not the equivalent of proving the truth of a matter so as to authorize an award of attorney fees under the statute. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court (*Evid. Code, § 190*). Expenses are thus recoverable only where the party requesting the admission "proves" the truth of that matter, not where that party merely prepares to do so.

[See 2 **Witkin,** Cal. Evidence (3d ed. 1986) § 1607.]

(2a) (2b) Appellate Review § 25--Decisions Appealable--Costs and Attorney Fees--Judicial Arbitration--Order Striking Cost Memorandum. --A superior court order made after entry of a judgment on a judicial arbitration award, was not appealable as an order made after an appealable judgment (*Code Civ. Proc., § 904.1, subd. (a)(2)*) to the extent the order struck plaintiff's memorandum of costs for service and deposition fees ordinarily awarded to the prevailing party pursuant to *Code Civ. Proc., §§ 1033* and *1033.5*. The arbitrator had authority to award costs of suit (Cal. Rules of Court, rule 1614(a)(8)) and exercised that authority by ordering the parties to bear their own costs. That order effectively denied costs to each party and left nothing more to be decided on that issue. The only way plaintiff could have challenged that order was by a request for a trial de novo. Plaintiff, however, did not request a trial de novo following arbitration, and thus waived any challenge to the arbitrator's order denying costs.

(3) Arbitration and Award § 27.5--Judicial Action on Award--Trial De Novo--Effect. --A timely request for a trial de novo operates to vacate an arbitration award in its entirety, putting the case at large as though no arbitration proceedings had occurred (Cal. Rules of Court, rule 1616(c)). The judicial arbitration statute does not permit a party to elect a trial de novo on some issues and to accept the arbitration award as to others. If the arbitrator awards costs in a specified amount, the cost portion of the judgment is not appealable, since a dissatisfied party can request a trial de novo as to costs and subsequently obtain review of the cost award on appeal from the court's de novo judgment.

(4a) (4b) Appellate Review § 29--Decisions Appealable--Orders Relating to Judgment--Prejudgment Interest--Arbitration Award--Prevailing Party Statute. --Following entry of a judgment in plaintiff's favor on a judicial arbitration award, the trial court's order denying plaintiff prejudgment interest under *Code Civ. Proc., § 998* and *Civ. Code, § 3291* (plaintiff entitled to prejudgment interest upon obtaining judgment more favorable than previous settlement offer rejected by defendant), was appealable. Plaintiff's right to claim costs pursuant to *Code Civ. Proc., § 998*, did not "vest" until the judgment was entered, and thus the arbitrator could not have ruled on that issue, and the trial court's determination of that issue was the only ruling thereon and was appealable. Further, because the arbitrator's award is not a "judgment" within the meaning of *Civ. Code, § 3291*, the arbitrator lacked authority to award plaintiff prejudgment interest.

(5a) (5b) Costs § 12--Costs After Rejection of Offer to Compromise--Prejudgment Interest--Arbitration Proceedings. --*Code Civ. Proc., § 998*, and *Civ. Code, §*

3291, providing that if the plaintiff makes an offer which the defendant does not timely accept and the plaintiff obtains a more favorable judgment, the judgment shall bear interest from the date of the offer, applies to judicial arbitration proceedings. However, in a personal injury action, a judgment in favor of plaintiff following a judicial arbitration award, which judgment was for the exact amount of plaintiff's previously rejected settlement offer and required each party to bear its own costs, was not "more favorable" to plaintiff than the prior settlement offer, and thus did not entitle her to prejudgment interest.

COUNSEL: Stephen B. Gorman and Peter J. Kozak for Plaintiff and Appellant.

Chaffin & Sarro and William A. Chaffin, Jr., for Defendants and Appellants.

JUDGES: Opinion by Puglia, P. J., with Sparks and Sims, JJ., concurring.

OPINION BY: PUGLIA, P. J.

OPINION

[*4] [49]** Lisa M. Wagy (plaintiff), individually and as guardian ad litem, sued James Franklin Brown and Ethel Brown (defendants) for personal injuries to herself and her minor children arising from an automobile accident. In their answer defendants denied negligence and asserted plaintiff's contributory negligence.

In response to plaintiff's request for admissions (*Code Civ. Proc., § 2033*), defendants denied negligence.

Pursuant to *Code of Civil Procedure section 998*, plaintiff made an offer to compromise for $50,000 (further **[***2]** statutory references to sections of an undesignated code are to the Code of Civil Procedure). Defendants did not timely accept plaintiff's offer and it was therefore "deemed withdrawn." (*§ 998, subd. (b)(2)*.) Thereafter, the case was ordered to judicial arbitration. (§ 1141.11, subd. (a).)

Defendants admitted for purposes of the arbitration only that they were negligent, thus obviating the necessity for proof on that issue. The arbitrator awarded plaintiff $50,000 and ordered each side to bear its own costs. (See Cal. Rules of Court, rule 1614(a)(8).) [1] Neither party requested a trial de novo (*§ 1141.20*) and the award was entered as a judgment (*§ 1141.23*).

1 A transcript of the arbitration proceeding is not included in the record on appeal.

Following entry of judgment, plaintiff filed a memorandum of costs in the superior court, seeking service and deposition fees ordinarily awarded to the **[*5]** prevailing party pursuant to *sections 1032* and *1033.5*, and prejudgment interest in the amount of $3,013 pursuant to **[***3]** *section 998* and *Civil Code section 3291*. (See *§ 1033.5, subd. (a)(13)*.) Plaintiff also moved to recover attorney fees in the amount of $250 pursuant to *section 2033, subdivision (o)* which she claimed were reasonably incurred in preparing to prove defendants' negligence at the arbitration hearing.

Defendants opposed plaintiff's motion for attorney fees, arguing that *section 2033, subdivision (o)* applies only after a trial and does not apply to proceedings incident to arbitration. [2] Alternatively, defendants argued they are not liable for plaintiff's attorney fees incurred on account of their denial of negligence in responding to a request for admissions because they "had reasonable ground to believe" they would ultimately prevail on the matter (*§ 2033, subd. (o)(3)*), and they had a "good reason for the failure to admit" requests for admissions propounded early in the proceeding before all discovery was complete (*§ 2033, subd. (o)(4)*).

2 Defendants do not contend on appeal nor did they argue in the superior court that an award of attorney fees under *section 2033, subdivision (o)* is an item of costs (see *§ 1033.5, subd. (a)(10)(B)*) within the authority of the arbitrator to award or deny (Cal. Rules of Court, rule 1614(a)(8)) and therefore foreclosed to plaintiff by the arbitrator's order that each party bear its own costs.

[*4]** Defendants moved to strike plaintiff's cost memorandum. They contended plaintiffs were foreclosed from recovering costs by the arbitrator's ruling that each side bear its own costs and that, in any event, prejudgment interest under *section 998* and *Civil Code section 3291* is not recoverable when, as here, the judgment is precisely equal to the offer to compromise.

After hearing, the superior court granted plaintiff's request for $250 in attorney fees, finding that the purpose of *section 2033, subdivision (o)* is to ensure compliance with discovery requests. The court further determined that it had discretion to apply *section 2033* in postarbitration proceedings. The court denied plaintiff's

motion for costs including **[**50]** prejudgment interest, and granted defendants' motion to strike on the grounds that "the costs in issue were ruled upon by the arbitrator."

Plaintiff appeals from the order striking her memorandum of costs. Defendants cross-appeal from the order granting attorney fees. We shall dismiss the appeal from the order striking costs except to the extent it relates to the claim for prejudgment interest and, as to that, we shall affirm. We shall reverse the order granting **[***5]** attorney fees.

[*6] I

(1) For reasons that will become apparent, we shall consider first defendants' cross-appeal from the order granting attorney fees. The order is appealable. (*Lakin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 655-656 [25 Cal.Rptr.2d 109, 863 P.2d 179]*.)

Section 2033, subdivision (o) authorizes the court to award costs including attorney fees incurred by a party in proving any matter where the proof is necessitated by an opposing party's denial of a request for admissions. It provides in relevant part: "[i]f a party fails to admit . . . the truth of any matter when requested to do so under this section, *and if the party requesting that admission thereafter proves* . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." (Italics added.)

" 'Proof' is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (*Evid. Code, § 190*.) **[***6]** Given this definition, preparation for trial or arbitration is not the equivalent of proving the truth of a matter so as to authorize an award of attorney fees under *section 2033, subdivision (o)*. Expenses are recoverable only where the party requesting the admission "proves . . . the truth of that matter," not where that party merely prepares to do so. Plaintiff is not entitled to attorney fees under the statute and the trial court erred in awarding them.

II

We next consider plaintiff's appeal from the order striking her cost memorandum.

(2a) We must first determine if that order is appealable. A postjudgment order on a motion to strike costs is ordinarily appealable under *section 904.1, subdivision (a)(2)*, as an order made after an appealable final judgment. Defendants contend that section does not confer appealability because a judgment on a judicial arbitration award is not appealable under *section 1141.23*, and therefore the order striking costs is not appealable as an order made after an appealable judgment. [3]

3 *Section 904.1, subd. (a)* provides in relevant part: "An appeal may be taken from a superior court in the following cases: [P] (1) From a judgment . . .. [P] (2) From an order made after a judgment made appealable by subdivision (a)."

Section 1141.23 provides in relevant part: "The arbitration award shall be in writing, signed by the arbitrator and filed . . .. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, *except that it is not subject to appeal* . . .." (Italics added.)

[*7]** Within the context of a judicial arbitration it has been held that an order striking costs is itself a final judgment and is appealable as such. In *Joyce v.* **[*7]** *Black (1990) 217 Cal.App.3d 318 [266 Cal.Rptr. 8]*, the court held: "The substance and effect of the order, not its label or form, determines whether it is appealable as a final judgment. This order [striking costs] has all the earmarks of a final judgment. It is final in the sense that it leaves nothing for future consideration. More importantly, it is the only judicial ruling in the case, and thus there is no other opportunity for review by appeal." (At p. 321; citations omitted; emphasis original; see also *Dickens v. Lee (1991) 230 Cal.App.3d 985, 987 [281 Cal.Rptr. 783]*.)

In *Joyce*, unlike this case, the arbitrator awarded costs but failed to specify in what amount costs were recoverable. The *Joyce* **[**51]** court reasoned that in those circumstances, costs are properly determined and awarded by the superior court in the first instance after judgment has been entered. As explained in *Dickens v. Lee, supra, 230 Cal.App.3d at page 987*: **[***8]** "In such a case, there can be no request for a trial de novo as to costs, since the court determines costs in the first instance

and thus the portion of the court's judgment awarding costs must be appealable, because otherwise there would be no opportunity for appellate review."

Defendants argue, persuasively, that *Joyce* and *Dickens* are distinguishable because in those cases, although the arbitrators awarded costs, the amounts were not specified and thus could not be challenged by trial de novo.

The arbitrator has authority to award costs not to exceed statutory costs of suit (Cal. Rules of Court, rule 1614(a)(8)). Here, unlike *Joyce* and *Dickens*, the arbitrator exercised that authority, ordering each side to bear its own costs. That order effectively denied costs to each party and left nothing more to be decided with respect to that issue.

(3) The only way plaintiff could challenge the arbitrator's order denying costs was by a request for trial de novo (*§ 1141.20*; Cal Rules of Court, rule 1616). A timely request for trial de novo operates to vacate the arbitration award in its entirety, putting the case at large "as though no arbitration proceedings had occurred." (Cal. **[***9]** Rules of Court, rule 1616(c); *Trump v. Superior Court (1981) 118 Cal.App.3d 411, 415 [173 Cal.Rptr. 403]* [the judicial arbitration statute does not permit a party to elect trial de novo on some issues and to accept the arbitration award as to others]; cf. *Dickens v. Lee, supra, 230 Cal.App.3d 985, 987-988* [if the arbitrator awards costs in a specified amount ". . . the costs portion of the judgment is nonappealable, since a dissatisfied party *can request a trial de novo as to costs and subsequently obtain review of the costs* award on appeal from the **[*8]** court's de novo judgment" (italics added)].**(2b)** Plaintiff did not request a trial de novo and thus she waived any challenge to the arbitrator's order denying co sts. The plaintiff's purported appeal from the superior court's order striking costs must therefore be dismissed because it is not an order made after an appealable judgment (*§ 904.1, subd. (a)(2)*) nor, with an exception to be noted, is it a final judgment in the sense that it is the *only* ruling on costs and resolves issues left unresolved by the arbitrator. (See *Joyce v. Black, supra, 217 Cal.App.3d at pp. 321-322*.) **[***10]**

(4a) However, to the extent plaintiff's appeal from the order striking costs relates to plaintiff's claim for prejudgment interest under *section 998* and *Civil Code section 3291*, a different analysis is indicated. Prejudgment interest under those provisions is an item of costs under *section 1033.5, subdivision (a)(13)* which allows as costs "Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing at trial . . .." *Civil Code section 3291* provides that if plaintiff makes an offer pursuant to *section 998* which defendant does not timely accept and "plaintiff obtains a more favorable judgment," the judgment shall bear interest at 10 percent per annum from the date of the offer. The arbitrator's order that each party bear its own costs would effectively deny plaintiff recovery of prejudgment interest only if that item of costs were within the authority of the arbitrator to decide.

Plaintiff urges, however, that her right to claim costs pursuant to *section 998* did not "vest" until the judgment was entered. As a result, she contends, the arbitrator could *not* have ruled on the issue of prejudgment interest; accordingly, plaintiff **[***11]** argues, the trial court's determination of that issue was the only ruling thereon and its ruling is appealable under the rule of *Joyce v. Black, supra, 217 Cal.App.3d at pages 321-322*. As will appear, we agree.

On the other hand, defendants argue that *section 998* and *Civil Code section 3291* relating to recovery of prejudgment interest do not apply in arbitration proceedings. For this proposition defendants rely on *Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal.App.3d 656 [217 Cal.Rptr. 514]* and *Nott v. Superior Court (1988) 204 Cal.App.3d 1102 [251 Cal.Rptr. 842]*.

[52]** *Woodard*, which held that *section 998* and *Civil Code section 3291* do not apply to arbitration proceedings, involved contractual, not judicial arbitration. *Woodard* was distinguished on that basis in *Joyce v. Black, supra, 217 Cal.App.3d at page 323*: "The reasoning in *Woodard* is sound within the context of that case and supports that court's holding as to *contractual* arbitration. But we reject **[***12]** any interpretation of *Woodard's* broad-sweeping **[*9]** language as applying to *judicial* arbitration. Because application of *Code of Civil Procedure section 998* and *Civil Code section 3291* to judicial arbitration is consistent with the language of those statutes and the strong public policy in favor of encouraging early settlement, we hold that prejudgment interest is recoverable under *Code of Civil Procedure section 998* and *Civil Code section 3291* in judicial arbitration proceedings." (Original italics.) The court explained: ". . . judicial arbitration takes place within the

judicial arena and is necessarily followed by court action, consisting of either a trial de novo (*§ 1141.20*) or entry of judgment on the award (*§ 1141.23*). Thus the statutory prejudgment interest provisions setting the date of 'trial' as an outside limit on acceptance of the settlement offer (*§ 998*; *Civ. Code, § 3291*), providing for recovery of prejudgment interest if the plain tiff obtains 'a more favorable judgment' (*Civ. Code, § 3291*), and other wise referring to 'trial' or the 'judge' (*§ 998*) are all, unlike contractual arbitration, logically applicable to judicial arbitration procedures." (*217 Cal.App.3d at p. 322*.) **[***13]**

(5a) We agree with the holding in *Joyce* v. *Black* that *section 998* and *Civil Code section 3291* apply to judicial arbitration proceedings, entitling plaintiff in appropriate circumstances to prejudgment interest. Nothing we said in *Nott* v. *Superior Court* is inconsistent with that holding. In Nott, plaintiff's action for personal injury against defendant and codefendant Harms was set for judicial arbitration. Before the arbitration commenced, plaintiff served defendant on August 31 with an offer to settle for $3,500 pursuant to *section 998*. The arbitration commenced on September 16. (*204 Cal.App.3d at p. 1104*.) On September 25, defendant mailed to plaintiff its acceptance of plaintiff's offer. The acceptance was filed with the court September 28. On October 7, the arbitrator awarded plaintiff $24,950 against codefendant Harms but found defendant not liable. Plaintiff moved for entry of judgment against defendant according to the terms of its offer to settle (*§ 998, subd. (b)(1)*). (*204 Cal.App.3d at p. 1105*.) Defendant resisted, arguing the commencement of the arbitration was equivalent to commencement **[***14]** of trial within the meaning of *section 998, subdivision (b)(2),* and therefore the plaintiff's offer must be deemed withdrawn before defendant accepted it. [4] The trial court denied plaintiff's motion to enter judgment. We issued a writ of mandate directing the trial court to enter judgment in accordance with plaintiff's offer to settle. We held a judicial arbitration is not a trial within the meaning of *section 998, subdivision (b)(2)* such that its commencement would terminate an outstanding offer to compromise as a matter of law. (*204 Cal.App.3d at pp. 1106-1107*.) We pointed out a judicial arbitration does not meet the test of finality: "A judicial arbitration hearing **[*10]** does not result in a judgment but in an arbitration award. (*§ 1141.20*.) It does not finally resolve any issue of fact or law in the case. A party may freely set aside an arbitration award by a timely request for a 'de novo trial, by court or jury, both as to law and facts.' (*§ 1141.20, subd. (b)*.)" (*204 Cal.App.3d at p. 1107*.) Nott neither holds nor logically implies that *section 998* and *Civil Code section 3291* do not apply **[***15]** to arbitration procedures. In fact, Nott applied *section 998* in a judicial arbitration.

> 4 *Section 998, subdivision (b)(2)* provides that "If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, . . ."

As the *Nott* court observed, defendant "could have achieved its proffered objective under the existing scheme of things by making its offer more than 30 days prior to the judicial arbitration hearing. Alternately, it could have revoked its offer at the outset of that hearing or any time prior to [plaintiff's] **[**53]** acceptance." (*204 Cal.App.3d at p. 1108*.)

(4b) Entitlement to prejudgment interest is dependent on plaintiff obtaining a "more favorable judgment" (*Civ. Code, § 3291*) than the amount of her offer. The arbitrator awarded plaintiff $50,000, the identical amount of her offer and denied costs. The arbitrator's award is not a "judgment" within the meaning of *Civil Code section 3291*. As we **[***16]** pointed out in *Nott*, the award does not finally resolve any issue of fact or law and may be set aside by a timely request by either party for a trial de novo. (*Nott v. Superior Court, supra, 204 Cal.App.3d at p. 1107*.) Thus even if the award were more favorable than plaintiff's offer to settle, the arbitrator would not be invested with authority to award plaintiff prejudgment interest. We hold that the arbitrator's order, in effect denying plaintiff her costs, could not and therefore did not comprehend the issue of prejudgment interest.

(5b) The superior court entered the award as a judgment (*§ 1141.23*). The judgment for $50,000 with each party to bear its own costs, was not "more favorable" to plaintiff than her offer. Therefore plaintiff was not entitled to prejudgment interest and to the extent plaintiff's memorandum of costs so requested, the superior court did not err in ordering it stricken. [5]

> 5 To be entitled to prejudgment interest, plaintiff must receive a "more favorable judgment" than her offer to compromise (*Civ. Code, § 3291*). The judgment was for $50,000 which is not more favorable than plaintiff's $50,000 offer to compromise. However, a plaintiff may recover

expert witness fees in the discretion of the court if defendant refuses to accept plaintiff's offer to compromise and thereafter "defendant fails to obtain a more favorable judgment." (*§ 998, subd. (d)*.) The subtle distinction between *Civil Code section 3291* and *section 998, subdivision (d)* becomes important only in the relatively infrequent situation where the offer and judgment are equal. In that case, as with a "push" in the game of blackjack, the status quo ante prevails.

[*17]** Plaintiff contends that her recovery of $250 in attorney fees under *section 2033, subdivision (o)* should be added to the arbitration award for the **[*11]** purposes of calculating whether the judgment was more favorable than her settlement demand. (*Stallman v. Bell (1991) 235 Cal.App.3d 740, 748 [286 Cal.Rptr. 755]* [for purposes of *§ 998*, preoffer and postoffer statutory costs are added to the verdict to determine whether plaintiff obtained a judgment more favorable than his settlement offer].) Because we have determined that the court erred in awarding attorney fees under *section 2033, subdivision (o)*, plaintiff's contention is moot.

The order that defendants pay $250 in attorney fees is reversed. To the extent the order striking plaintiff's cost memorandum relates to plaintiff's request for prejudgment interest, it is affirmed. In all other respects plaintiff's appeal is dismissed.

Sparks, J., and Sims, J., concurred.