SUMMARY
October 17, 2024

**2024COA114**

**No. 23CA1813, *McLellan v. Weiss* — Courts and Court Procedure — Award of Actual Costs and Fees When Offer of Settlement Was Made — Subsequent Statutory Offers**

In this personal injury action, a division of the court of appeals determines as a matter of first impression whether a subsequent offer of settlement made under section 13-17-202, C.R.S. 2024, impacts a defendant's entitlement to an award of costs based on an earlier offer when the plaintiff's final judgment did not exceed the earlier offer but exceeded the subsequent offer. The division concludes that a subsequent offer does not extinguish a previous offer or limit the costs the defendant is otherwise entitled to recover based on the earlier offer. Rather, the parties' respective rights under section 13-17-202 are to be determined as to each statutorily compliant offer made.

Accordingly, the division affirms the district court's judgment awarding the defendant costs accrued after the first statutory offer through trial, even though the plaintiff's final judgment exceeded the second statutory offer. The division also affirms the district court's judgment awarding the plaintiff only actual costs accrued before the first offer.

COLORADO COURT OF APPEALS **2024COA114**

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Court of Appeals No. 23CA1813
City and County of Denver District Court No. 21CV34116
Honorable Kandace C. Gerdes, Judge

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Denise McLellan,

Plaintiff-Appellant,

v.

Lyle Weiss,

Defendant-Appellee.

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JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE BROWN
Welling and Moultrie, JJ., concur

Announced October 17, 2024

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Bachus & Schanker, LLC, Corey A. Holton, Denver, Colorado, for Plaintiff-Appellant

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¶ 1 In this personal injury action, plaintiff, Denise McLellan, appeals the district court's award of costs to defendant, Lyle Weiss, under the offer of settlement statute, section 13-17-202, C.R.S. 2024. McLellan contends that the court erred by allowing Weiss to recover all the costs he accrued after his first statutory offer of settlement because he made a subsequent statutory offer of settlement that either extinguished the first offer altogether or limited the costs he could recover.

¶ 2 Resolving McLellan's appeal requires us to determine, as a matter of first impression, whether a subsequent statutory offer of settlement impacts a defendant's entitlement to an award of costs based on an earlier offer. We conclude that a subsequent offer does not extinguish a previous offer or limit the costs the defendant is otherwise entitled to recover based on the earlier offer. Rather, the parties' respective rights under section 13-17-202 are to be determined as to each statutorily compliant offer made.

¶ 3 Accordingly, we reject McLellan's challenge to the district court's award of costs to Weiss. Because we also conclude that the court correctly awarded McLellan only the actual costs she accrued before Weiss' first offer, we affirm.

## I. Statutory Framework

¶ 4 The legislature enacted the offer of settlement statute "to encourage the settlement of litigation by encouraging reasonable settlement offers by all parties," *Strunk v. Goldberg*, 258 P.3d 334, 336 (Colo. App. 2011) (citing *Centric-Jones Co. v. Hufnagel*, 848 P.2d 942, 946-47 (Colo. 1993)), and by "imposing a sanction on a party who rejects a reasonable offer by another party and recovers less against that party than the party's offer," *Lawry v. Palm*, 192 P.3d 550, 566 (Colo. App. 2008). To that end, the offer of settlement statute operates as an exception to the general rule that only the prevailing party in civil litigation is entitled to recover their reasonable costs incurred in litigating the case. *See* C.R.C.P. 54(d) ("Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party . . . ."); *see also* §§ 13-16-104, -105, C.R.S. 2024.

¶ 5 Under the offer of settlement statute, if a defendant makes a statutorily compliant offer of settlement that the plaintiff rejects, and the plaintiff's final judgment does not exceed the offer, then the

defendant is entitled to recover the actual costs they incur after the date of the offer, even if the plaintiff is the prevailing party:

> If the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff.

§ 13-17-202(1)(a)(II).

¶ 6 The statute also makes clear that if an offer is rejected, "the party who made the offer is not precluded from making a subsequent offer." § 13-17-202(1)(a)(III). But the statute is silent regarding the effect, if any, of a subsequent offer on a party's entitlement to costs based on an earlier offer. *See* § 13-17-202.

¶ 7 Section 13-17-202 also does not define "final judgment," but as used in the statute, the term is commonly understood as "the amount that disposes of the entire litigation." *Mitchell v. Chengbo Xu*, 2021 COA 39, ¶ 16. "In determining whether the judgment obtained by [a] plaintiff is greater than the offer of settlement made by [a] defendant, the judgment and offer must be considered in a like manner." *Rubio v. Farris*, 51 P.3d 992, 994 (Colo. App. 2002).

Thus, when a defendant makes a statutory offer inclusive of costs and interest, the "final judgment" to compare to the offer includes not only the "award of damages" but also actual costs[1] and interest accrued before the offer of settlement was made. *Mitchell*, ¶¶ 17-18; *see* § 13-17-202(2) ("When comparing the amount of any offer of settlement to the amount of a final judgment actually awarded, any amount of the final judgment representing interest *subsequent* to the date of the offer in settlement *shall not be considered*.") (emphasis added). "In other words, it's an apples-to-apples comparison." *Miller v. Hancock*, 2017 COA 141, ¶ 34.

## II. Background

¶ 8 In December 2021, McLellan sued Weiss to recover damages she suffered as a result of an accident Weiss had caused. Before trial, Weiss made two written offers of settlement pursuant to section 13-17-202. On July 21, 2022, Weiss offered to settle for

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[1] For purposes of the offer of settlement statute, "actual costs" do not include attorney fees but may include any costs paid for by a party or their attorney or agent for "filing fees, subpoena fees, reasonable expert witness fees, copying costs, court reporter fees, reasonable investigative expenses and fees, reasonable travel expenses, exhibit or visual aid preparation or presentation expenses, legal research expenses, and all other similar fees and expenses." § 13-17-202(1)(b), C.R.S. 2024.

$7,500, inclusive of costs and interest (first offer). On November 17, 2022, Weiss increased the gross amount of his offer to $15,000, inclusive of costs and interest (second offer). McLellan rejected both offers. Following a three-day trial in May 2023, a jury awarded McLellan $1,150 in economic damages.

¶ 9 The district court computed McLellan's final judgment — including prejudgment interest and allowable costs through the date of each offer of settlement — as follows:

| | First Offer<br>July 21, 2022<br>$7,500 | Second Offer<br>November 17, 2022<br>$15,000 |
|---|---|---|
| Verdict | $1,150.00 | $1,150.00 |
| Prejudgment Interest and Pre-offer Costs | $5,729.04 | $16,153.91 |
| Total | $6,879.04 | $17,303.91 |

¶ 10 After trial, Weiss moved for an award of costs under section 13-17-202(1)(a)(II), arguing that he was entitled to recover his actual costs accrued after July 21, 2022, through trial, because

McLellan's final judgment did not exceed his first offer.[2] The same day, McLellan moved for an award of costs as the prevailing party under C.R.C.P. 54(d) and section 13-16-104, arguing that she was entitled to recover all her reasonable and necessary costs despite Weiss' first offer because her final judgment exceeded Weiss' second offer. In a later response to Weiss' motion, McLellan alternatively argued that, because her final judgment exceeded the second offer but not the first, Weiss was only entitled to recover the costs he accrued between the first and second offers — that is, costs accrued after July 21 but before November 17.

¶ 11 The district court concluded that, because McLellan's final judgment did not exceed the first offer, Weiss was entitled to recover his costs accrued after the date of that offer through trial. The court noted that section 13-17-202 allows a party to serve more than one statutory offer of settlement "but is silent as to the effect

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[2] Weiss also argued that he was the prevailing party given that McLellan asked the jury to award her damages of over $280,000 but recovered only $1,150. Because Weiss does not reraise that argument on appeal, we deem it abandoned. *See Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 38 ("[A]rguments raised in the trial court and not pursued on appeal are deemed abandoned[.]" (citing *People v. Dash*, 104 P.3d 286, 293 (Colo. App. 2004))).

of multiple offers." After considering the legislative purpose of the statute, the court determined that "a successive offer does not extinguish the first statutory offer." It also determined that McLellan, as the prevailing party, was entitled to recover her actual costs accrued before the date of the first offer. The court entered judgment accordingly.

## III. Analysis

¶ 12 McLellan contends that the district court erroneously interpreted section 13-17-202 by awarding Weiss his actual costs accrued after the date of the first offer through trial. She asks us to interpret the statute to mean either that (1) subsequent statutory offers of settlement extinguish prior offers, such that a plaintiff's final judgment should be compared only to the latest offer made; or (2) a defendant is only entitled to costs accrued *between* statutory offers of settlement when a plaintiff's final judgment exceeds a subsequent offer but not an earlier offer. McLellan further contends that the court erred by awarding her only her actual costs accrued before Weiss' first offer rather than all her necessary and reasonable costs incurred in connection with the litigation. We are not persuaded by McLellan's contentions.

### A. Standard of Review and Generally Applicable Law

¶ 13 We interpret statutes de novo. *Antero Treatment LLC v. Veolia Water Techs., Inc.*, 2023 CO 59, ¶ 11. In doing so, our primary task is to give effect to the legislative intent as reflected in the plain and ordinary meanings of the words and phrases used. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶ 40. We read the statute as a whole, giving consistent and sensible effect to all its parts. *Id.*; *see also* §§ 2-4-101, -201, C.R.S. 2024; *A.M. v. A.C.*, 2013 CO 16, ¶ 8. And we avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results. *Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16. When the language of a statute is clear, we enforce it as written. *Elder v. Williams*, 2020 CO 88, ¶ 18; *see also People v. Diaz*, 2015 CO 28, ¶ 12 ("We do not add words to the statute or subtract words from it.") (citation omitted).

¶ 14 Only if a statute is ambiguous — "that is, reasonably susceptible [of] more than one interpretation" — do we turn to other interpretive aids to discern the legislature's intent. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 13. These aids include legislative history, the end to be achieved by the statute, and the consequences of a

given construction. *See* § 2-4-203, C.R.S. 2024; *Morris v. Goodwin*, 185 P.3d 777, 779 (Colo. 2008).

### B. The Second Offer Had No Effect on Weiss' Entitlement to Costs Accrued after the First Offer

¶ 15 The award of costs contemplated by section 13-17-202(1)(a)(II) is mandatory if the three conditions set forth in the statute are met: (1) the defendant must "serve[] an offer of settlement in writing at any time more than fourteen days before the commencement of the trial"; (2) the offer must be "rejected by the plaintiff";[3] and (3) the plaintiff must "not recover a final judgment in excess of the amount offered." § 13-17-202(1)(a)(II); *see also Centric-Jones Co.*, 848 P.2d at 947 ("[T]he act provides very clear and definite steps to follow."). If these conditions are satisfied, "then the defendant *shall* be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff." § 13-17-202(1)(a)(II) (emphasis added); *see Centric-Jones Co.*, 848 P.2d at 947 ("[T]he court is required to award costs if the offer is refused and the subsequent trial judgment obtained is less favorable to the offeree than the offer, whether the

[3] Under section 13-17-202(1)(a)(III), "[i]f an offer of settlement is not accepted in writing within fourteen days after service of the offer, the offer shall be deemed rejected."

offeree prevails or not. . . . The use of the word 'shall' within a statute is presumed to be mandatory.").

¶ 16 Weiss' first offer met the statutory conditions. Weiss served the first offer in writing more than fourteen days before trial, McLellan rejected the offer, and McLellan did not recover a final judgment that exceeded $7,500. Consequently, the district court was required to award Weiss his actual costs accrued after July 21, 2022, to be paid by McLellan. *See* § 13-17-202(1)(a)(II).

¶ 17 Of course, the first offer is not the end of the story. Four months later, Weiss made a second, higher offer — something expressly contemplated by the offer of settlement statute, § 13-17-202(1)(a)(III) (If an offer of settlement is rejected, "the party who made the offer is not precluded from making a subsequent offer."), and consistent with the statute's legislative purpose to encourage reasonable settlement offers, *see Centric-Jones Co.*, 848 P.2d at 946-47 ("[T]he statute creates incentives to settle.").

¶ 18 When a defendant makes a subsequent, higher offer of settlement under section 13-17-202, one might expect three possible outcomes: (1) the plaintiff's final judgment does not exceed either the earlier, lower offer or the later, higher offer, entitling the

defendant to recover actual costs incurred after the first offer, *see Miller*, ¶ 58; (2) the plaintiff's final judgment exceeds the earlier, lower offer but does not exceed the later, higher offer, entitling the defendant to recover actual costs incurred after the second offer, *see id.*; or (3) the plaintiff's final judgment exceeds both the earlier, lower offer and the later, higher offer, in which case the defendant is not entitled to costs, *see id.* at ¶ 59; *see also Mitchell*, ¶ 20 (the plaintiff's final judgment, if calculated correctly, would have exceeded both of defendant's statutory offers of settlement and therefore the defendant was not entitled to costs).

¶ 19 But this case does not present one of these common scenarios. Instead, because McLellan incurred significant costs between the first offer and the second offer, her final judgment exceeded the second, higher offer even though it did not exceed the first, lower offer. These rare circumstances require that we determine what effect, if any, a subsequent offer has on a defendant's entitlement to an award of costs in connection with an earlier offer. Based on the plain language of the statute, we conclude that a subsequent offer does not impact a defendant's entitlement to costs vis-a-vis an earlier offer.

¶ 20 Section 13-17-202(1)(a)(II) provides that, if a defendant serves "*an* offer of settlement" and the three conditions are met, the defendant becomes entitled to an award of costs accruing after "*the* offer of settlement."[4] (Emphasis added.) And if "an offer of settlement" is rejected, the defendant may make subsequent offers. § 13-17-202(1)(a)(III). Read together, these provisions plainly require that each offer of settlement be considered independently and that the defendant's entitlement to costs be measured against each offer.

¶ 21 Although the legislature clearly contemplated that a defendant may make multiple offers of settlement, it did not impose any consequence for doing so. *See* § 13-17-202. The statute does not say, for example, that a subsequent offer extinguishes an earlier offer or that the last offer controls when determining whether a defendant is entitled to costs. The statute does not make a defendant's entitlement to an award of costs dependent on a plaintiff rejecting "the last" or "the highest" offer of settlement. Nor

[4] We note that section 13-17-202(1)(a)(I), governing statutory offers of settlement made by plaintiffs to defendants, is structured similarly.

does it provide that, if the plaintiff's final judgment exceeds a later offer, a defendant who was already entitled to an award of costs based on an earlier offer may no longer recover those costs, must recover fewer costs, or may only recover costs accrued after the first offer but before the second. Simply put, McLellan's proposed interpretations require us to add words to the offer of settlement statute that do not exist, something we cannot do. *See Diaz*, ¶ 12. Had the legislature intended any of these results, it would have said so. *See id.*

¶ 22 Still, McLellan contends that section 13-17-202's "silence" on the effect of multiple offers creates ambiguity such that we should look beyond the statute to other interpretive aids, which she argues support her proposed interpretations. *See Oracle Corp. v. Dep't of Revenue*, 2017 COA 152, ¶ 22 (explaining that silence in the statutory language may create ambiguity). We see no ambiguity. If the plaintiff's final judgment, as calculated under section 13-17-202(2), fails to exceed any statutorily compliant offer, the defendant is entitled to costs accrued after the date of that offer through trial — regardless of whether the defendant made subsequent offers.

¶ 23 Moreover, interpreting the statute this way is consistent with the legislature's intent to incentivize settlement and penalize parties who reject reasonable offers. *See Centric-Jones Co.*, 848 P.2d at 946-47; *Lawry*, 192 P.3d at 565-66; *see also Carousel Farms Metro. Dist.*, ¶ 40 ("The primary purpose [of statutory interpretation] is to give effect to the intent of the legislature."). Our interpretation encourages parties to make early reasonable settlement offers and to continue making additional offers as trial approaches. In contrast, McLellan's proposed interpretations contravene the legislature's intent, discouraging defendants from making additional offers closer to trial for fear of losing an award of costs to which they would otherwise be entitled, while encouraging plaintiffs to reject early reasonable offers and drive up the costs of the litigation.

¶ 24 Thus, we conclude that if a defendant extends multiple offers of settlement that comply with section 13-17-202 and are rejected by the plaintiff, each offer must be separately analyzed to determine whether the defendant is entitled to an award of costs based on that offer. *See Miller*, ¶ 58 (instructing the court on remand to analyze the defendant's two statutory offers independently). If a defendant is entitled to costs based on an earlier offer, it does not matter

whether they made a subsequent offer that would not entitle them to costs under the statute.

¶ 25 Here, Weiss made the first offer of settlement for $7,500 on July 21, 2022. McLellan's final judgment, including prejudgment interest and costs accrued through the date of the offer, was less than $7,500. Under section 13-17-202(1)(a)(II), Weiss "shall be awarded actual costs accruing after the offer of settlement to be paid by" McLellan. This is so even though Weiss made a second offer of settlement for $15,000 on November 17, 2022, under which he would not be entitled to recover any costs. The subsequent offer had no effect on Weiss' entitlement to costs based on the first offer. Accordingly, we perceive no error in the court's award of costs to Weiss.

### C. As the Prevailing Party, McLellan Was Only Entitled to Actual Costs Accrued before the First Offer

¶ 26 McLellan contends that the district court erred by awarding her only her actual costs accrued before Weiss' first statutory offer of settlement. We disagree.

¶ 27 As best we understand, McLellan contends that the court should have awarded her (1) all her reasonable and necessary costs

incurred during the litigation under section 13-16-104 and C.R.C.P. 54(d) because she was the prevailing party or (2) her actual costs accrued before Weiss' first offer and her reasonable and necessary costs incurred after the second offer. But McLellan's contentions are based on the premise that because her final judgment exceeded Weiss' second offer, Weiss is not entitled to the benefit of section 13-17-202(1)(a)(II) — either at all or at least following his second offer. Because we have rejected that premise, we likewise reject this contention.

¶ 28 The statute entitles McLellan to recover only the actual costs she accrued prior to July 21, 2022. As we have explained, section 13-17-202(1)(a)(II) provides that a plaintiff must pay the defendant's actual costs that accrue after the defendant makes a statutorily compliant offer of settlement if the plaintiff rejects the offer and does not recover a final judgment that exceeds the offer. Historically, the statute was also interpreted to preclude an award of *any* costs to the plaintiff, even if the plaintiff was the prevailing party. *See Centric-Jones Co.*, 848 P.2d at 947 (interpreting section 13-17-202(3), C.R.S. 1992, and making clear that when a defendant becomes entitled to recover costs under the statute, "[t]he court is

not permitted to award costs to the prevailing party"). As a division of this court explained in *Bennett v. Hickman*, an "effect of this statute is to modify the provisions of [section] 13-16-104 . . . and C.R.C.P. 54(d), by not allowing a party who rejects a settlement offer and recovers less at trial to recover [their] costs, even though that party is determined to be the prevailing party." 992 P.2d 670, 672-73 (Colo. App. 1999) (citing *Centric-Jones Co.*, 848 P.2d at 947).

¶ 29 In 2008, however, the legislature amended section 13-17-202(1)(a)(II) to provide that "if the plaintiff is the prevailing party in the action, the plaintiff's final judgment shall include the amount of the plaintiff's actual costs that accrued prior to the offer of settlement." Ch. 5, sec. 1, § 13-17-202(1)(a)(II), 2008 Colo. Sess. Laws 8. A division of this court determined that the 2008 amendment was "aimed at 'correcting'" the "perceived 'inequity'" created by *Bennett* by allowing a prevailing plaintiff whose final judgment did not exceed an offer of settlement to recover their "pre-offer costs." *Miller*, ¶¶ 30-32 (quoting Hearings on H.B. 08-1020

before the S. Judiciary Comm., 66th Gen. Assemb., 1st Reg. Sess. (Jan. 28, 2008) (remarks of Senator Veiga)).[5]

¶ 30 At the time the statute was amended to allow a plaintiff to recover pre-offer costs, it already contemplated that multiple offers could be made. Yet the legislature did not include any language altering the plaintiff's entitlement to costs in the event the plaintiff's final judgment exceeded a subsequent offer. We decline to add those words to the statute. *See Diaz*, ¶ 12.

¶ 31 Consistent with the statutory language as interpreted by *Miller*, the court awarded McLellan actual costs accrued prior to July 21, 2022, the date of the first offer. We perceive no error.

## IV. Disposition

¶ 32 We affirm the district court's judgment.

JUDGE WELLING and JUDGE MOULTRIE concur.

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[5] We note that the last sentence of section 13-17-202(1)(a)(II) provides that, "as provided in section 13-16-104[, C.R.S. 2024], if the plaintiff is the prevailing party in the action, the plaintiff's final judgment shall include the amount of the plaintiff's *actual costs* that accrued prior to the offer of settlement." (Emphasis added.) Section 13-16-104, in turn, entitles a prevailing plaintiff to recover "costs." And C.R.C.P. 54(d) entitles a prevailing party to recover "reasonable costs." Because any inconsistency between "actual costs," "costs," and "reasonable costs" is not at issue here, we do not attempt to reconcile these terms.