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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SANDRA JEAN DADE, Plaintiff and Appellant, v. DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.	E064438 (Super.Ct.No. CIVDS1303736) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Rafael A. Arreola and Brian S. McCarville, Judges.[*] Affirmed as modified.

Huarte Law Office, Anne M. Huarte; Girardi Keese and John A. Girardi for Plaintiff and Appellant.

[*] Judge Arreola is a retired judge of the San Diego Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution. Judge Arreola presided at the trial and Judge McCarville signed the judgment.

Jeanne E. Scherer, Chief Counsel, Jerald M. Montoya, Deputy Chief Counsel, and Ruth Yeager, Yuan Chang, and Mark Berkebile, Deputy Attorneys for Defendant and Respondent.

I. INTRODUCTION

Plaintiff and appellant, Sandra Jean Dade, brought this lawsuit against defendant and respondent, State of California, for severe and permanent injuries she suffered in a single-vehicle accident on State Route 127 (SR 127) in July 2012. Dade alleged a puddle on SR 127 caused her vehicle to veer off-road and roll over numerous times. She pursued a single cause of action for a dangerous condition of public property on SR 127. The California Department of Transportation (Caltrans), acting for the state, prevailed at the jury trial in June 2015. The jury found no dangerous condition existed. The court awarded Caltrans over $100,000 in costs, including $96,228.87 in expert witness fees Caltrans incurred after making a statutory offer to compromise. (Code Civ. Proc., § 998, subds. (b), (c)(1).)[1]

On appeal, Dade contends the court prejudicially erred in excluding certain testimony from her biomechanical expert and certain testimony from another driver who witnessed her accident. In addition, she argues Caltrans's offer to compromise was unreasonable, and the court therefore abused its discretion in awarding Caltrans its expert witness fees. We reject each of these claims and affirm.

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

II. FACTS AND PROCEDURE

Dade's evidentiary contentions relate to two motions in limine filed by Caltrans. We summarize the proceedings regarding those motions and then move to the pertinent evidence adduced at trial, the jury's verdict, and the postjudgment motion to strike or tax costs.

A. *Motion in Limine No. 9 to Preclude Carley Ward from Offering Accident Reconstruction and Traffic Engineering Testimony*

Dade designated Carley Ward as her biomechanical expert, who would "testify as to how [Dade's] injuries occurred during the subject automobile accident." At her deposition in May 2015, Ward also offered opinions on accident reconstruction and traffic engineering. Caltrans argued the court should preclude Ward from offering accident reconstruction and traffic engineering testimony because Dade had not designated her as an expert on these topics, she was not qualified to offer opinions on these topics, and she had not conducted the analysis necessary to opine on these topics. In addition, Caltrans argued such testimony would be both cumulative, because Dade had designated other experts on both topics, and unduly prejudicial. It also asked the court to exclude any reference to the work of Richard Hille, an accident reconstruction expert who Ward had hired to analyze the event data recorder (EDR)—or "black box"—from Dade's vehicle. Dade had not identified Hille in her designation of expert witnesses.

At deposition, Ward testified she was not an accident reconstructionist and had no licenses in the area, although she had reconstructed accidents in the course of her work,

when she did not have someone else to do it, or she thought the reconstruction with which she was provided was wrong. In this case, Ward disagreed with the conclusion of Dade's designated accident reconstructionist, Kurt Weiss. Weiss concluded Dade's vehicle had rolled seven to eight times during the accident, but Ward felt that number was much too high. She estimated the vehicle rolled three to four times. She further opined the EDR data was wrong. She had some experience with EDR data but was not certified in it. Her consultant, Hille, was certified to work with EDR data.

In opposition to this motion in limine, Dade argued there was no reason to exclude Ward's testimony for unfair surprise, given that Caltrans had deposed Ward about her accident reconstruction and traffic engineering experience and opinions. Moreover, Dade argued, Ward's experience qualified her on these topics, even if she did not have degrees or licenses on the topics. And, she was permitted to rely on the opinions of other experts—Hille, namely—in forming her opinions.

The court deferred ruling on this motion until it could hold a hearing on Ward's qualifications under Evidence Code section 402. At that hearing, Ward testified that she studied injuries produced traumatically. She had studied well over a thousand rollover collisions. Her biodynamic analyses attempted to determine the movements of the body within a vehicle. It was also important for her to know the movements of the vehicle itself because its movements determined how the occupants moved. She had previously been challenged as an accident reconstructionist in court, and courts had permitted her to testify on reconstruction.

To conduct her biodynamic analysis in this case, Ward attempted to determine how many times the vehicle rolled. She went to the scene, looked for broken glass patterns, and found three separate points where the vehicle touched down, corresponding to three rolls. She found a point of rest 50 feet later through photogrammetry, and thus she concluded there may have been a fourth roll, but no more than four. She opined Dade's injuries and the condition of her vehicle were not consistent with the vehicle rolling over eight times.

Ward could not say exactly what speed the vehicle was going when it left the road. Although she was not certified in EDR analysis, she was critical of the data from the EDR showing that the speed of the vehicle was 73 miles per hour. She believed the wheels would speed up when they left the ground, resulting in a higher speed reading. The court asked for studies showing wheels would speed up when a vehicle left the road, and Dade's counsel indicated he would "work on that" and present anything he found the following morning.

The following morning, Dade's counsel did not proffer any foundational studies or other materials. The court ruled Ward could not testify the EDR data on speed was wrong, suggesting there was a lack of foundation. Further, she could not testify about the number of times the vehicle rolled, beyond opining within how many rolls Dade had sustained her injuries. The court ruled under Evidence Code section 352 that the delay and confusion involved in such testimony outweighed its probative value. The ruling was without prejudice to reconsideration after the accident reconstructionists for both parties

testified. If they testified to eight or more rolls, the court would reconsider the probative value of Ward's opinion challenging that number of rolls.

B. *Motion in Limine No. 10 to Preclude Testimony Regarding Water North of the Accident Location*

Dade alleged she was traveling northbound near Baker, California on SR 127—a two-lane paved road—when the accident occurred. Caltrans argued the court should preclude Dade from offering the testimony of percipient witness Scott Mitre that puddles of water existed north of the accident site. At his deposition, Mitre testified he was traveling southbound on SR 127, and 10 miles north of the accident location he observed 10-foot long puddles on both sides of the roadway. As a result of these puddles, Mitre had trouble controlling his vehicle. Caltrans argued such testimony had little to no probative value and would mislead the jury. Whether there were puddles of water 10 miles north of the accident site was irrelevant because Dade never drove through that portion of the roadway.

Dade argued in opposition that the conditions Mitre observed north of the accident site were relevant as a comparison to the portion of SR 127 she traveled, where the puddles were not observable, and to show SR 127 had been constructed to allow standing water to exist within the lanes, creating a dangerous condition.

The court granted this motion and precluded Mitre from testifying about the conditions on SR 127 10 miles north of the accident site. The court ruled such evidence

was irrelevant. But it ruled Mitre could testify about the conditions on SR 127 within a mile of the site of the accident.

C. *Pertinent Trial Evidence*

Kimberly Dennison is Dade's niece and was the front passenger in Dade's vehicle on the morning of the accident. The two of them left Dade's house in Oak Hills, California at 8:00 a.m. and took Interstate 15 north to Baker, where they arrived an hour to an hour and a half later. From Baker, they took SR 127 north. It drizzled from the time they left Baker until the accident occurred. Dennison recalled a "huge puddle" covering both lanes of traffic and Dade swerving onto the dirt to try to miss the puddle, but she recalled no other details from the accident. At her deposition, she also testified Dade swerved to miss a puddle, though she described the puddle as covering only half of their lane.

On the morning of Dade's accident, Mitre left his home in Nevada and was driving southbound on SR 127 when he witnessed the accident. The accident occurred on a portion of the road that curves. The entire curve is approximately 2,000 feet long. The road is "bumpy" and "dippish" in this area. It had been raining for approximately 15 minutes as Mitre drove south before the accident, with the rain steady enough that Mitre had the wipers on "full time and not intermittently." The rain turned into a mist within a mile of the accident. He noticed 10-foot by 10-foot puddles of water in both the northbound and southbound lanes as he was heading into the area of the accident.

Mitre saw Dade's car coming toward him heading north and estimated she was driving about 50 to 55 miles per hour.[2] She veered into the southbound lane of traffic for a fraction of a second. Mitre was paying attention to her vehicle but did not notice the surface of the road at that point, and he could not say why she swerved into his lane, nor could he say whether she hit a puddle in the road. After veering into the southbound lane, Dade veered back into her own lane and towards the dirt on her right side of the road. Her vehicle left the road altogether, hit a berm of dirt, and "rolled up into the air." Mitre saw Dade's vehicle flip approximately six times. The vehicle came to rest on its wheels approximately 50 feet off the road. Mitre stopped driving and called for help. He was at the scene of the accident for approximately 75 to 80 minutes, helping Dade, waiting for the ambulance to extract her from the vehicle, and waiting for the California Highway Patrol (CHP). He had to leave before the CHP arrived.

Mitre left and continued driving south through the curve, where Dade had driven just prior to the accident. There were two-foot by two-foot puddles in the road, one approximately 200 feet after the curve, and another approximately 500 feet after that.

Officer Janitzio Jurado of the CHP investigated the accident. He received a radio call regarding the accident at approximately 9:52 a.m. and arrived at the scene within five minutes. He took the same route Dade was driving when the accident occurred—northbound on SR 127 from Baker. The road was wet from the rain, but it was not still raining. He did not observe any flooding, puddles, or other unusual conditions within the

[2] Mitre is a train conductor and had experience in estimating speeds of train cars going by him.

curve where the accident occurred. The ambulance was just leaving and there were no witnesses at the scene. He obtained a statement from Dennison a few days later. Dennison reported that she and Dade were talking and listening to the radio when the vehicle suddenly veered off the road. She said Dade was driving the speed limit, but she had not looked at the driver's side of the car. The signs posted on SR 127 indicated the speed limit was 55 miles per hour. According to the officer, Dennison did not say the vehicle swerved to miss a puddle. Dennison testified to the opposite at trial—she did tell him the vehicle swerved to miss a puddle.

Jeff Smith supervises the Caltrans maintenance crew that is responsible for SR 127. SR 127 has "turnable" signs that read "Flooded" and may be rotated 90 degrees by hand. The signs are usually turned parallel to the highway such that drivers cannot read them, and a member of the maintenance crew may turn the signs to face the road if conditions warrant it. If water were covering the road "from fog line to fog line," Smith would consider that flooded and turn the signs. Likewise, if there were puddles 10 feet by 10 feet in size and in both lanes, he would turn the "Flooded" signs. He would not turn the signs for puddles that were two feet by two feet. Caltrans engineers never provided Smith with any materials outlining the circumstances under which he and his crew should turn the signs. He learned when to turn the signs from his on-the-job experience.

The day of the accident, Smith was on "storm patrol," monitoring the effects of the rain on the entire 90-mile stretch of SR 127. Smith started driving on SR 127 at 6:00

a.m. on the day of the accident. He drove the entire round-trip length of SR 127—south from Shoshone to Baker, and then north back to Shoshone—and did not note any storm activity. He then started another trip south from Shoshone and arrived at the scene of the accident somewhere between 45 to 90 minutes after it had occurred. He arrived at the scene at approximately 10:00 a.m. The turnable signs were in their parallel position and had not been turned toward drivers. Smith did not note any flooding or puddles in the area, or any conditions that would warrant turning the "Flooded" signs. The pavement was wet when he arrived, even though he did not recall encountering any rain during his drive. Usually, there was no standing water in this curving area of SR 127 because the road is banked, so that the water will flow from west to east across the road and into drainage areas.

Steven Clark is a forensic meteorologist whom Dade retained. He estimated that on the day of the accident, one-third of an inch of rain fell between 3:00 a.m. and 9:45 a.m., within a mile radius of the accident site.

Ward testified about her observations of broken glass clusters and rough terrain at the scene of the accident, which she visited in March 2015. She also testified about her examination of the vehicle and Dade's medical records, and explained how Dade's injuries occurred within one to three rollovers.

Dale Dunlap is a civil engineer whom Dade retained. His firm conducted a survey of 900 feet of SR 127 in the area of the accident. The portion of the road surveyed was "fairly flat" and climbed in elevation "ever so slightly" in the northbound direction. Both

lanes of the road were also banked through the curve. Dunlap explained how the accumulation of water on the roadway can be hazardous by causing drivers to lose control of their vehicles. Water can accumulate even on roads that are banked if there are depressions in the road impeding water flow. Depressions would have caused the puddling other witnesses observed. Dunlap observed the portion of SR 127 surveyed to be "in fairly good shape." His survey did not pick up any location on the road where puddles would have existed. But it is possible for depressions that are invisible to the naked eye to exist, which could be determined with specialized survey equipment. Dunlap did not use such equipment. The area where Mitre observed two-foot by two-foot puddles as he was leaving the scene was not within the area of SR 127 that Dunlap's firm surveyed.

Dunlap opined that the puddles Mitre observed as he was leaving, combined with the failure to turn the "Flooded" signs toward traffic, more probably than not presented a dangerous condition. He also opined the signs should be turned toward traffic no matter what size puddle existed. Dunlap had researched whether any prior wet weather accidents had occurred on this area of SR 127 and did not find any of record.

Ronald Nelson is a civil and traffic engineer whom Caltrans retained. He had worked for Caltrans from 1957 to 2000. He visited the subject portion of SR 127 in January and November 2014 and had Caltrans staff conduct a survey of 1,000 feet south of the curve to approximately 500 feet north of the curve. Including the curve itself, the survey covered approximately 2,000 feet of the road. Nelson determined from the survey

data that there were no depressions or undulations in the road. This was consistent with the survey conducted by Dunlap's firm, which found no undulations either.

Nelson opined that the surveyed area could not contain 10-foot by 10-foot puddles, and moreover, the banking of the road in this area would cause water to flow across the road. Nelson further opined that the pertinent area of SR 127 should be considered flooded when water is flowing across it and covering the road from fog line to fog line. The water would be flowing and not standing in puddles because of the "geometrics of the curve." Nelson found there were no wet weather accidents recorded on the subject portion of SR 127 for 10 years prior to Dade's accident. Nelson also opined that no design defect existed on the subject portion of SR 127, there was no significant risk of injury when using the subject portion, and Caltrans had no notice of a dangerous condition at the subject location. Turning the "Flooded" signs toward traffic when no flooding existed would be harmful because it would breed insensitivity to the signs.

Stephen Fenton is a civil engineer and certified accident reconstruction engineer whom Caltrans retained. Fenton determined that Dade's vehicle was traveling northbound and went off the right side of the road, slid sideways, hit an embankment and went airborne briefly, and then rolled over sideways several times. Fenton opined the vehicle rolled at least eight and possibly nine times based on the eight families of scratch patterns he observed on the vehicle. Officer Jurado's report prepared within a day or two

of the accident contained a diagram showing only four impressions of the vehicle in the dirt.

Based on Fenton's observations of the physical evidence, he calculated the speed of Dade's vehicle before it began rolling at somewhere between 76 and 78 miles per hour. He had almost 20 years of experience in analyzing EDR data and analyzed 23 pages of EDR data in this case. The EDR data was consistent with his calculation based on the physical evidence, which gave him a high degree of confidence about the speed of the vehicle.

Fenton used very precise, specialized equipment—a 3-D laser scanner—to determine whether there were any undulations, depressions, or areas where excessive pooling of water would occur on the pertinent area of SR 127. The 3-D laser scanner collected and analyzed over 100 million data points. He and his team took the scans in December 2013 and December 2014. He also documented the condition of the road with traditional survey equipment, video recordings, and photographs. All of this data indicated there were no undulations that would cause pooling on the road.

Fenton opined Dade's speeding—75 to 80 miles per hour on a 55-mile-per-hour road—in rainy weather and while driving through a curve caused the accident. He further opined that her speed contributed to her vehicle rolling over so many times, and had she not been speeding and still drove off the road, she likely would not have rolled.

Dade never called Weiss, her designated accident reconstructionist, and she did not seek to call any rebuttal witnesses.

On appeal, Dade asserts the extent of her injuries are not in dispute, and neither party summarizes the medical evidence adduced at trial. For our purposes, we see no need to summarize that evidence either, other than to note the following:

Dade suffered an amputated arm, extensive brain and cervical spine injuries, broken ribs, and bleeding in several internal organs. She was in a coma for seven months after the accident. Dade, who was 70 years old at the time, did not testify at trial. She is fully dependent on caregiving assistance in that she is unable to feed, bathe, or dress herself, is incontinent, and is unable to administer her own medications. The parties stipulated Dade's past medical expenses amounted to $435,554.11. Dade's life care planner and economist estimated the present value of the cost of her life care plan would be $6,632,957. Caltrans's life care planner and economist estimated the present value of the cost of Dade's life care plan would be between $1,642,542 and $2,871,746.

D. *Pertinent Jury Instructions and Jury Verdict*

Consistent with CACI No. 1100, the court instructed the jury on a cause of action for dangerous condition of public property as follows: "To establish this claim, Sandra Dade must prove all of the following: One, that the State of California owned or controlled the property; two, that the property was in a dangerous condition at the time of the accident; three, that the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred; four, that negligent or wrongful conduct of the State of California's employee, acting within the scope of his or her employment created the dangerous condition . . . [or] [t]hat the State of California had notice of a dangerous

condition for a long enough time to have protected against it; five, that Sandra Dade was harmed; and six, that the dangerous condition was a substantial factor in causing Sandra Dade's harm."

Further, consistent with CACI No. 1102, the court defined a dangerous condition as follows: "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public when the property is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. Whether the property is in a dangerous condition is to be determined without regard to whether Sandra Dade exercised or failed to exercise reasonable care in her use of the property."

The court also instructed the jury on comparative fault based on CACI No. 405: "The State of California claims that Sandra Dade's own negligence contributed to her harm. To succeed on this claim, the State of California must prove both of the following: One, that Sandra Dade was negligent; and two, that Sandra Dade's negligence was a substantial factor in causing her harm." The court also instructed the jury that negligence is a failure to use reasonable care; Dade was negligent if Caltrans proved she was not driving at a reasonable speed at the time of the accident; the speed limit was a factor to consider when deciding whether she was negligent; and the speed limit at the site of the accident was 55 miles per hour. (CACI Nos. 401, 706, 707, & 708.)

The jury returned a verdict in favor of Caltrans by answering only the first question on the verdict form submitted to it—namely: "Was the property in a dangerous

condition at the time of the incident?" The jury answered, "No," and did not reach the remainder of the verdict form. The court entered a judgment consistent with the verdict.

E. *Dade's Motion to Strike or Tax Costs*

Approximately two years into the case and one month before trial began, Caltrans made a statutory offer to compromise pursuant to section 998 (998 offer). It offered Dade $25,000 and a waiver of all costs incurred, in exchange for her release of all claims and a dismissal with prejudice of the entire action.

After Dade rejected the offer and the jury returned the verdict for Caltrans, Caltrans filed a memorandum of costs seeking $117,985 in expert witness fees, and another $21,370 in other costs. Dade filed a motion to strike or tax the costs associated with expert witnesses, on the grounds that (1) the 998 offer was not reasonable and not made in good faith, and (2) Caltrans failed to substantiate the expert witness fees. Caltrans's opposition asserted, among other things, that its offer was reasonable, based on the evidence available to the parties at the time. Caltrans's counsel's supporting declaration stated that "[t]he parties had engaged in extensive discovery prior to" the 998 offer, and the parties had deposed the accident reconstructionists, traffic engineers, and Smith. Caltrans had produced evidence there were no other wet weather accidents at or complaints about the subject location, Dade's own accident reconstructionist had opined she was traveling between 71 and 77 miles per hour when her vehicle left the road, and Smith had not observed any conditions warranting the use of the "Flooded" signs on the

morning of the accident. In its opposition, Caltrans also agreed to reduce the amount of expert witness fees it was seeking to $96,228.87.

The court granted in part and denied in part the motion to tax costs. It found the 998 offer of $25,000 and a waiver of costs was reasonable, explaining: "With respect to whether or not the offer of $25,000 based on all of [the] circumstances of this case and including whether or not she was going within the speed limit, including whether or not there is [a] defect on the roadway, the weather, and so on was not reasonably [*sic*] because there was the likelihood the defendant would prevail. And so I'm going to make a finding that based on all the circumstances, it was reasonable. And mainly because the law requires that the person be using due care. And going 71 to 77 miles per hour, based on both the plaintiff's expert and defense's expert, is not reasonable or due care. So I'm going to find that there wasn't an unreasonable offer to offer $25,000 and a waiver of cost, which would be substantial or are substantial." But it reduced the amount of expert fees to $96,228.87 (as Caltrans had proposed in its opposition). Combined with $21,370 in nonexpert costs that Dade did not challenge as unsubstantiated, it awarded total costs in the amount of $117,598.87. The court entered an amended judgment awarding these costs.

III. DISCUSSION

A. *The Exclusion of Ward's Testimony Challenging the Number of Rollovers and the EDR Data Did Not Prejudice Dade*

Dade first contends the court erred in excluding Ward's testimony about the number of rollovers in the accident and her disagreement with the EDR data. Dade argues this evidence was "crucial" to show she was not speeding at the time of the accident, and the court's exclusion of this testimony "effectively gutted" her case.

We review the trial court's decision to admit or exclude expert testimony for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) We shall not reverse a judgment for the erroneous exclusion of evidence unless there is a reasonable probability the jury would have reached a result more favorable to Dade, absent the error. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.)

We will assume without deciding that the court erred in precluding Ward from testifying (1) Dade's vehicle rolled three to four times as opposed to eight times, and (2) the EDR data showing a speed of 73 miles per hour was incorrect. Even so, there is no reasonable probability Dade would have realized a more favorable result, had the court admitted the evidence.

At least two reasons support this conclusion. First, we cannot agree with Dade that the court's ruling gutted her case. The point of Ward's proposed testimony was to show that Dade was not speeding. But there was other evidence Dade was not speeding.

Indeed, when the court inquired about Dade's accident reconstructionist during trial, her counsel explained he was not going to call Weiss because the testimony of percipient witnesses (Mitre and Dennison) established Dade was not speeding.

Second, and more importantly, even if the jury had heard and credited Ward's excluded testimony, Dade would not have achieved a more favorable result. The jury's verdict reveals it never reached the question of Dade's speeding (or lack of speeding).

The elements of a cause of action for dangerous condition of public property are: (1) the property was in a dangerous condition at the time of the plaintiff's injury; (2) the dangerous condition created a reasonably foreseeable risk of the kind of injury the plaintiff suffered; (3) the dangerous condition proximately caused the injury; and (4) either (a) a negligent or wrongful act or omission of a public entity employee, acting within the scope of his or her employment, created the dangerous condition, or (b) the public entity had sufficient notice of the danger to take corrective measures. (Gov. Code, § 835.)

Only the first element is at issue here—whether the property was in a dangerous condition. A "'[d]angerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property *is used with due care* in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a), italics added.) "The status of a condition as 'dangerous' for purposes of the statutory definition does *not* depend on whether the plaintiff or other persons were actually exercising due care but on

whether the condition of the property posed a substantial risk of injury to persons who *were* exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768.) "Whether the condition of property posed a substantial risk of injury to foreseeable users exercising due care is an objective standard and is measured by the risk posed to an ordinary foreseeable user. [Citation.] Accordingly, where the condition of property posed a substantial risk of injury to the ordinary foreseeable user exercising due care, the fact the particular plaintiff may not have used due care is relevant only to his comparative fault and not to the issue of the presence of a dangerous condition." (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 992.) Thus, "[t]he negligence of a plaintiff-user of public property . . . is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.)

In accordance with these authorities, the court defined a dangerous condition for the jury as a condition that creates a substantial risk of injury when the property is used *with reasonable care*, and it instructed the jurors to determine whether a dangerous condition existed "*without regard to whether Sandra Dade exercised or failed to exercise reasonable care* in her use of the property." (Italics added.) In other words, the jury was instructed to assume users were employing reasonable care for purposes of the first question on the verdict form: "Was the property in a dangerous condition at the time of the incident?" Whether Dade herself was speeding and thus not using reasonable care was irrelevant to this question.

The jury's answer to the question rendered moot the issues of her speed and level of care. The jury determined SR 127 was not in a dangerous condition, regardless of Dade's speed and level of care. This was the first element of the cause of action the jury was asked to consider. It never reached the other elements, like causation, or Caltrans's defense of comparative fault, at which point Dade's particular use of the property would have been relevant. (See CACI VF-1100.) In light of this verdict, there is no reasonable probability—or even a remote probability—that Ward's testimony relating to Dade's speed would have changed the outcome of the trial. (Cf. *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1139, 1143 [any error in a causation instruction was harmless because the jury's verdict revealed that it never reached the issue of causation].)

Dade contends the instruction defining a dangerous condition was internally inconsistent in that it told the jury to consider whether the property was in a dangerous condition when "being used 'with reasonable care' by Ms. Dade," and also to determine whether the property was in a dangerous condition "'without regard to whether Sandra Dade exercised or failed to exercise reasonable care.'" But Dade advances an unreasonable reading of the instruction to reflect a nonexistent conflict. The instruction defined a dangerous condition as one "that creates a substantial risk of injury to members of the general public when the property or adjacent property is used with reasonable care." (CACI No. 1102.) As we have discussed, the quoted language plainly meant the jury should assume the property was used with reasonable care. That is entirely consistent with telling the jury to disregard whether Dade herself exercised reasonable

care in her use of the property. We presume the jury understood and followed these clear instructions. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1308.)

Dade also argues the asserted error resulted in a denial of a fair hearing and was therefore reversible per se. We are unpersuaded by this argument. Improperly excluding evidence generally is not a structural error requiring per se reversal. (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 849.) Rather, appellate courts ordinarily apply the standard of prejudice we discuss above, that is, whether a better result was reasonably probable. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund*, *supra*, 65 Cal.App.4th at pp. 1431-1432.) Dade's reliance on *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659 does not persuade us to apply the reversible per se standard. There, the trial court's granting of two motions in limine effectively prevented the plaintiffs from offering any evidence at all to establish their case. (*Id.* at pp. 668, 677.) The rulings foreclosed the plaintiffs from pursuing the only theory of liability supported by their evidence, and after the plaintiffs' opening statement, the court granted a nonsuit. (*Id.* at pp. 668-669, 672-675.) The appellate court held this denied the plaintiffs the right to offer evidence and the right to a fair hearing, and constituted per se reversible error. (*Id.* at p. 677.) This case is not analogous. As should be apparent from our summary of the evidence at the 10-day trial, the court's ruling did not prevent Dade from calling numerous witnesses to otherwise establish her case.

B. *The Exclusion of Mitre's Testimony Regarding Conditions 10 Miles North of the Accident Site Was Not Error or Prejudicial*

Dade contends the court erroneously precluded Mitre from testifying about rain and 10-foot wide puddles he observed 10 miles north of the accident site. She asserts this evidence was relevant to whether Smith, the Caltrans employee on storm patrol, had notice of rain and puddling requiring him to turn the "Flooded" signs. We conclude the court correctly ruled this evidence was irrelevant, and even assuming it erred, any error was not prejudicial.

The public entity's notice of the dangerous condition is, indeed, an element of the cause of action, and the court so instructed the jury. (Gov. Code, § 835, subd. (b).) (CACI No. 1100.) Nevertheless, conditions on the road 10 miles north of the accident site did not bear on conditions at the accident site, and so did not bear on notice of conditions at the accident site. The scope of relevant evidence was not the entire 90-mile stretch of SR 127. The court acted well within its broad discretion in limiting Mitre's observations of the conditions to a mile before and a mile after the accident site. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639 [the trial court's determination of the relevance of evidence is reviewed for abuse of discretion].)

Moreover, it is not reasonably probable Dade would have realized a better result, had the court permitted Mitre to testify about the rain and puddles farther outside the

accident site.[3] Mitre, in fact, testified that he observed heavy rain for approximately 15 minutes before he reached the accident site, and he observed 10-foot by 10-foot puddles before he reached the site, as well as smaller puddles when he left the site. If the jury was not convinced a dangerous condition existed in light of this evidence, his observations about the same or similar conditions even farther away would not have changed the outcome. Furthermore, the jury never reached the notice element of the cause of action, having found no dangerous condition existed. (See CACI VF-1100 [asking whether the defendant had notice of the dangerous condition for a long enough time to have protected against it, only after asking whether a dangerous condition existed, and whether the condition created a reasonably foreseeable risk of the kind of incident that occurred].) If the excluded evidence was relevant to notice, as Dade asserts, and the jury never reached notice, it follows that the excluded evidence would have made no difference.

C. *The Court Did Not Abuse Its Discretion in Refusing to Strike the Expert Witness Fees of Caltrans*

Dade lastly argues the court abused its discretion when it denied her motion to strike or tax Caltrans's expert witness fees. She asserts Caltrans's 998 offer of $25,000 and a waiver of costs was unreasonable and not made in good faith. We disagree the court erred.

[3] Dade again urges us to apply the reversible per se standard to any error in excluding Mitre's testimony. Just as we determined in part III.A., the limited exclusion of some of Mitre's testimony did not deprive Dade of a fair hearing.

Section 998 permits the recovery of expert witness fees following the nonacceptance of a pretrial settlement offer. (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019.) It states that if a plaintiff rejects a pretrial settlement offer and then fails to obtain a more favorable judgment or award at trial, the plaintiff "shall pay the defendant's costs from the time of the offer." (§ 998, subd. (c)(1).) Additionally, the version in effect at the time of trial permitted the court, "in its discretion, [to] require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses" incurred by the defendant in preparing for or during trial, so long as such costs were reasonably necessary. (Former § 998, subd. (c)(1).)[4]

"The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.' [Citations.] To effectuate this policy, section 998 provides '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.' [Citation.] At the same time, the potential for statutory recovery of expert witness fees and other costs provides parties 'a financial incentive to make reasonable settlement offers.'" (*Martinez v. Brownco Construction Co.*, *supra*, 56 Cal.4th at p. 1019.)

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[4] The trial, costs ruling, and entry of amended judgment occurred in 2015. The Legislature has since made a minor change to the pertinent subdivision of section 998. The Legislature amended the statute effective January 1, 2016 to provide that a court "may require the plaintiff to pay a reasonable sum to cover *postoffer* costs of the services of expert witnesses" incurred in preparing for or during trial. (§ 998, subd. (c)(1), italics added.) Although this change was not effective in 2015, Caltrans was nevertheless seeking only postoffer expert witness fees.

"[A] section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement . . . .' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.)

The amount demanded by the plaintiff, however, does not by itself indicate "whether [the] defendant's compromise offer is 'realistically reasonable,' in 'good faith,' 'token' or 'nominal.' It is only one of the many factors to be taken into consideration by the trial judge in making his decision. To hold otherwise could force a liability-free defendant to pay for damages not of his doing." (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710, fn. omitted.) Accordingly, when the "defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer." (*Ibid.*) If the plaintiff refuses such an offer, it is also consistent with the legislative purpose for the defendant to proffer expert witnesses at trial to establish the defendant's lack of liability. (*Id.* at pp. 710-711.) And under these circumstances, it is also consistent with the legislative purpose for the plaintiff to reimburse the defendant for these costs. (*Id.* at p. 711.)

Where, as here, the offeror obtains a judgment more favorable than its 998 offer, the judgment constitutes prima facie evidence that the offer was reasonable. (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1484.) The burden is on the offeree to show otherwise. (*Ibid.*) Courts evaluate the reasonableness of a 998 offer in light of what both parties knew or should have known at the time of the offer, and not by virtue of hindsight. (*Id.* at p. 1485; *Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 548.)

We review for abuse of discretion the trial court's determination that the 998 offer was reasonable and made in good faith. (*Adams v. Ford Motor Co., supra,* 199 Cal.App.4th at p. 1484.) Having presided over proceedings below, trial courts are in the best position to evaluate the respective strengths of the parties' cases, and as such, they are in the best position to evaluate the reasonableness of 998 offers. (*Id.* at p. 1486.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) We should not reverse unless the court exercised its discretion in an arbitrary, capricious, or patently absurd way. (*Culbertson v. R. D. Werner Co., Inc., supra,* 190 Cal.App.3d at p. 710.)

Here, we cannot say the court abused its discretion in determining Caltrans made a reasonable and good faith 998 offer. The jury's verdict represented a complete victory for Caltrans and, without question, a judgment more favorable than its offer. This constituted prima facie evidence that Caltrans's offer was reasonable, and Dade had the burden of showing otherwise. She did not.

Caltrans made the 998 offer approximately two years into the case and one month before trial, and we know from the declaration of its counsel that the parties had completed extensive discovery by that point, including the depositions of Smith, their respective traffic engineers (Dunlap and Nelson), and their respective accident reconstructionists (Weiss and Fenton). We also know from other evidence in the record that Ward and Mitre had been deposed by that time.

This evidence available to the parties at the time showed Caltrans had a significant likelihood of prevailing at trial. There was almost no evidence that a dangerous condition existed at the subject portion of SR 127. Smith did not observe any puddling or flooding in the area when he drove through it twice (once on his southbound trip and once on his northbound trip), specifically monitoring for such conditions. He was driving through a third time when he encountered the accident, and even then he did not note any puddling. While Mitre observed puddles within a mile of the site, he could not say why Dade swerved and did not note the condition of the road at that point, since he was paying attention solely to her vehicle. That leaves only Dennison as a witness to the accident. Officer Jurado obtained her statement shortly after the accident, when her memory of the recent event would have been freshest in her mind. According to him, she did not say Dade swerved to miss a puddle, only that the vehicle suddenly veered off the road. It is highly improbable Dade would not have had the officer's collision report two years into the case, and accordingly, she should have known this information at the time of the 998 offer. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 120

[courts evaluate 998 offers based on what the offeree knew or reasonably should have known, including evidence that was reasonably available to an offeree not dilatory in pursuing discovery].)

In addition, the surveys of both parties' traffic engineers, Dunlap and Nelson, revealed no depressions or undulations in the road. Dade's own expert, Dunlap, described the road as "in fairly good shape," and he could not identify any particular location in the survey area where puddles would have existed. Caltrans's accident reconstructionist, Fenton, used specialized equipment—a highly precise 3-D laser scanner—and also determined there were no undulations or depressions that would cause pooling of water on the road. At best, Dunlap could only say it was *possible* that depressions invisible to the naked eye might have existed, but he did not use the specialized equipment necessary to make this determination. Both parties' traffic engineers also found an absence of other wet weather accidents, which was probative of whether a dangerous condition existed. (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 243.)

In short, both parties' evidence demonstrated Caltrans was highly likely to prevail at trial on the ground that no dangerous condition existed, without even reaching the evidence of Dade's speed and level of care. But even that evidence would have indicated to Caltrans that it was likely to prevail. Dade's own accident reconstructionist, Weiss, agreed with defense expert Fenton that she was traveling well over the speed limit. There was no indication Dade had taken Weiss off her witness list at the time of the 998 offer,

as it was not until the middle of trial that she informed the court she was not going to call him. It is true Dade's biomechanical expert, Ward, disagreed with Weiss and Fenton about her speed. Still, Ward would have only testified to fewer rollovers than Fenton, and would have opined only that the EDR data was wrong. But she could not say at what speed Dade was traveling, and she admitted she was not an expert in EDR data like Fenton. Fenton could both calculate Dade's speed and analyze the EDR data, which led him to conclude she was speeding, consistent with the opinion of her own accident reconstructionist. The sum of this evidence would have bolstered Caltrans's belief that it was likely to prevail, and rightly so.

All in all, the trial court properly evaluated the 998 offer not simply in comparison to the enormous amount of damages Dade sought, but also in light of Caltrans's significant likelihood of prevailing. (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at pp. 1485-1486.) Moreover, the court properly considered the waiver of costs as part of the offer. The waiver carried significant value because, if accepted, it would have eliminated Dade's "exposure to the very costs which are the subject of this appeal, a sum [she] can hardly claim now to be de minimis." (*Jones v. Dumrichob*, *supra*, 63 Cal.App.4th at pp. 1263-1264 [the trial court did not abuse its discretion in finding a 998 offer to waive costs, with no monetary sum offered, to be reasonable].) We reject Dade's contention that the offer was not reasonable or in good faith, given the strength of Caltrans's evidence and the weakness of Dade's.

Under the wide latitude we afford the trial court within the bounds of reason, we cannot conclude the court abused its considerable discretion. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 [under the abuse of discretion standard, the "'showing on appeal is wholly insufficient if it presents a state of facts . . . which . . . merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"].)

IV. DISPOSITION

The amended judgment is affirmed. Caltrans shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.