Filed 4/22/08 Von Arx v. Max Equipment Rental CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DOUGLAS VON ARX, et al. Plaintiffs and Appellants, v. MAX EQUIPMENT RENTAL, et al., Defendants and Respondents.	D048759 (Super. Ct. No. GIN038509)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

Plaintiff Douglas Von Arx (Plaintiff) was injured in a workplace accident involving a trenching attachment (trencher) for a ride-upon trenching machine, manufactured by defendant Charles Machine Works, Inc. (Charles), and rented to his employer by Max Equipment Rental, LLC (Max). Plaintiff brought this action against defendants and respondents Max and Charles for negligence, strict products liability, and breaches of warranties, alleging that his injuries were caused by defects in the trencher or negligence in its maintenance. Shortly thereafter, the workers' compensation insurance

carrier for his employer, Harbor Specialty Insurance Company (Harbor), intervened in the action and Plaintiff and Harbor (collectively referred to as Appellants) took the matter to jury trial.[1]

At the conclusion of Appellants' presentation of evidence, the trial court granted defendants' motion for a nonsuit on the ground Plaintiff had failed to establish the element of causation of his injuries from either the alleged defects or negligence. Appellants challenge the resulting judgment for Max, including its award of expert fees and costs pursuant to Code of Civil Procedure section 998.[2] Although Appellants also challenged the judgment against Charles, that portion of the appeal has been settled and a request for dismissal is forthcoming.

On appeal, Appellants contend the trial court erroneously failed to recognize that they had presented sufficient expert opinion and nonexpert evidence from which a trier of fact could have found causation of the injury from the actions or inactions of Max, on either negligence or design defect theories. Appellants further argue the trial court erroneously excluded certain opinion evidence from an employee of Max, its former service manager. (Evid. Code, § 800.) Finally, they contend that the settlement offers presented to Appellants were unreasonable and not made in good faith, such that the award of costs and expert fees to Max was unjustified. (§ 998, subd. (c)(1).)

---

1 Plaintiff's employer at the time of the accident was Western States Engineering and Construction (Western, not a party to this appeal). Its insurer, Harbor, intervened on the basis of subrogation to recover approximately $280,000 personal injury and disability benefits paid to Plaintiff. The same attorney represents both Appellants in this court.

2 All further statutory references are to Code of Civil Procedure unless noted.

We agree with the trial court that the evidence produced by Appellants was insufficient to justify the necessary reasonable or logical inferences of causation of the harm from the actions or inactions of Max, and the nonsuit ruling was proper. No prejudicial evidentiary error occurred, and the trial court was justified in awarding costs and fees pursuant to section 998. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Accident and Complaints

On September 1, 2003, Plaintiff was employed as the construction superintendent for Western at a gas station/minimart building project in Oceanside. Two weeks earlier, as part of the construction equipment, Western had rented from Max the subject "Ditch Witch ride-on trencher model 3700" equipped with a model H.312 trenching attachment (or the trencher). The trenching attachment looked like a huge chainsaw and consisted of a horizontal boom around which the digging chain ran, attached to two sprockets at the end of the boom. There was a third sprocket (the idler sprocket) in the middle to which an auger was attached, serving to empty the trench of the soil being dug. Parallel to and above the horizontal boom and chain was a metallic bar referred to as the lower trench cleaning bar, the purpose of which was to protect people from falling onto the rotating digging chain. (This trench bar is sometimes also referred to as a personal restraint or safety bar; we will refer to it as the trench bar.) The trench bar weighs about 40 pounds and was designed to be attached to support brackets that were attached to the boom, by means of two large bolts going through two holes in the support brackets, secured by

locking nuts of a special variety called "deformed" nuts; we will refer to them as locknuts.

Western's foreman and equipment operator, Brett Hancock, took delivery of the trencher two weeks before the accident, and signed Max's form stating it was in acceptable condition. The rental contract stated that the customer acknowledged examining the equipment upon delivery, and usage of it would constitute acknowledgment that the equipment was in good mechanical condition at the time. The rental contract also provided that the renter, Western, had the responsibility to perform normal periodic service, adjustments, and lubrication of the equipment, and to check it before each shift.

After delivery on August 18, 2003, the trencher remained at the job site for almost two weeks, and had been used for about 12.5 hours by other Western workmen and subcontractors, such as the electrical workers. Hancock and others noticed it needed paint, had a missing handle, overheated sometimes, and one of its tires kept going flat. The accident occurred on Labor Day, when Plaintiff and other workmen were at work because the project was behind schedule. Plaintiff and his friend and fellow equipment operator, Hancock, marked certain trenches that needed to be dug for electrical conduits. Hancock walked around the trencher and inspected it that morning, and pumped up a tire, but did not notice anything else wrong with the equipment. Their plan was to dig trenches, staying ahead of wooden forms for concrete that were being placed afterwards. Hancock operated the machine for about 60-75 minutes, and dug five or six deep trenches. The soil was rocky and hard and the machine was bouncing.

Plaintiff then took over and operated the trencher for about five minutes, while Hancock followed behind with a shovel. Hancock looked up when he heard the sound change, and saw Plaintiff was slumped over the steering wheel. The trench bar had hit Plaintiff on the head, cracking his skull, and there were blood and fluids everywhere. Hancock pulled the trench bar out of the cab of the machine, assisted Plaintiff and screamed for help. Plaintiff's severe brain injuries required surgery and months of treatment.

One of Western's laborers, Joseph Matlack, was across the street that day and saw a commotion at the job site. When he returned, he saw Plaintiff being treated by paramedics. Matlack's friend, Robert Pena, told Matlack he saw the accident. Pena said they were doing trench work under a wooden form when the arm suddenly flipped up and hit Plaintiff in the head.

The next morning Hancock assisted in the investigation being conducted by representatives of Max, the Ditch Witch Company, Charles and OSHA. The investigators took pictures and determined that one of the two bolt and locknut combinations was missing from the support brackets for the trench bar, which had allowed the trench bar to pivot upwards on the remaining bolt and into the cab of the machine, striking Plaintiff. The missing bolt was the one farthest away from the operator. They searched for the bolt but could not find it. They also found that the digging chain was very loose and had fallen off of the auger idler sprocket.

Plaintiff filed his complaint July 19, 2004, seeking damages for products liability, negligence, and breaches of warranties against Max and Charles. Harbor filed its

complaint in intervention a month later. Answers and cross-complaints were filed, but the cross-complaints were severed by stipulation.

B. Litigation and Evidence

Trial began in January of 2006. The parties stipulated to certain background facts of the case, including Charles's manufacture of the trencher which was delivered, new, in 1998. Max purchased the used trencher from the original owner in February 2001. Max is in the business of renting construction equipment, and rented this trencher to Western on August 18, 2003. At the time of the accident, Plaintiff was the construction superintendent for Western at the Oceanside project. He was operating the trencher, equipped with its attachment. The trencher's lower trench cleaning bar (trench bar) was designed to be attached to it with two large bolts and locking nuts, going through two holes in two support brackets extending from the boom. While Plaintiff was operating the trencher, the lower trench cleaning bar struck him on the head causing bodily injury.[3]

Appellants presented extensive testimony from expert and lay witnesses about the circumstances of the accident and the condition of the equipment. Plaintiff could not remember the circumstances of the accident, but remembered others were using the trencher the day before the accident and were not doing anything they should not have been doing. He thought the trencher had been used about eight hours during the two-

---

[3] We observe that we have not received very much assistance from Appellants in preparing our statement of facts, since the material presented in Appellants' opening brief amounts to a disorganized and poorly written set of notes about the investigation, sometimes not in complete sentences. Appellants are essentially attempting to retry the case, which is not the correct function of an appellate brief.

week period it had been at the site. Plaintiff was an experienced equipment operator and would normally walk around the machine to inspect it, and he did so when it was delivered. He does not remember seeing any missing bolts on the trench bar.[4]

Hancock testified that he when he took delivery of the trencher, no guidance, instructions or operation manuals were provided. Plaintiff had conducted safety meetings about using the equipment and had checked the equipment for loose bolts or nuts and would normally tighten them. Hancock did not notice that the digging chain was off one of the sprockets until that was later pointed out to him during the investigation, and he had not known that the trencher could operate if the chain were off the sprocket. According to Western's owner, Joseph Karaki, he would not have expected the Plaintiff as part of his job duties to inspect rented equipment for safety.

Max's co-owner, Mason Bailey, testified that the rental sheet for the trencher showed it was rented out without an operations manual. The contract stated that the renter would have the responsibility for maintaining and lubricating the equipment. Twenty-four hour service was available from Max on call. Bailey described Max's preventative maintenance program and stated that company records showed that the battery and chain idler wheel and bearing were replaced shortly before it was rented to Western. Bailey sent two investigators to the accident scene, Nathaniel Ward and Terrence Webster, to meet with the OSHA investigators and Charles's products safety

---

[4] By stipulation, the parties have included as part of the record on appeal a variety of photographs of the site and the equipment, all entered into evidence at trial. Some of these are also attached to the Max respondent's brief.

coordinator, Richard Lambert. Lambert testified at trial about his investigation, noting that at some point, the trencher's four-foot boom had been changed to a three-foot boom, which performed trenching adequately. However, the trench bar was for a four-foot boom. The length of the boom would not have made a difference if the bolts and locknuts had been properly installed. A shorter trench bar might not have reached into the compartment if loosened, "for the depth of the trencher was being trenched up [sic]."[5]

Ward, Max's branch manager, wrote a report about his inspection, which included the statement that after he looked at the trench in the machine, "it looks like at some point the bolt was broke off, came loose or fell off." After the accident, Ward had talked to a Western employee, Joe, who said it was possible that someone had moved up the trench bar in order to reach underneath the wooden forms, although no one was sure if this had happened or when those wooden forms were put in place. When Ward looked at the trencher, he noticed that there was a lot of shiny metal around the bolt hole, suggesting that the bolt had been removed recently. The chain was loose and off the auger idler sprocket, and the sprocket and chain showed wear patterns. Also, Ward found a mark on the top of the trench bar showing where the digging tooth had caught on it.

---

5 Appellants now contend on appeal that the length of the trench bar amounted to a product defect, since it did not match the boom length. However, this issue was not raised during the trial court's hearing on the nonsuit motion, and Plaintiff's experts did not discuss this issue, which was only testified to by Lambert. This theory appears to be a new argument on appeal, based on controverted facts, which cannot now be raised. (*City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1493.)

Terrence Webster was the Max service manager in August 2003, and had 20 years of mechanic's experience with the Marines and eight years of mechanic's experience in the equipment business. He prepared the machine for rental and was one of the investigators at the accident scene. At some point before this rental, he had replaced the digging chain on this trencher with an aftermarket chain, and had replaced the idler sprocket on the boom twice on the trencher. The chain would come loose if it were not adjusted after every eight hours of use, or if the idler sprocket or drive sprocket were worn. Sometimes they replaced the boom or the trencher bars as needed. At times, needed repairs were not made on equipment before it was rented, but that was not the case with this machine.[6]

At trial, Webster was asked if he knew of anybody who knew whether Plaintiff or Hancock had removed a bolt from the trench bar, and he answered, "I believe that one of the gentlemen at the site said they had removed it. I forgot who it was." However, Appellants then read his deposition testimony into the record, stating that he did not know of anyone who saw anyone remove the bolt. Appellants' attorneys continued to ask him whether he knew how the bolt became missing, or if he had an opinion about whether excessive vibration could have caused that to occur, and the trial court sustained objections for lack of foundation for such an opinion.

---

[6] At the time of trial, Webster was no longer employed by Max and had brought an action against it.

Testimony was presented from a Ditch Witch employee, Michael Anderson, who explained the function of the trench bar as a safety device. He had seen instances when nuts and bolts holding the trench bar in place came loose on a machine. To prevent this, his company required that special deformed or stover nuts be utilized to hold the trench bar in the brackets. These types of nuts are intended to be bent out of a round shape and their threads will cut into existing threads in order to create a secure lock.

Appellants presented expert testimony from Dr. Michael Fourney, an aeronautical engineer, who was their designated causation, engineering, and accident reconstruction expert. Dr. Fourney reviewed deposition transcripts of the witnesses and photographs of the equipment, and he and an associate inspected the equipment when it was being disassembled sometime after the accident. Dr. Fourney prepared and testified to five professional opinions, from which he created three possible scenarios for how the accident had taken place. First, he believed that a tooth on the loose digging chain had struck the trench bar on its top surface, causing it to rotate and hit the Plaintiff on the head. He said that if the bolt had not come out, there would not have been an accident. The reason is that when two bolts are in place, the trencher bar cannot pivot on one such bolt to change position. He had no knowledge of the condition of the trencher when it was rented out by Max.

Next, Dr. Fourney compared the bracket and bolt design on this trencher model to other Charles trencher attachment models, and stated that such alternative stub/sleeve design brackets would not have allowed this type of accident to occur. However, he still did not believe that the design of this trencher, securing the bar on brackets with bolts and

locknuts, was defective. Although he initially testified that the bracket design did not adequately allow for the effect of vibrations in the application for which it was used, he also testified that he had not performed certain tests for the effect of vibration, and he thought that the design of the locking or deformed locknut prevented such a bolt from falling out by itself. There was no indication that the locking nut could have vibrated out by itself. However, the maintenance on the accident machine appeared to be poor, based on his observations and the photographs, since the chain was loose and off the worn sprocket.

Based on his research, Dr. Fourney presented three scenarios for how the accident had occurred. First, the trencher bar could have hit the chain, which caused the bar to rotate on a single bolt, and to be hit again by the chain tooth and to slam into the cab of the machine. Second, a substance on the chain (dirt/rock) could have hit the far end of the bar, knocking it into a perpendicular position, where the chain tooth grabbed it and took it into the cab. Third, someone such as Plaintiff took the bar and lifted it up where the chain could grab it. He could not say it was more probable than not which scenario occurred. He did not know how the bolt came loose. The accident would not have happened if the bolt were not missing. However, it was a significant factor that the chain was loose and off the sprocket for some time, as shown by wear patterns.

Appellants also presented expert testimony from a construction equipment specialist, Richard Pozzo, who gave the opinion that it would be dangerous for construction company employees to operate a trencher that had its chain off the sprocket, or missing a bolt, or if the restraint bar were out of alignment or bouncing up and down.

However, he did not know whether Western's employees knew of these problems at the time. He stated that he didn't know of anything that Max did or did not do in terms of maintaining the equipment that would have caused or contributed to the accident. He further testified that he did not have any criticism of the design of the equipment.

C. Nonsuit Motion and Ruling; Costs Award

At the close of Appellants' case, both defendants moved for nonsuit on the causes of action being pursued at trial, negligence and design defect (including implied warranty). Appellants agreed that express warranty was no longer being pursued.

The grounds asserted by defendant Max were that Plaintiff and his experts had failed to produce evidence that there was a defective product. Also, they could not show that Max had rented out the equipment knowing it would be used without inspection for defects, since the contract includes terms requiring the renter to inspect it and perform maintenance functions. With respect to failure to warn, the failure to provide an operator's manual would not have made any difference, since it was obvious that a safety bar should not be lifted out of the way. There was no evidence that the conditions that led to the accident existed at the time of rental (the missing bolt, the bar being lifted up or the chain being run off the sprocket). Plaintiff's construction equipment expert, Pozzo, did not find anything Max had done or not done that caused or contributed to the accident. Dr. Fourney had no knowledge of the condition of the equipment when Max delivered it to Western.

Although Charles has settled the case, we may briefly summarize its arguments in seeking nonsuit, as background material. Charles mainly argued that it was no longer

disputed that the cause of the accident was the missing bolt, and at most, Appellants' expert Dr. Fourney had stated that it was only a possibility that the bolt had vibrated out. Dr. Fourney had not found the design of the bracket attachment was defective, nor that there was any failure to warn.

In response, Appellants maintained (1) if the alternative stub/sleeve design had been implemented, the accident would not have happened; and (2) their expert felt that the most likely scenario was that the digging chain had hit the bar, causing it to go up, based on wear patterns on the bar. Appellants further argued that the cause was the missing bolt, which allowed the bar to rotate, and that the bracket design allowed this to happen. Another scenario, excessive vibration, was also possible. The negligence claim was based on the same arguments, and also that the equipment was in poor condition, which had allowed the chain to come off the sprocket for some unknown period of time. Appellants therefore contended that Max was negligent in not providing an operator's manual and in providing the equipment in poor condition. The attorney for Harbor added that Max's maintenance logs did not show that the bolts in particular had ever been checked.

In stating its ruling, the trial court found that Appellants had failed to provide substantial evidence to prove design defect or that there was causation of injury, regarding either design defect or negligence. Plaintiff's expert Dr. Fourney testified there was an adequate locking nut design, which took vibration into account, and the design and manufacturing processes were not known to be defective. Dr. Fourney had not provided any sufficient evidence that the actions or inactions of either defendant caused

the injuries. The evidence was that Max had maintained its rental vehicles, and no complaints or repair requests were made by Western employees within the two weeks before the accident in which the machine was rented to Western. Accordingly, none of Appellants' causes of action would survive nonsuit.

Following the grant of nonsuit, defendants filed their costs memoranda. Appellants responded with their motions to tax costs, contending in relevant part that these section 998 offers had been unreasonable and inadequate. The history of these offers is as follows. Max made section 998 offers in August, for $50,001 to Plaintiff (as did the other defendant). These offers expired, and in October 2005, Max made a new offer of $15,000.01 to Harbor (while trial was scheduled for November 2005). Appellants' section 998 offers as of June 2005 were approximately $1.3 million, and as of December 2005, $749,999. The offers were not accepted and the matter went to trial in February 2006.

After hearing argument on the motions to tax costs, the trial court granted them in part and denied in part. The court ruled that Max's offers were reasonable under the circumstances, and costs and expert fees would be assessed against Appellants in the amounts of $60,990.20 (Plaintiff) and $66,997.55 (Harbor). Appellants filed their respective notices of appeal.

DISCUSSION

I

NONSUIT RULING ON CAUSATION

In granting the nonsuit motion, the trial court essentially ruled Appellants had failed to present any evidence from which it could be reasonably inferred that it was Max's conduct or inaction that caused these injuries. The main theory pursued against Max was negligence, but products liability was also pled against it as a supplier or distributor, and Max appropriately defended on both. (See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 1430-1431, pp. 855-857.) Under the circumstances of this case, the causation discussion encompasses all of the pleaded theories.[7]

To analyze this ruling, we first set forth our standards of review for examining the record, both as to the procedural device of nonsuit and as to the evidentiary issues presented. We also outline the elements that Appellants had to prove to make out their prima facie cases of products liability or negligence, in order that the trial court might have been required to deny Max's motion and go forward with the defense case. In general, this court does not reverse a trial court judgment unless an examination of the record and evidence requires a conclusion that the claimed error was prejudicial, so that a result more favorable to Appellants would have been reached in the absence of such

---

[7] Appellants do not discuss their breach of warranty theories on appeal, and we have no occasion to address them separately.

error. (Cal. Const., art. VI, § 13; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

A. Standards of Review: Nonsuit in Products Liability/Negligence Context

In its nonsuit ruling, the trial court determined as a matter of law that the evidence presented by Appellants was insufficient to permit the jury to find in their favor regarding the issues of whether defendants were negligent or had supplied a defective product for use. For their products liability claim, Appellants had the burden of making their case that (1) there was a defect in the manufacture or design of the product, and (2) such defect was the cause of the injury. (*Dimond v. Caterpillar Tractor Co*. (1976) 65 Cal.App.3d 173, 177 (*Dimond*).) For their negligence claim, they had to show breach of duty, causation, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) For both these causes of action in this context, the element of causation is the same. (*Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370-1371 (*Stephen*).)

When a trial court rules upon a motion for nonsuit, to determine whether a plaintiff's evidence is sufficient, " 'the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff ['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff ['s] favor." ' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*).)

In evaluating the record on appeal, the test for reviewing a nonsuit order "is whether, if all legitimate inferences favorable to plaintiff are made, the evidence is sufficient to support [the] claim that [the] injuries were proximately caused by a design defect in the [product]. [Citations.]" (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 118 (*Campbell*); *Nally, supra*, 47 Cal.3d at p. 291.) "The plaintiff must be given an opportunity to present all the facts he expects to prove before a nonsuit is proper. [Citations.]" (*Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 273.)

As an appellate court reviewing the grant of nonsuit, we disregard conflicting evidence, instead inquiring whether Appellants brought forward sufficient evidence of a substantial nature, to allow the jury to find that the product was defective, and such defect caused the injury. (*Dimond, supra*, 65 Cal.App.3d 173, 177.) "Those elements--defect and proximate cause--may be established by circumstantial evidence. [Citations.]" (*Ibid.*) Any inferences drawn from the circumstantial evidence must be logical and reasonable, in order to support the plaintiff's showing. (*Id.* at p. 181.) Substantial evidence to establish a product defect, and likewise causation of injury, amounts to a showing of "a substantial probability that the design defect, and not something else, caused the plaintiff's injury." (*Stephen, supra*, 134 Cal.App.4th 1363, 1373.)[8]

---

8 It is not disputed here that the appropriate standard for establishing Appellants' prima facie case of design defect is the second test outlined in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430: "[A] product may be found defective in design . . . if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. [Citation.]" (Also see, *Campbell, supra*, 32 Cal.3d at p. 119.)

B. Role of Expert and Opinion Evidence

For purposes of examining the evidence produced regarding the role of Max in this accident, we evaluate Appellants' showing that there was a causative link between the design of the equipment provided and the injury. (*Campbell, supra,* 32 Cal.3d 112, 118-119.) " 'It is not incumbent upon a plaintiff to show that an inference in his favor is the only one that may be reasonably drawn from the evidence; he need only show that the material fact to be proved may logically and reasonably be inferred from the circumstantial evidence. [Citations.]' " (*Id.* at p. 121.) Regarding causation, Appellants had the burden of supplying facts from their witnesses from which the requested inferences could reasonably be drawn or extended. (See *Dimond, supra,* 65 Cal.App.3d 173, 184-185.)

In products liability cases in which "the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation. [Citations.]" (*Stephen, supra,* 134 Cal.App.4th at p. 1373, citing *Dimond, supra,* 65 Cal.App.3d 173, 177.) Such expert testimony should be directed toward showing there was a substantial probability that the alleged product defects or faulty conditions caused the plaintiff's injury. (*Stephen, supra,* at p. 1373*;* see *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487 [a possible cause of an injury may be deemed to be the probable one if there are no other reasonable causal explanations, such that it is more likely than not that the injury was a result of that specific causative factor].) More than a theoretical possibility of causation is required to support an expert's conclusion that the alleged breaches of duty or the defects in the product were operative causes of injury.

(*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 (*Jennings*).)

As to both the design and negligence issues, Appellants provided evidence from percipient witnesses about the conditions at the scene and of the equipment, in combination with the testimony of their expert Dr. Fourney. Expert testimony was essential, since this was a case "when the plaintiff's theory of design defect is one of technical and mechanical detail regarding obscure components of a vehicle or complex circumstances of an accident." (*Stephen, supra*, 134 Cal.App.4th 1363, 1370, fn. 6, citing *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567-570.) However, Dr. Fourney did not address several other circumstances of the accident, such as the degree of maintenance of the equipment by both Max and by the renter, Western. Such testimony was provided by Appellants' construction equipment expert, Richard Pozzo, who discussed the need for regular maintenance and inspection of such equipment.

We will assess the sufficiency of the showing Appellants made, particularly the expert and related evidence regarding causation, in seeking to overcome the nonsuit motion by Max. First, however, we address their contentions of error regarding the exclusion of Max's former service manager, Webster's, opinion testimony about how the bolt and locknut for the trencher bar came to be missing, and how that affects the causative factor issues.

C. Ruling on Webster's Opinions

Appellants seek to show the trial court's abuse of discretion in the rulings excluding certain opinion evidence sought to be elicited from Webster, who had

examined the trencher on behalf of his employer after the accident, and who testified about Max's maintenance practices, in which he had participated. He was not a designated expert. We review such rulings by the trial court on admissibility of evidence under an abuse of discretion standard, to determine if prejudicial error occurred. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900; *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 112 (*Osborn*).)

Under Evidence Code section 800, a nonexpert witness may only express opinions in testimony that are "(a) Rationally based on the *perception* of the witness"; and "(b) *Helpful* to a clear understanding of his testimony." (Italics added.) The term "opinion" includes " 'all opinions, inferences, conclusions, and other subjective statements made by a witness.' " (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 4, pp. 531-532.) This concept is further explained in *Osborn, supra,* 224 Cal.App.3d 104, 112-113:

> "Opinion testimony of a lay witness may be particularly helpful when the matters observed by the witness may be too complex or subtle to enable the witness accurately to convey them without resorting to the use of conclusory descriptions. [Citation.] Put another way, ' " 'Where the facts concerning [the] condition [of areas and objects] cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury.' " ' [Citations.]"

The evidence sought to be elicited from Webster, a lay witness, was opinion evidence about the conditions under which the bolt became missing, and probable causes for that occurrence. It was undisputed that Webster knew that a locknut had previously secured the bolt, and the purpose of a locknut was to hold the bolt still so that it would

not vibrate loose. Webster did not see the bolt removed, and in fact it was undisputed that nobody had seen such a thing. The trial court was therefore required to exercise its discretion in determining whether an adequate foundation or reasonable basis for the requested opinion had been presented. Also, "to the extent the trial court's ruling is based on conclusions of law, we review those conclusions de novo. [Citation.]" (*Stephen, supra*, 134 Cal.App.4th 1363, 1370, fn. 5.)

The transcript of that testimony shows that Webster stated that he was one of the people who looked for the bolt, but could not find it. Webster also said he heard from someone at the site that "they had removed it," but he forgot who it was. His deposition testimony earlier said that he did not know of anyone who removed the bolts from the trencher bar bracket. Appellants then asked in several different ways whether Webster believed that vibration of the equipment had any effect upon the bolts and nuts used to hold the trencher bar in place, such as causing them to become missing, or how the bolt came to be missing in general. Objections were raised about lack of foundation and lack of expertise, which were sustained. Counsel then went on to other topics, such as Webster's preparation of the trencher for rental and his observations afterwards that the digging chain was loose. He also said Max was "always" short staffed.

Appellants contend that it would have been helpful, in explaining Webster's other testimony, to allow him to testify about how he thought the bolt became missing, such as through vibration. (Evid. Code, § 800, subd. (b).) However, Webster did not need any help to describe the basic construction or condition of the machine, which he had worked on repeatedly. Moreover, this matter required expertise. Dr. Fourney testified on cross-

examination that he thought the design of the bracket, bolts and locknuts was adequate to accommodate vibration in the operation of the machine. He had read the reports and depositions of the various inspectors of the machine, had examined a similar machine and operation, and looked at photographs, to reach those conclusions. He was an engineering, accident reconstruction and causation expert who was qualified to reach such conclusions. We cannot say that the trial court abused its discretion in determining that a person of ordinary experience, such as Webster, could not simply form an opinion on the effect of vibration upon the bolt and locknut as readily as would an expert trained in engineering and those other disciplines. (*Campbell*, *supra*, 32 Cal.3d 112, 124.) This was not a matter of common knowledge, but rather "sufficiently beyond common experience" (Evid. Code, § 801, subd. (a)), such that it was not admissible under Evidence Code section 800, subdivision (b) as "helpful" to explain Webster's other testimony, such as how he worked on the machine or how he was not able to find the bolt. (Evid. Code, §§ 702, 803.)[9]

---

9 Evidence Code section 702 provides: "(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. [¶] (b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

Evidence Code section 803 provides: "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper."

Accordingly, upon the facts of this case, "the trial court correctly ruled that it was not for nonexpert minds to determine" how the bolt became missing. (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 982-983). In fact, "[t]he nonexpert could only guess. We will not undertake to enumerate the factors that would be considered by physicists and other experts in answering these questions. We are not certain they would all agree in their opinions but expert opinions are essential to an informed and intelligent determination as to these critical facts." (*Ibid.*)

D. Expert Testimony Regarding Max; Analysis

Both product liability and negligence claims were pursued at trial, with similar causation theories. (*Stephen, supra*, 134 Cal.App.4th 1363, 1370-1371.) We first outline Appellants' showing on design defect, then turn to the negligence arguments made. At the time of the hearing on nonsuit, all parties essentially agreed that the actual cause of the injuries was the missing bolt which allowed the bar to rotate, and that it could not be proven how or when the bolt went missing.

Dr. Fourney's expert testimony, in combination with his evaluation of the physical evidence, attempted to address several design theories to show product liability, but none of these was supported by substantial evidence. Although he suggested that an alternative available design (a stub/sleeve attachment) would not have allowed such an accident to happen, he nevertheless evaluated the accident machine's bracket design as adequate. Although he originally stated that the entire design was not adequate to the current application, he also stated that the type of locknut used was adequate to resist the vibration involved in trenching. He did not have enough information to testify about

whether the design or manufacturing processes were defective. He believed the maintenance of the trencher at the time of the accident was poor, in that it was known that the chain had been off the sprocket for some unknown period of time. However, neither he nor Mr. Pozzo could designate the design as the main reason for the chain coming off the sprocket or hitting the bar, since such a problem could be avoided if proper adjustments were made during use.

On appeal, Appellants argue that the "most likely scenario" was the second one given by Dr. Fourney (dealing with a substance on the chain hitting the bar and knocking it up, where the chain tooth grabbed it and took it into the cab). Dr. Fourney, however, was unable to say with any scientific degree of certainty that it was more probable than not which scenario occurred. It is not appropriate for this court to weigh the evidence or select one of the different scenarios, as Appellants apparently desire. Nor, as requested, can we now dismiss one of the scenarios (that Plaintiff himself might have moved the bar for some reason), when the expert did not do so. Rather, Appellants' theory of design defect remains that there were numerous possibilities of how the accident had happened, but their expert was unable to assign probabilities to the different scenarios. Although Dr. Fourney believed that the accident would not have happened if the bolt were not missing, he did not have any information about how the bolt came loose, nor did anyone else. He could not say the bolt came out due to a faulty design. These expert opinions did not amount to a prima facie showing of a product defect that caused these injuries.

Similarly, regarding the negligence claim, Appellants' theory was that Max had sometimes, and here, provided equipment in poor condition, that was poorly maintained

or had loose bolts. However, neither Dr. Fourney nor Mr. Pozzo had any knowledge of the condition of the equipment when it was delivered to Western. Witnesses called by Plaintiff testified about Max's checklists and procedures used before renting its equipment. Hancock and Webster testified the trencher was in adequate condition when delivered. Appellants thus failed to produce evidence that Max rented out the equipment knowing it would be used without inspection for defects, since the rental contract includes terms requiring the renter to inspect it and perform maintenance functions during use. Instead, the evidence was that Max had regularly maintained its rental vehicles, and no complaints or repair requests were made by Western employees within the two weeks before the accident that the machine was rented to their company.

Further, Appellants did not provide evidence that certain conditions that led to the accident existed at the time of rental (the missing bolt, the bar being lifted up or the chain being run off the sprocket), or were caused by the acts of Max. Plaintiff's construction equipment expert, Pozzo, did not find anything Max had done or not done that caused or contributed to the accident. With respect to failure to warn, Appellants did not show that Max's admitted failure to provide an operator's manual was a causative factor, in light of the more severe missing bolt problem. The bolt hole showed exposed uncorroded metal, suggesting the removal was recent. The equipment had been at the construction site for almost two weeks, and had been used by others for 12.5 hours as of the time of the accident, and the necessary causation showing about Max's liability in particular was not created by the evidence.

In their expert testimony from construction equipment specialist Pozzo, Appellants obtained his opinion that it would be dangerous for construction employees to operate a trencher that had its chain off the sprocket, or a missing bolt, or if the restraint bar were out of alignment or bouncing up and down. However, Pozzo was not at the scene and did not know whether Western's employees knew of these problems at the time. Neither of Appellants' experts could identify any of Max's actions or inactions as the substantial factor of causation of these injuries.

In conclusion, the trial court correctly concluded that Max was entitled to nonsuit, because the elements of the cases made out by Appellants of product defect or negligence were not supported by substantial evidence in the form of expert opinion or circumstantial evidence, even viewed in a favorable light on appeal.

II

AWARD OF COSTS AND EXPERT FEES

Appellants challenge the trial court's award of fees and costs to defendants, including expert witness fees, under section 998. They contend the settlement offers made to them by Max were inadequate and unreasonable and therefore should not justify any such costs awards. Max's section 998 offer to compromise was made in August, for $50,001, and it required a release from Plaintiff but expired. In October 2005, Max made a new offer of $15,000.01 to Harbor, while trial was scheduled for November 2005, and it required a release from Harbor. At that time, Charles was making similar offers to each appellant.

In contrast, Appellants' section 998 offers as of June 2005 were approximately $1.3 million, and as of December 2005, $749,999. No offers were accepted.

Following trial and the grant of nonsuit in February 2006, costs memos and motions to tax costs were filed. Max sought expert fees of $30,745.95, which Appellants sought to strike as unjustified. Appellants also argued that there had been confusion about which party plaintiff had received each offer, and about whether credit would be given each party plaintiff for offers made by both Max and Charles, in light of the workers' compensation liens involved. The August 2005 offer for $50,001 was to include all liens and was served upon counsel for both Plaintiff and Harbor, as well as Charles. At that time, experts were still being deposed. The October 2005 offer was directed toward Harbor in particular, for $15,000.01, and was served on both Appellants.

In opposition, Max pointed out that the first offer required a release from Plaintiff, while the second one was directed toward obtaining a release from Harbor (plaintiff in intervention), and therefore Max did not believe any argument about confusion was justified. The case had been pending for over a year and expert depositions were taken in September and October 2005. The case had already been pending as a worker's compensation matter within Harbor's system, and the injuries and many facts were known. Max further argued that even a "modest" offer can be made in good faith, if the defendant reasonably believes it has no liability exposure. (*Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.)

Ultimately, the trial court's ruling was that Max's offers were reasonable under the circumstances, and were not merely token or bad faith offers, as to both Appellants. The

court interpreted the record as showing that when the first offer was made in August 2005, Plaintiff had enough information to evaluate it to determine its reasonableness, since experts had been designated, many witnesses had been deposed, and inspection and testing had taken place. Likewise, the second offer in October 2005 to Harbor was not unreasonable and could have been evaluated sufficiently by Harbor, based on the discovery conducted. The court disagreed with Appellants' argument that there had been confusion about which party had received the offer, since Plaintiff and Harbor (plaintiff in intervention) were separately identified parties. Additional rulings were made regarding the reasonableness of the amounts requested.

Costs and expert fees were accordingly assessed against Appellants in the amount of $60,990.20 (Plaintiff) and $66,997.55 (Harbor).

Appellants generally maintain on appeal that they could not have properly evaluated either of the offers at those stages of trial preparation, because Max's liability remained uncertain, while its exposure was great. Appellants point out that Harbor had expended workers' compensation benefits of almost $300,000, and they contend a jury could have found this to be a million dollar case in light of the injuries suffered. Appellants believe that both the $15,000.01 or $50,001 offers were only nominal or token in nature and had no reasonable prospect of being accepted, and that Max knew this. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.)

"In reviewing an award of costs and fees under Code of Civil Procedure section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal.

[Citations.] The purpose of Code of Civil Procedure section 998 is to encourage the settlement of litigation without trial. [Citation.] ' "Its effect is to punish the plaintiff who fails to accept a reasonable offer from a defendant." ' [Citation.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152 (*Carver*).) To implement these principles, the following rule has been developed: " 'Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The burden is therefore properly on plaintiff, as offeree, to prove otherwise.' [Citation.]" (*Ibid.*)[10]

We now focus on the circumstances of this case to consider whether the trial court abused its discretion when it evaluated these offers as being within a reasonable range. (*Carver, supra,* 97 Cal.App.4th at p. 152.) Max has satisfied the statutory requirements, because the pretrial offers of $15,000.01 and $50,001 were not inconsiderable or unreasonable in amount, in light of the difficulty of proof of the liability issues, particularly the causation element. Much discovery had been conducted about the role of Western in the events, as well as Max. Also, the attorneys for both Appellants were

---

10 Section 998, subdivision (c)(1) states that "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff 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 defendant."

working together closely in preparing for trial and the record does not demonstrate there was any undue confusion about which party was being asked to compromise or when, based on the different requests for releases in the different offers.

Moreover, the trial court had an adequate basis to take into account the inevitable uncertainties of what issues would be dispositive at trial, so that none of the different kinds of expert work could be deemed to be excessive or unnecessary. The amounts imposed were supported by the record, and fell within the appropriate exercise of the court's discretion. We have been given no basis in the record to reverse the judgment or the order awarding costs and fees.

DISPOSITION

The judgment and orders are affirmed. Each party shall bear its own costs on appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.