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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ISOFEA PILIMAI, Plaintiff and Appellant, v. FARMERS INSURANCE EXCHANGE COMPANY, Defendant and Respondent.	C047483 (Super. Ct. No. 03CS00611)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster, Judge. Reversed with directions.

Clayeo C. Arnold and Anthony M. Ontiveros; and Leslie M. Mitchell for Plaintiff and Appellant.

Rust, Armenis, Schwartz, Lamb & Bills and Brian Turner for Defendant and Respondent.

Is an insurance company in an uninsured motorist arbitration subject to the penalties provided in Code of Civil

Procedure[1] section 998 and Civil Code section 3291 based on its refusal to accept a section 998 settlement demand within its policy limits when compensatory damages awarded in the arbitration meet or exceed its policy limits? Yes. The explicit language of section 998 applies to arbitrations and the strong public policy of this state of encouraging the making and acceptance of reasonable settlement offers requires us to conclude that an insurance company is liable for section 998 costs even when, added to the judgment for compensatory damages, the total exceeds the policy limits. We shall reverse the trial court's order denying plaintiff Isofea Pilimai his costs in this case. We shall also order that the trial court add prejudgment interest to the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 6, 1999, Pilimai sustained injuries in an automobile accident with an uninsured driver. He filed a petition to compel arbitration with Farmers Insurance Exchange Company (Farmers), his insurance carrier, under the uninsured motorist provisions of his insurance policy. The policy limit for uninsured motorist coverage in Pilimai's policy was $250,000.

On March 21, 2003, prior to the arbitration, Pilimai served a section 998 settlement demand on Farmers offering to settle the case for $85,000.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

The arbitration was held in October and November of 2003. On November 14, 2003, the arbitrator served the arbitration award. The arbitrator found Pilimai was entitled to recover damages in the amount of $556,972. The arbitrator entered an award "in that amount less the $15,000 credit that [Farmers] is entitled to, or the amount of the uninsured motorist policy limits which will have to be proven by declaration of the court upon a petition to confirm this arbitration award." The arbitration award was silent on the subject of costs and prejudgment interest.

Both Pilimai and Farmers timely filed petitions to confirm the award as a judgment in the trial court. Only Farmers, however, set its petition for a hearing. In Farmers's petition, it sought to obtain a judgment for $250,000 (based on its policy limit) less the $15,000 credit it was entitled under the policy.

In Pilimai's petition and in his opposition to Farmers's petition, Pilimai sought a judgment in the same amount, plus costs and prejudgment interest. Pilimai claimed he was entitled to recover his costs of suit and prejudgment interest based on section 998 and Civil Code section 3291. His memorandum of costs sought $18,301.23 in costs and $36,470.22 in prejudgment interest.

The trial court concluded that Farmers's petition was the only one properly before it because Pilimai never set his petition for a hearing. The court further found that neither party sought to correct or vacate the award made by the arbitrator. As a result, the court entered judgment in the

amount of $235,000. The trial court concluded that absent the insurance policy, Pilimai would be entitled to recover his costs and prejudgment interest under section 998 and Civil Code section 3291. However, the court concluded that because an award of costs and prejudgment interest would exceed the limit of the insurance policy, Pilimai was not entitled to recover costs or prejudgment interest.

Farmers served notice of judgment on Pilimai on June 8, 2004. Pilimai filed his timely notice of appeal on July 28, 2004. This is an appealable judgment. (§ 904.1, subd. (a)(1).)

DISCUSSION

I

The Lack Of An Affirmative Pleading Requesting Costs Does Not Bar The Award Of Costs

Farmers contends the court was powerless to award costs and prejudgment interest in this case because the only pleading properly before the court was its petition to confirm the award and it did not affirmatively ask for costs. We reject this argument.

Farmers's petition prayed for a judgment confirming the award in the amount of $235,000 and "[f]or such other and further relief as the court may deem proper." An award of prejudgment interest fits within the petition's description of further relief as the trial court deemed just and proper. (*Newby v. Vroman* (1992) 11 Cal.App.4th 283, 286.) It follows logically that an award of statutorily allowable costs also properly flows from this request. Further, Pilimai requested an

award of costs and prejudgment interest in his response to Farmers's petition. This was sufficient to present the issue to the court.

More fundamentally, however, there is no legal requirement that a party affirmatively plead entitlement to costs or prejudgment interest to be able to recover them. The statute that sets forth the requisite allegations for a petition to confirm an arbitration award is silent on the issue of costs and interest: "A petition under this chapter shall: [¶] (a) Set forth the substance of or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement. [¶] (b) Set forth the names of the arbitrators. [¶] (c) Set forth or have attached a copy of the award and the written opinion of the arbitrators, if any." (§ 1285.4.) Thus, there is no statutory requirement to affirmatively plead entitlement to costs or interest.

Moreover, "'[t]he awarding of costs is but an incident to the judgment. . . .' [Citations.] Accordingly, costs follow as a matter of course unless the court for good reason should decree otherwise. [Citation.] No further judicial action is required after an award of costs is made. The requirement is imposed upon the party who is entitled to costs that he file a memorandum of the items of his costs and disbursements (§ 1033) and if he fails to do so he is deemed to have waived the costs accruing in his favor." (*Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 696-697, fn. omitted.) As to prejudgment interest, "[i]t has been long settled that, in a

contested action, prejudgment interest may be awarded even though the complaint contains no prayer for interest." (*Newby v. Vroman, supra,* 11 Cal.App.4th at p. 286.)

II

Pilimai Is Entitled To Recover His Costs Under Section 998 And Prejudgment Interest Under Civil Code Section 3291

Pilimai argues that the trial court erred in refusing to award him his section 998 costs and prejudgment interest. We agree.

A

Standard Of Review

Because there are no disputed facts in this case, and our analysis turns on the legal question of the interpretation of section 998 and Civil Code section 3291 and their application to this contractual arbitration, our review is de novo. (*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 329.)

B

Section 998 And Civil Code Section 3291

Section 998 provides, in relevant part, "(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section. [¶] (b) Not less than 10 days prior to commencement of trial or arbitration (as provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, 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. [¶] . . . [¶] (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs." By its terms, section 998 specifically does not apply to eminent domain actions, enforcement actions taken by various public entities, and labor arbitrations. (§ 998, subds. (g), (i).) The statute does not exclude uninsured motorist arbitrations. From the specific inclusion of arbitration in the text of subdivisions (b) and (d) of section 998 and the statute's failure to exclude uninsured motorist arbitrations, we conclude this section applies to this uninsured motorist arbitration.

To further the purposes of section 998, Civil Code section 3291 provides, in part, "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept . . . and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

The purpose of Civil Code section 3291 and "section 998 is to 'encourage settlement by providing a strong financial disincentive to a party--whether it be a plaintiff or a defendant--who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.'" (*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co., supra,* 73 Cal.App.4th at p. 330 [§ 998]; S*teinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 21 [§ 3291].) The net effect of these sections is to entice parties to make reasonable settlement offers by offering them the "carrot" of shifting the burden of costs and prejudgment interest to the other side, and further to discourage the rejection of those offers with the "stick" of requiring a party who rejects such an offer to pay costs and interest. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1116.) In this way, the statutes seek to ease court congestion and free up scarce judicial resources. (*Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390-391.)

Section 998 applies to arbitrations generally. In *Caro v. Smith* (1997) 59 Cal.App.4th 725, 736, 738, the court concluded that a plaintiff who recovered more than his section 998 offer was entitled to recover both his court costs[2] under section 998 and prejudgment interest under Civil Code section 3291 on the

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[2] The plaintiff in *Caro* did not seek to recover costs of the arbitration, only the costs incurred during the judicial proceeding. (*Caro v. Smith*, *supra*, 59 Cal.App.4th at p. 738 & fn. 7.)

entry of the arbitration award as a judgment. Similarly, in *Weinberg v. Safeco Ins. Co. of America* (2004) 114 Cal.App.4th 1075, 1084, the court concluded that Civil Code section 3291 prejudgment interest could be properly awarded in an arbitration.

As the trial court correctly concluded here, Pilimai extended a valid section 998 demand for $85,000 and Farmers did not accept it. Pilimai recovered $235,000 in the arbitration against the insurer -- a sum far in excess of his demand. Thus, under those statutes, standing alone, Pilimai was entitled to recover both his costs and prejudgment interest.

We now turn to the trial court's restriction of the judgment to the policy limits.

C

The Policy Language

Farmers argues neither the arbitrator nor the court had the power to award any costs under the relevant terms of the insurance policy much less award them above the policy limits. We disagree.

The policy provides that Farmers "will pay all sums which an insured person or such other person as permitted under the law is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury actually sustained by the insured person . . . ." Both parties agree the relevant policy limit is $250,000. The policy further provides that in the event the parties are unable to agree that the uninsured driver would be liable to the insured, or on the

amount of payment due, the matter is to be determined by arbitration. The policy defined the job of the arbitrator as follows: "[t]he arbitrator shall determine (1) the existence of the operator of an uninsured motor vehicle, (2) that the insured person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle, and (3) the amount of payment under this part as determined by this policy or any other applicable policy."

On the subject of the procedures for the arbitration, the policy states: "Arbitration will take place in the county where the insured person lives. Local court rules governing procedure and evidence will apply. The decision in writing of the arbitrator will be binding subject to terms of this insurance." Further, the policy recites, "The expense of the arbitrator and all other expenses of arbitration will be shared equally. Attorneys' fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them."

These policy provisions must be read in conjunction with existing statutes. "The interpretation of the language in an insurance policy is a question of law. In resolving such a question courts look first to the plain meaning of the disputed term to ascertain the mutual intention of the parties. [Citation.] As a general rule of construction, the parties are presumed to know and to have had in mind all applicable laws extant when an agreement is made. These existing laws are considered part of the contract just as if they were expressly

referred to and incorporated." (*Miracle Auto Center v. Superior Court* (1998) 68 Cal.App.4th 818, 821.)

As a result of this general rule that applicable statutes are considered part of the contract, we conclude the parties had section 998 and Civil Code section 3291 -- and their respective cost-shifting mechanisms -- in mind when they entered into this contract. Consequently, those two statutory provisions must therefore constitute part of this contract unless the contract expressly excluded them.[3]

Nothing in the insurance policy explicitly waives the protections of section 998 and Civil Code section 3291. The policy's definition of the duties of the arbitrator is not inconsistent with the power of the arbitrator (or the court upon entry of judgment) to award the prevailing party costs or prejudgment interest in the circumstances defined under section 998 and Civil Code section 3291. These items of costs and prejudgment interest are incidental to the underlying judgment, not a part of the substantive damage award. (*Oak Grove School*

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[3] In *Parker v. Babcock* (1995) 37 Cal.App.4th 1682, 1684, the court rejected the plaintiff's contention that section 998 applies to a contractual arbitration. That case, however, predates the amendment of section 998 in 1997 that specifically enlarged the scope of section 998 to include arbitrations. (Stats. 1997, ch. 892, § 1.) Furthermore, the parties in *Parker* specifically designated a procedure for the payment of the arbitration award, the signing of releases, and the dismissal of the underlying action. (*Parker*, at p. 1685.) Thus the parties chose an alternative to the statutory petition rules of the Code of Civil Procedure we examine in this case. *Parker* has no application here.

Dist. v. City Title Ins. Co., *supra,* 217 Cal.App.2d at pp. 696-697; *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc. supra,* 60 Cal.App.4th at pp. 21-22.)[4]

Further, the clause of the insurance contract that references the expenses of the arbitrator, attorney fees, witness fees, and other expenses of the arbitration does not expressly exclude the application of section 998 and Civil Code section 3291. Given that the parties are deemed to have made this contract with those provisions in mind and to have incorporated them into their contractual documents, they must

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[4] In *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.*, *supra,* 60 Cal.App.4th at pages 15-16, the insurance company sought an order that prejudgment interest under Civil Code section 3291 was not an item of damage on which it must pay postjudgment interest. The court agreed. Unlike the compensatory function of prejudgment interest allowable on contractual liquidated damage claims under Civil Code section 3287, the purpose of Civil Code section 3291 is to "encourage settlements and to compensate plaintiffs for the loss of settlement funds from the rejection of reasonable settlement offers, but *not* to compensate them for the loss of use of calculable sums owed to plaintiffs. Because damages are monetary compensation for 'detriment from the *unlawful* act or omission of another . . .' (Civ. Code, § 3281, italics added), and because a defendant's refusal of a reasonable settlement offer is not in itself 'unlawful,' absent special circumstances [citation], the compensatory function we discern for prejudgment interest under [Civil Code] section 3291 does not elevate this kind of interest to the status of damages." (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.*, *supra*, 60 Cal.App.4th at pp. 21-22; see also *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 533.)

apply here. The statutes thus empowered the arbitrator or the trial court to award costs and prejudgment interest.[5]

The parties' contractual allocations of costs between themselves are often affected by section 998. For example, in *Scott Co.*, the parties entered into a construction contract that contained a unilateral attorney fees provision in favor of defendant Blount. (*Scott Co. v. Blount, Inc.*, *supra*, 20 Cal.4th at pp. 1107, 1108-1109.) During the litigation, defendant Blount served a section 998 offer of settlement of $900,000, which the plaintiff rejected. (*Scott Co.*, at p. 1107.) After trial, the plaintiff recovered $442,054 in damages. (*Ibid.*) Our Supreme Court concluded Civil Code section 1717 converted the express contractual unilateral attorney fees provision of the contract into a bilateral provision allowing attorney fees to the prevailing party: Scott Co. (*Scott Co.*, at p. 1109.) While plaintiff Scott Co. was the prevailing party in the action, the court concluded that the rejected section 998 offer operated on this same attorney fees clause to cut off Scott Co.'s right to attorney fees as of the date of the offer. (*Scott Co.*, at p. 1112.) More importantly, despite the fact that Scott Co. was the prevailing party in the sense that it had a net monetary recovery, the court held section 998 required

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[5] Because the parties did not expressly attempt to waive the protections of section 998 or Civil Code section 3291, we do not address the question of whether the strong public policy of this state of encouraging reasonable settlements and preserving scarce judicial resources would prohibit such a waiver as a matter of public policy.

Scott Co. to pay the defendant's postoffer attorney fees because it rejected the reasonable section 998 offer and failed to obtain a larger damages award. (*Scott Co.*, at p. 1116.)

Similarly here, the insurance contract between the parties is subject to the cost-shifting provisions contained in section 998 and the prejudgment interest provision of Civil Code section 3291. Those statutes act on the contractual language restricting the arbitrator's fees and expenses and shift those expenses to Farmers to serve the compelling public policies of promoting the making and acceptance of reasonable settlement offers, and the corresponding reduction of the draw on the judicial system's scarce resources. Thus, these statutes properly provided the court or the arbitrator the basis to award costs and prejudgment interest.

D

Insurance Code Section 11580.2

Farmers also argues Insurance Code section 11580.2, subdivision (p)(4) defines its maximum liability in this case as the policy limits. Because the damage award, plus costs and interest, exceed that limit, Farmers claims Pilimai may not recover costs or prejudgment interest against it. We disagree.

Insurance Code section 11580.2, subdivision (p)(4) provides, "When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by

or for any person or organization that may be held legally liable for the injury."

The maximum liability of Farmers under this provision refers to the compensatory damages recoverable by Pilimai, not the costs of the proceedings or prejudgment interest that arise directly from its status as a litigant in the arbitration and subsequent court proceedings. We draw this conclusion from *Harris v. Northwestern National Ins. Co.* (1992) 6 Cal.App.4th 1061. There, a bond company argued its liability under a surety bond it posted was limited to the penal sum of the bond posted and therefore it could not be held liable for costs in addition to that amount. (*Id.* at p. 1065) The statute that provides for surety bonds states, "'[n]otwithstanding any other statute, the aggregate liability of a surety to all persons for all breaches of the condition of the bond is limited to the amount of the bond.'" (*Id.* at p. 1065, quoting § 996.470, subd. (a).) The appellate court concluded the statutory language referred only to liability of the surety for breaches of the condition of the bond and therefore did not limit the liability of the surety for other statutory obligations. (*Harris v. Northwestern National Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1065.) Because the surety's liability for costs was imposed by statute and "based upon [the surety's] status as a party litigant, not for breach of the condition of the bond" the surety could not avoid paying costs which exceeded the penal sum of the bond. (*Id.* at pp. 1065-1066.) The surety could have avoided the costs and risks of litigation by negotiating settlements, or by interpleading

the entire amount of the bond into the court. (*Id.* at p. 1066.) By gambling that it might avoid liability altogether by litigating the matter on the merits, the surety could not complain about its additional liability for court costs under Civil Code section 1032. (*Harris*, at p. 1067.)

Such is the case here. Farmers could have avoided any liability for costs and prejudgment interest by settling this action for $85,000. (In hindsight, it also could have saved $150,000 in policy payouts, and untold amounts of attorney fees.) Its liability for costs and prejudgment interest arises not out of the insurance contract, but rather arises from statute and Farmers's status as a litigant in the action. (§§ 1032, 998; Civ. Code, § 3291.) For this reason, Farmers cannot complain that it lost its gamble that the insured's damages might be less than the amount of its policy limits.

III

Pilimai Was Not Required To Move To Vacate Or Amend The Arbitration Award To Recover His Costs

Farmers makes two additional related arguments. First, Farmers argues that the trial court could not award costs because it was limited to confirming the award as rendered unless it was properly asked to correct or vacate the award or dismiss the proceeding. Second, Farmers argues that because Pilimai did not move to correct the arbitrator's award, he cannot appeal the trial court's denial of costs and interest. We disagree.

The statutory scheme for entering a judgment on an arbitration award belies Farmers's first argument. Section 1286 provides, "If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding." According to Farmers, this gives the court three choices: (1) confirm the award; (2) amend it; or (3) vacate it. This statute does not restrict the court's authority to award costs.

First, a judgment confirming an arbitration award is the same as any other judgment and therefore carries with it the same rights to costs as any other judgment. Under section 1287.4, a judgment confirming an arbitration award "has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification."

Second, the statute concerning the entry of arbitration awards as court judgments expressly authorizes the awarding of costs. Under section 1293.2, "The court shall award costs upon any judicial proceeding under this title. . . ."[6] Section 998

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[6] In *Austin v. Allstate Ins. Co.* (1993) 16 Cal.App.4th 1812, 1815-1816, the appellate court concluded that section 1293.2 applies only to costs incurred in judicial proceedings and not to those incurred during the contractual arbitration

and Civil Code section 3291 specifically provide for the award of costs and prejudgment interest in judicial proceedings *and arbitrations*. The enactment of section 998's application to arbitrations postdates section 1286 and therefore must be read harmoniously with that section.

Thus, we conclude that section 1286's substantive directive to the court to confirm the award, correct it, or vacate it, does not limit the court's ability to order costs under section 998 or prejudgment interest under Civil Code section 3291.

We reject Farmers's argument that Pilimai must have moved to correct or vacate the award to recover costs and prejudgment interest. Under sections 998, 1032, 1033 and Civil Code section 3291, the trigger required to impose costs and prejudgment interest is a judgment. Because costs and interest are not items of damages, but incidental to that judgment (*Oak Grove School Dist. v. City Title Ins. Co.*, *supra*, 217 Cal.App.2d at pp. 696-697 [costs]; *Hess v. Ford Motor Company, supra,* 27 Cal.4th 517, 533 [Civ. Code, § 3291 prejudgment interest]), it makes no sense to require a party to move to amend or vacate the underlying compensatory damage award to allow them to seek costs and prejudgment interest that are available only on entry of judgment.

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proceedings. *Austin,* however, predates the 1997 amendment to section 998 that made that section expressly applicable to arbitration proceedings. (Stats. 1997, ch. 892, § 1.) As a result, the *Austin* court's conclusion could not discuss the application of section 998 or Civil Code section 3291 to arbitration proceedings following the 1997 amendment.

The absence of an award of costs and prejudgment interest by the arbitrator does not bar Pilimai's claim here. While Pilimai or Farmers could have asked the arbitrator to resolve the entitlement to costs and prejudgment interest (see § 998), the arbitrator's ruling was silent on this point. As a result, the trial court could properly award costs in the first instance. (§ 998 [empowering the court *or* the arbitrator to make an award of costs]; *Weinberg v. Safeco Ins. Co. of America*, *supra*, 114 Cal.App.4th at p. 1085 [where the arbitrator did not consider or rule on an issue, the trial court could properly award prejudgment interest]; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 27-28 [same].)

IV

Pilimai Has Not Waived His Right To Challenge The Judgment By Accepting The $235,000 Paid By Farmers

Farmers further argues that by accepting its check for $235,000, Pilimai waived his right to appeal the denial of costs and prejudgment interest. We disagree.

It is the general rule that "a party is not entitled to accept the benefits of a judgment order or decree and then appeal from it." (*Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 822.) This rule applies to arbitration awards. (*Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 661.) There is, however, an exception to this rule that is relevant here. "The exception is applicable where an appellant is concededly entitled to the benefits which are accepted and a reversal will

not affect the right to those benefits. [Citations.] This exception is most amenable to application in circumstances involving different items of property [citations], or where portions of the judgment appealed from are conceptually severable from those portions accepted." (*Trollope*, at p. 825.)

Here, both parties agree Pilimai is entitled to at least the $235,000 Farmers's paid. Pilimai has not argued for a larger award of damages, nor has Farmers posited an argument for less. If we either affirmed or reversed this judgment, the $235,000 judgment figure would remain unchanged.

Further, as we have already explained, costs and prejudgment interest are incidents of the judgment for that amount, not part of the damages to be recovered. (See *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc., supra,* 60 Cal.App.4th at p. 23; *Harris v. Northwestern National Ins. Co.*, *supra*, 6 Cal.App.4th at pp. 1065-1066.) For that reason, the recovery of costs and prejudgment interest is conceptually distinct from the recovery of the policy limits of $235,000 that Pilimai received. Thus, this general rule of waiver has no application here.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a new judgment in favor of Pilimai and against Farmers in the principal sum of $235,000 plus: (a) award prejudgment interest pursuant to Civil Code section 3291; and (b) award Pilimai's costs (including the arbitration costs) incurred after

his section 998 demand under section 998. Pilimai shall recover his costs on appeal. (Cal. Rules of Court, rule 27(a).)

ROBIE, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.