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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MERCY ZAMORA, Plaintiff and Appellant, v. TEXTRON, INC., et al., Defendants and Respondents.	A124923 (City & County of San Francisco Super. Ct. No. 453285)
MERCY ZAMORA, Plaintiff and Respondent, v. TEXTRON, INC., et al., Defendants and Appellants.	A124992

Mercy Zamora was severely injured when the brakes failed in her "Haulster" three-wheeled vehicle. She sued the Haulster's manufacturer, Cushman Inc., and its corporate successors (Cushman), among others, for negligence and strict product liability. The jury awarded her $1,595,000 in total damages and allocated 37.5 percent of the responsibility for the accident to Cushman.

Cushman contends it was error for the court to preclude it from introducing the National Highway Transportation Safety Administration's (NHTSA) preamble to a notice of rulemaking that was published in the Federal Register. Cushman maintains that a clarification of the final rule expressed in the preamble was evidence that its brake design

complied with the relevant federal safety regulation, and that the court's exclusion of the preamble crippled its defense. Additionally, Cushman argues the court erred when it excluded the testimony of a former Cushman employee with personal knowledge of development of the Haulster's brake system on the ground that the employee was an undisclosed expert witness. Finally, Cushman challenges limitations the court imposed on its examination of Zamora's medical experts concerning the extent and longevity of her injuries. We conclude that the first two evidentiary rulings were prejudicial error, and on that basis we reverse the judgment.

In light of this resolution, we dismiss as moot Zamora's appeal from the court's posttrial rulings reducing her award of past medical damages and denying her motion for cost-of-proof sanctions against Cushman. Finally, we affirm the judgment for costs entered in favor of defendants Brake Parts, Inc. and Affinia Group, Inc. (jointly Brake parts).

BACKGROUND

The Accident and Lawsuit

Zamora was a parking control officer for the City and County of San Francisco who was driving a Haulster downhill when its hydraulic brakes failed and she collided with a van stopped at a red light. Her injuries included pelvic fractures, lacerations to her liver, a crushed ovary and fallopian tube, and multiple perforations of her small intestine.

Zamora sued Cushman for strict liability and negligence, alleging that the Haulster's braking system was defectively designed and that its occupant safety protection was inadequate. She also sued Brake Parts for defectively manufacturing the Haulster's wheel cylinder.

The jury found Cushman liable for negligence and design defect and found Brake Parts not liable. It awarded Zamora $1,595,000 in economic and noneconomic damages, allocated 37.5 percent of the responsibility for her injuries to Cushman, 57.55 percent to

the City and County of San Francisco (which was not named as a defendant), and five percent to Zamora.

The Motions In Limine

Central to Zamora's theories of design defect, negligence and negligence per se was her claim that the Haulster was not equipped with the type of braking system required under federal safety regulations. United States Department of Transportation Federal Motor Vehicle Safety Standard No. 122 (Standard 122) prescribes performance standards for brake systems for motorcycles and three-wheeled vehicles such as the Haulster. It provides that "Each motorcycle shall have either a split service brake system or two independently actuated service brake systems." It is undisputed that the Haulster is equipped with a hand operated parking brake system and a hydraulic single service brake system, not a split service brake system.[1]

Cushman asked the court to take judicial notice of a 1972 notice of final rulemaking published in the Federal Register, which announced the amendment of title 49 of the Code of Federal Regulations to add Standard 122. Cushman argued the preamble section of the notice showed the Haulster's brake design complied with the regulation as interpreted by the NHTSA, the promulgating agency. The specific language Cushman sought to introduce states: "Each motorcycle is required to have either a split hydraulic service brake system or two independently actuated service brake systems. *The latter system encompasses a hydraulic service brake system combined with a hand operated parking brake system.*" (37 Fed. Reg. 5033 (Mar. 9, 1972) (italics added).)[2]

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[1] Most cars and pickup trucks have dual master cylinder systems with two separate hydraulic systems, so that if the front brakes fail because of a brake fluid leak the rear brakes will still work. Dual master cylinders have been required on cars and pickups since 1967.

[2] This language appears in Section I of the notice, captioned "*Equipment*." The full text is: "Each motorcycle is required to have either a split hydraulic service brake system or two independently actuated service brake systems. The latter system encompasses a hydraulic service brake system combined with a hand operated parking

Zamora moved to exclude the preamble from evidence. She argued, inter alia, that the preamble was not part of the regulation itself, and therefore it lacked any legal force and effect. She also argued that Cushman failed to show it relied on the preamble when it designed the Haulster; that the preamble was inadmissible hearsay; and that, in any event, the brake design in the Haulster did not comply with the definition provided by the preamble because its hand-operated parking brake was not a "service brake." In addition, Zamora urged the court to exclude the preamble because Cushman had not produced it in response to her discovery requests for documents " 'setting forth what standards any public entity or regulatory agency requires be met' " by the Haulster and " 'relating to communication with any government entity regarding the [Haulster's] compliance with the Federal Motor Vehicle Safety standards.' " Finally, Zamora contended the preamble was more prejudicial than probative and should be excluded under Evidence Code section 352.

Zamora also moved to exclude the testimony of former Cushman employee Robert Ewoldt on the grounds that Cushman had not identified Ewoldt during discovery and his testimony would differ from or contradict the deposition testimony of the individuals Cushman had designated as most knowledgeable about the design of the Haulster brake

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brake system. Although several objections were received to the split hydraulic service brake system proposal, the NHTSA has determined that partial failure braking features are necessary in the event of a hydraulic pressure loss in the normal service brake system. If a motorcycle has a hydraulic service brake system, it must also have a reservoir for each master cylinder, and a master cylinder reservoir label advising the proper grade of DOT brake fluid. If the service brake system is a split hydraulic type, a failure indicator lamp is required. [¶] Additionally, three-wheeled motorcycles must be equipped with a friction type parking brake with a solely mechanical means to retain engagement. Some commentators felt that pin or pawl type brakes should be permitted. The Administration does not know of an impact test adequate to test the strength of a mechanical lock, and pin or pawl type brakes, prone to failure upon impact, have been found to be inadequate. The NHTSA concurs, however, with comments objecting to the proposed parking brake indicator lamp, and has determined that the safety benefits involved are negligible in comparison with the expense of providing it."

system.[3] Cushman's response was that it had produced documents that disclosed Ewoldt's name and relationship to Cushman, including his deposition testimony, from a previous Wisconsin lawsuit[4] that similarly alleged design defect based on the Haulster's single master cylinder brake design. Therefore, there was no unfair surprise, and because Ewoldt had retired from Cushman in 2000, long before Zamora's case was filed, it had no duty to produce him in response to "person most knowledgeable" deposition notices. Cushman argued instead that Ewoldt should be permitted to testify to "his historical knowledge of Cushman and non-expert matters related thereto."

At the hearing held on the motions in limine, Zamora elaborated on her arguments. She argued that "[s]omeone somewhere clearly has to know of Ewoldt's existence and Ewoldt's prior testimony where he says, 'I'm the guy that designed the system.' They've used him in other cases to testify as to why they did, what they did in this system. And they have that testimony. They knew it. They produced some of it to us a year ago. [¶] We didn't depose him because we waited to see if they were going to disclose him as an expert. When they didn't disclose him as an expert, I thought, well, maybe he's not alive anymore, maybe he's not well, maybe—whatever it is, he's not coming, because the testimony's clearly expert testimony. And that's why [Code of Civil Procedure, section] 2034 is applicable to that."[5]

Cushman's response was that it was offering Ewoldt as a percipient witness, not as an expert. It was anticipated that he would testify from his personal knowledge about how and why Cushman designed the Haulster brake system as it did. It argued: "He's

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[3] Zamora had served notice pursuant to Code of Civil Procedure section 2025.230 upon Cushman to produce the persons most knowledgeable on several aspects of the Haulster's design and operation. Cushman neither identified nor produced Ewoldt.

[4] *Vis v. Cushman Inc.* (Wis. App. 2001) 638 N.W.2d 393.

[5] Code of Civil Procedure sections 2034.010 et seq. regulate the exchange of expert witness information.

not going to offer opinion. He's not going to offer anything except, 'This is what I did. This is what Cushman did back when both the federal register was—when NHTSA was proposing the new standards for motorcycles and when the vehicle [at] issue here was designed.' That's what Mr. Ewoldt is here for. We are not identifying him and we are not going to use him as an expert witness." Cushman emphasized that Zamora had been apprised of Ewoldt's involvement in the Wisconsin litigation for over a year, had questioned Cushman's witnesses about him in their depositions, and had noticed Ewoldt to appear at trial.[6] Cushman also explained it did not produce the preamble and related documents earlier because they were not in Cushman's files[7] and Cushman did not learn of their existence until shortly before trial, when it found them in a search of the Department of Transportation's archives and promptly produced them to Zamora.

The trial court granted Zamora's motion to exclude Ewoldt's testimony because "he was not properly and timely disclosed either as a retained expert or as a non-retained expert" and neither of the witnesses Cushman produced disclosed in their depositions that Ewoldt would be called as a percipient witness. The court ruled that Cushman could use the preamble to Standard 122 in cross-examining Zamora's safety expert, but it reserved ruling on whether Cushman would be allowed to introduce the preamble into evidence.

The Trial

In its opening statement, Cushman displayed the preamble to the jury and explained that the NHTSA's own interpretation of Standard 122 provided the option of

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[6] Cushman had objected to the notice to appear because Ewoldt is not a California resident, but it offered to withdraw the objection and intended to have him testify.

[7] Cushman's parent company was bought by Textron Inc. in 1998, seven years after the Haulster 464 involved in this case was manufactured. In 2001 Textron discontinued the Haulster 464 line, and about a year later closed Cushman's facility and moved its operations from Nebraska to Charlotte, North Carolina. Cushman's documents were boxed and shipped to a large warehouse in Charlotte, but apparently many records pertaining to the Haulster 464 and other discontinued vehicles were lost.

equipping the Haulster with a hydraulic service brake system combined with a hand-operated parking brake. Zamora's expert, Dr. Rudolf Limpert, opined that the Haulster should have been designed with a dual master cylinder. He also testified that a parking brake is not a "service brake," that is to be used to slow and bring a moving vehicle to a stop. On cross-examination, Dr. Limpert conceded that statements published in the Federal Register are available to the industry, and would presumably be read by manufacturers such as Cushman.

After Zamora rested, and immediately before Cushman's brake design expert was to take the stand, the court revisited the admissibility of the preamble to Standard 122 in the Federal Register. This time it ruled that the preamble and related correspondence between Cushman and the NHTSA[8] were inadmissible for three reasons: "One, that because there's no—although they are subject to mandatory judicial notice, there is no way to verify the truth of the matter contained within these documents, therefore, without any verification of the truth of the matter, they're not relevant, excluded on relevance grounds. It's also excluded on 352 grounds more prejudicial than probative and confusing to the jury. And finally third ground, it was not properly disclosed during discovery. So for any one of those reasons or combination of those reasons, these documents are excluded."

During deliberations, the jury reported a possible deadlock and asked to see the preamble to Standard 122 and the cross-examination of Dr. Limpert. It sent the court the following written request: "What happens when we get to a question and cannot get 9 people to agree? & Request for read back of [Cushman's] cross-examination of Dr. Limpert on 7/9 and exhibits used in cross-examination [interpretation of Standard 122]." The court instructed the jury that it could not consider any documents that were

[8] No issues concerning the court's exclusion of the related correspondence have been raised in this appeal.

not in evidence, and ordered all references to the preamble to be redacted from the testimony before it was read back to the jury.

Cushman's motion for a mistrial was denied. The jury found by a vote of 11 to one that Cushman was liable for defectively designing the Haulster and by a vote of nine to three that it was negligent. Cushman moved unsuccessfully for a new trial or partial judgment notwithstanding the verdict, and then filed this timely appeal.

DISCUSSION

I. *Legal Standards*

We review the trial court's evidentiary rulings for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law. ' "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]" [Citations.]' [Citation.] A decision 'that transgresses the confines of the applicable principles of law is outside the scope of discretion' and is an abuse of discretion." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

The improper exclusion of evidence does not require reversal of the judgment unless the error resulted in a miscarriage of justice, and Cushman has the burden of demonstrating that absent the error, it is reasonably probable a more favorable result would have been reached. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.)

II. *Exclusion of Ewoldt's Testimony*

Cushman contends the court committed prejudicial error when it precluded Robert Ewoldt from testifying. Zamora maintains the ruling was correct for three reasons:

Cushman failed to disclose Ewoldt as an expert witness, "concealed his identity" in its discovery responses, and his testimony would contradict the testimony of the "person most knowledgeable" witnesses Cushman produced for deposition. We are persuaded that none of these arguments withstand scrutiny.

The problem with Cushman's first contention is that Ewoldt was not offered as an expert. Parties may be required to disclose expert witnesses, and, upon objection, "the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed" to comply with the expert disclosure rules. (Code Civ. Proc., §§ 2034.300, 2034.210, 2034.260.) But Cushman proffered Ewoldt to testify as a percipient witness, from his personal knowledge, about why Cushman chose the single circuit brake system, its testing of the braking system, and how Standard 122 and the Federal Register preamble influenced its design decisions.[9] Because these were factual issues, not matters of expert opinion, Ewoldt's proposed testimony did not implicate the expert testimony disclosure requirements. The trial court could certainly have precluded Ewoldt from answering questions that ventured into the area of expert opinion, had the need arisen. But its wholesale exclusion of his testimony is not supported by Code of Civil Procedure section 2034.210 et seq.

Nor is the ruling supported by any conclusion that Cushman abused its obligation to produce the persons most knowledgeable of the Haulster's braking system for deposition by Zamora. Code of Civil Procedure section 2025.230 provides: "If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as

[9] Zamora acknowledges that Cushman identified Ewoldt in its list of intended percipient witnesses.

to those matters to the extent of any information known or reasonably available to the deponent." Zamora complains that neither of the two witnesses Cushman produced in response to the section 2025.230 deposition notice, Jarrett Jones and Scott Lemos, testified about Ewoldt's involvement in designing the Haulster or disclosed that he would testify at trial. She argues that these witnesses "admitted on behalf of Cushman that there was no documentation of the design process or information about how the braking system was designed. Cushman indicated it wanted to call Mr. Ewoldt, who would have provided different testimony on these subjects, thereby denying Zamora the opportunity to obtain meaningful discovery and prepare for trial, and effectively negate Zamora's reliance on the [person most qualified]. . . . In other words, Cushman sought to try the case by ambush."

Although Zamora's claim of an "ambush" has some superficial resonance, ultimately, we are not persuaded. Zamora provides no authority for her suggestion that Cushman's witnesses had a duty to disclose which other witnesses would testify at trial, and we are aware of none. Nor was Cushman obligated to produce Ewoldt, who had retired from the company a number of years earlier, in response to Zamora's Code of Civil Procedure section 2025.230 deposition notice. "[A] party can procure the attendance of an individual at a deposition by way of [a 'person most knowledgeable' notice] only if the prospective deponent is 'a party to the action' or 'an officer, director, managing agent, or employee of a party. . . .' [Citation.] . . . . The code applies by its language only to current officers, directors, managing agents, or employees. '*Persons formerly affiliated with a party (e.g., former officers or employees) are not required to attend a deposition unless subpoenaed.*' " (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1398, italics added.) A corporate defendant is thus not required to "produce former employees in response to the notice just because the former employees are far more knowledgeable about the litigation than anyone currently employed by the company. [The defendant's] duty is limited . . . to producing the most knowledgeable

person currently in its employ and making sure that that person has access to information and documents reasonably available within the corporation." (*Ibid.*) Cushman, therefore, was under no duty to produce Ewoldt as a person most qualified to testify pursuant to a section 2025.230 deposition notice.

Zamora alternatively contends the court properly barred Ewoldt's testimony because Cushman failed to identify him in interrogatory answers as a designer of the Haulster. This contention, too, is unpersuasive. Zamora asks this court to take judicial notice of the interrogatories and responses she identifies as supporting her claim, but those documents were apparently not before the trial court and, accordingly, are not subject to judicial notice on appeal. (*TSMC North America v. Semiconductor Manufacturing Internat. Corp.* (2008) 161 Cal.App.4th 581, 594, fn.4; *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1072-1073.)[10]

But even if these documents were properly before this court, there is another reason they do not support the exclusion of Ewoldt's testimony. Evidence may be excluded as a discovery sanction, but the court may impose such a sanction only where (1) a specific discovery order has been violated, or (2) the party to be sanctioned has committed "repeated and willful refusals to permit discovery or produce documents over a lengthy period of time which resulted in evidence becoming unavailable." (*Maldonado v. Superior Court, supra,* 94 Cal.App.4th at p. 1399; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 278-280; *Saxena v. Goffney, supra,* 159 Cal.App.4th at p. 332 [evidence sanction proper where a party "*willfully and falsely* withholds or conceals a witness's name in response to an interrogatory"]; *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.) In this case there was neither violation of a discovery order nor any finding of willful and repeated discovery abuses.

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[10] Accordingly, Zamora's April 16, 2010, request for judicial notice of the discovery material is denied.

We also disagree with Zamora's claim that Cushman "concealed" Ewoldt's involvement in the design of the Haulster's brake system. Whether or not Cushman's interrogatory responses were lacking, the record shows that Zamora was apprised in discovery of Ewoldt's testimony in the Wisconsin litigation and specifically that he was involved in the design of the Haulster. The record also confirms that Zamora knew this and nonetheless decided not to take Ewoldt's deposition. As her counsel told the court, "[w]e didn't depose [Ewoldt] because we waited to see if they were going to disclose him as an expert. When they didn't disclose him as an expert, I thought, well, maybe he's not alive anymore, maybe he's not well, maybe—whatever it is, he's not coming, because the testimony's clearly expert testimony." Zamora's current claim that she did not depose Ewoldt because Cushman concealed his involvement in the Haulster's design is hard to square with this explicit record.

We thus conclude Ewoldt's proposed testimony was not subject to exclusion under expert witness disclosure rules or as a discovery sanction. Its exclusion, therefore, was an abuse of discretion.

III. *Exclusion of the NHTSA Preamble to Standard 122*

The trial court correctly acknowledged that the preamble to Standard 122 published in the Federal Register was subject to mandatory judicial notice. Evidence Code section 451, subdivision (b) requires that judicial notice be taken of "[a]ny matter made a subject of judicial notice by . . . Section 1507 of Title 44 of the United States Code." Title 44, Section 1507 of the United States Code, in turn, provides that "[t]he contents of the Federal Register shall be judicially noticed."[11] However, the court also found the Federal Register entries and related correspondence (see fn. 8, *ante*) inadmissible as irrelevant because "although they are subject to mandatory judicial

[11] We therefore grant Cushman's January 29, 2010, request for judicial notice of specified entries in the Federal Register related to the legislative history of Standard 122, including the preamble to the final rule.

notice, there is no way to verify the truth of the matter contained within these documents. . . ." It additionally ruled the documents inadmissible because it considered them more prejudicial than probative and "not properly disclosed during discovery."

The core problem with the court's relevance finding is that the preamble's evidentiary import does not turn on whether it can be verified as truthful. Its relevance, rather, goes to the possibility that Cushman might have relied on it when it designed the Haulster, and to whether the Haulster's brake system complied with Standard 122. The NHTSA's interpretation of its own regulations is entitled to substantial deference. (*Public Citizen Inc. v. Mineta* (9th Cir. 2003) 343 F.3d 1159, 1165; see *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 877-886 [discussing agency's contemporaneous commentary of the relevant regulation, published in Federal Register, to interpret the regulation in preemption dispute].) Had he been allowed to testify, Ewoldt would have told the jury that Cushman relied on the language in the preamble in designing the Haulster's brake system. His testimony would have been corroborated to the extent that Zamora's expert witness testified that the statements appearing in the preamble represented NHTSA's responses to questions from interested parties, and that *companies like Cushman would read* those statements. The court's concern about verification has no bearing on the preamble's relevance to those key issues.

Zamora's other relevance arguments are also unpersuasive. Although she contends the preamble is irrelevant because it appeared in a notice of *proposed* rulemaking, the excluded language was in fact published in the NHTSA's preamble to its *final rule*—a distinction Zamora herself acknowledges elsewhere in her written argument. And since the issues at trial concern the meaning of the rule *as adopted*, the import of her assertion that NHTSA rejected efforts by Cushman to persuade it to alter the proposed rule before it was finalized is unclear.

Zamora next argues the preamble was irrelevant because it is contrary to the NHTSA's intent of insuring safe motorcycle braking performance. This argument, also,

is somewhat elusive. As we understand it, Zamora claims Cushman never came forward with evidence that the Haulster's parking brake met the requirements for *service brakes*, i.e., brakes designed to stop a moving vehicle. Therefore, she reasons, Cushman's "strained interpretation [of Standard 122] is at odds with the purpose of the NHTSA regulations—to provide for safe braking on motorcycles under normal and emergency conditions." The argument is unpersuasive. At the very least, the plain language of the preamble says that Standard 122 authorizes the use of "a hydraulic service brake system combined with a hand operated parking brake system." The claim that this language might undermine the regulatory intent of promoting safe vehicles might affect the weight the jury would accord it, but does not make it irrelevant.

We conclude that the preamble was probative evidence. We are, moreover, at a loss to identify any undue prejudice or substantial danger the jury would be confused by its admission. " 'Evidence Code section 352 vests discretion in the trial judge to exclude evidence where its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of prejudice, of confusion of issues, or of misleading a jury. "The discretion granted the trial court by section 352 is not absolute [citations] and must be exercised reasonably in accord with the facts before the court." ' " (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 674.) Zamora does not seem to claim the preamble is unduly prejudicial. Instead, she asserts its exclusion is justified because "[t]he time that would have been needed to adequately explain the process by which regulations are enacted, sift through the correspondence, compare the different types of vehicles, etc. would have consumed an extraordinary amount of time [*sic*]." We disagree. Entirely absent from Zamora's argument is any showing that admitting the preamble would necessitate "sifting through the correspondence" (presumably the correspondence between Cushman and the NHTSA when the proposed rule was under consideration), comparing different Haulster models, or diverging into time-consuming explanations of the regulatory process.

As for Zamora's argument that the preamble was unduly confusing because "the parties disagreed among themselves as to the meaning of the language," the same rationale would, if correct, justify the exclusion of any evidence, in any case, whose meaning or significance admits any ambiguity. Plainly, that is not the law. Where, as here, "the evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not as directly support the same inference, the testimony must be received over a section 352 objection absent highly unusual circumstances. . . . Here prejudice flowing from the [excluded evidence] is only that inherent in its relevance, no possibility of confusion exists, and there is no indication that exploration of the issue will consume court time in excess of that required for a fair trial. In those circumstances, we must conclude that there is not a reasonable basis for exercise of trial court discretion excluding the . . . testimony pursuant to Evidence Code section 352." (*Kelly v. New West Federal Savings, supra*, 49 Cal.App.4th at pp. 674-675.)

We turn, therefore, to whether the preamble was properly excluded as a sanction for not disclosing it in response to document requests. As we previously observed, such discovery sanctions are permissible only when a party violates a specific discovery order or the court finds a party repeatedly and willfully refused to produce documents, neither of which has been shown here. (*Maldonado v. Superior Court, supra,* 94 Cal.App.4th at p. 1399; *Mileikowsky v. Tenet Healthsystem, supra,* 128 Cal.App.4th at pp. 278-280; *Saxena v. Goffney, supra,* 159 Cal.App.4th at p. 332; see also *Karlsson v. Ford Motor Company* (2006) 140 Cal.App.4th 1202, 1214-1216.) Moreover, it is not at all clear from the record that Cushman was derelict in its discovery obligations. The duty to produce documents is limited to items "in the possession, custody, or control of any other party to the action." (Code Civ. Proc., § 2031.010, subd. (a); *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1076-1080 [trial court erred when it issued an order compelling the defendant to produce documents from a non-party state agency; "to obtain documents and witnesses from state agencies . . . [the propounding party] was required to

serve subpoenas directly upon the agencies from which they sought this information."].) Cushman informed the trial court that it discovered the preamble through a search of public records, not in the company's archives, and that the document came to light only shortly before trial. There is no contrary evidence in the record.

For each of these reasons, we conclude the trial court abused its discretion when it excluded from evidence the preamble of the notice of final rulemaking of Standard 122.

IV. *Prejudice*

"[W]here evidence is improperly excluded, the error is not reversible unless ' "it is reasonably probable a result more favorable to the appellant would have been reached absent the error." ' " (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.) This is such a case. Zamora argued throughout trial that the Haulster's braking system violated Standard 122, that Cushman designed the Haulster without regard to minimum safety standards, and that it never tested its hand brake for compliance with federal safety regulations. For example, Zamora told the jury in her opening statement that the Haulster "did not meet the requirements for design under the federal statute" and that "Cushman will not produce a witness who will be able to tell you why they picked a single circuit brake system." In closing, Zamora argued that "the law is real clear. You have to have service brakes that work, and if you have a split service brake system, you do that with a dual master cylinder. And a parking brake is not a service brake. It's in the law." By excluding the preamble and Ewoldt's testimony, the court precluded Cushman from fairly presenting a key element of its defense—that it designed the Haulster in reliance on, and in compliance with, the specific regulation Zamora argued it violated.

Given the importance of the excluded evidence, we believe it is reasonably probable that the exclusions affected the verdict. The jury's requests to see the preamble and for a read-back of the relevant cross-examination of Zamora's expert (from which the court redacted all references to the preamble) provide a strong indication that the jury

considered it important and that its absence played a significant role in the jury's deliberations and verdict.

Zamora argues the errors were harmless. No matter their effect on the negligence and negligence per se claims, she argues, they were irrelevant to the jury's finding of strict products liability because that claim "was determined by a simple risk/benefit test. . . ." unaffected by the excluded evidence. But the jury was required in connection with the product liability claim to determine, inter alia, whether the Haulster was defective as manufactured and sold, and whether its design was a substantial factor in causing Zamora's injuries. The jury was also instructed to consider the likelihood that the design defect (if it found one) would result in harm, and the feasibility of an alternative design.[12] We think it reasonably likely that the jury would have considered the excluded evidence in reaching these determinations. After all, the jury was painted an all but uncontradicted picture of a brake system design that violated federal safety regulations. For example, plaintiff argued to the jurors that a dual master cylinder design used on other Haulster models "is in compliance with engineering standards as well as the statute. The single is not" and told them that Standard 122 means "You can have two independent actuated service brakes, which this vehicle did not have, or you can have a

[12] The design defect/risk benefit test instruction given was as follows: "Plaintiff Mercy Zamora claims that the Cushman Haulster's design caused harm to plaintiff. To establish this claim, plaintiff must prove all of the following: [¶] That defendant Cushman manufactured or sold the Cushman Haulster; [¶] That at the time of the use, the Cushman Haulster was substantially the same as when it left Cushman's possession; [¶] That the Cushman Haulster was used in a way that was reasonably foreseeable to Cushman; P And that the Cushman Haulster design was a substantial factor in causing harm to the plaintiff. [¶] If plaintiff has proved these four facts, then your decision on this claim must be for plaintiff unless Cushman proves that the benefits of the design outweigh the risks. In deciding whether the benefits outweigh the risks, you should consider the following: [¶] The gravity of the potential harm resulting from the use of the Cushman Haulster; [¶] The likelihood that such harm would occur; [¶] The feasibility of an alternative design; [¶] The cost of an alternative design; [¶] And the disadvantages of an alternative.

split service brake system. That's a dual master cylinder. And if you have that, you meet the statute. If you don't, you don't. [Cushman] breached it." Moreover, the jury was prevented from hearing evidence that Cushman's design complied with those regulations as interpreted by the agency that promulgated them. The problem was compounded by the preclusion of Ewoldt's testimony, and with it any evidence that Cushman relied on the agency's interpretation or subjected the brake system to safety testing. All of this, unmitigated by Cushman's countervailing evidence, could very likely have contributed to the jury's finding of a design defect.

We conclude the court's erroneous exclusion of Mr. Ewoldt's testimony and the preamble to Standard 122 deprived Cushman of a fair trial and requires reversal. We therefore do not address Cushman's additional contentions concerning a ruling that limited its questioning of its medical and vocational experts based on facts elicited during Zamora's case-in-chief.

Our disposition renders moot the issues presented in the consolidated appeal filed by Zamora (No. A124923) challenging the court's denial of her motion for cost-of-proof sanctions against Cushman and reduction of her award of past medical expenses. That appeal is therefore dismissed.

V. *Zamora's Appeal from Brake Parts's Judgment for Costs*

Prior to trial, Brake Parts offered to settle Zamora's claims against it for $35,000 pursuant to Code of Civil Procedure section 998. Zamora rejected the offer. The next day, after defendants deposed Zamora's expert metallurgist, Brake Parts made a new section 998 settlement offer of zero dollars and a mutual waiver of costs. Zamora rejected this offer as well. Following the verdict in favor of Brake Parts, the trial court awarded it $172,546 in costs and expert fees pursuant to section 998. Zamora appealed

from the separate judgment entered in favor of Brake Parts. Her sole challenge is to the section 998 award of costs.[13]

Under Code of Civil Procedure section 998, subdivision (c)(1), "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff . . . shall pay the defendant's costs from the time of the offer." The court may also order the plaintiff to pay all of defendant's reasonable expert witness fees that are related to trial. (Code Civ. Proc., § 998, subd. (c)(1).) While it is undisputed that Zamora "fail[ed] to obtain a more favorable judgment" against Brake Parts, she contends the court abused its discretion when it awarded the costs because the zero dollar section 998 offer was merely a "token offer" of no real value and was not made in good faith. Zamora's contention is unsupported by the record or the law.

The controlling principles are settled. "To be valid, a section 998 offer must be made in good faith, which requires that the offer of settlement be ' "realistically reasonable under the circumstances of the particular case. . . ." ' [Citations.] A token or nominal offer made with no reasonable prospect of acceptance will not pass the good faith test. [Citation.] '[W]hen a party obtains a judgment more favorable than its pretrial offer, [the offer] is presumed to have been reasonable and the opposing party bears the burden of showing otherwise.' [Citations.] [¶] ' "Whether a section 998 offer was reasonable and made in good faith is left to the sound discretion of the trial court." [Citation.] "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

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[13] In addition to her respondent's brief, Zamora filed two separate opening briefs—one addressed to her challenge to the Cushman posttrial motions and one addressed to Brake Parts. This was improper. Under rule 8.216 of the California Rules of Court, "A party that is both an appellant and a respondent must combine its respondent's brief with its appellant's opening brief or its reply brief, if any, whichever is appropriate under the briefing sequence that the reviewing court orders." (Cal. Rules of Court, rule 8.216(b)(1).)

the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal." ' " (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1528-1529.)

Zamora argues the Code of Civil Procedure section 998 offer was in bad faith because it was unreasonable for Brake Parts to expect that she would accept a "merely 'token' " offer. But, "[t]here is no per se violation of the good faith requirement just because the offer does not tender a net monetary sum. [Citation.] In a particular case, a waiver of costs may be an offer of significant value." (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 471; see also *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1263-1264.) This seems to be such a case. The significant costs awarded to Brake Parts—almost $175,000—confirms that the offer to waive costs in exchange for dismissal was far from "token."

Zamora points to her rejection of a $35,000 settlement offer as evidence that Brake Parts could not reasonably have expected her to accept the zero dollar offer it made the very next day, particularly because she was claiming millions in damages and had demanded $2,000,000 from Brake Parts to settle. "Whether an offer to compromise is made in good faith, however, cannot be measured by the amount of claimed damages or a party's subjective belief in the case's value. An offer to compromise may be 'realistically reasonable' and justify cost shifting even though the party receiving the offer is unlikely to accept it as a consequence of the party's skewed valuation of the case." (*Essex Ins. Co. v. Heck*, *supra*, 186 Cal.App.4th at p. 1530.) Moreover, Zamora has not shown that her expert's deposition did not cause Brake Parts to reassess its exposure or Zamora's demand. " ' " ' ["]The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " ' " (*Id.* at p. 1529.) Zamora has not shown an abuse of discretion. Accordingly, we will not disturb the trial court's award of costs.

DISPOSITION

The judgment in favor of Zamora is reversed and the case is remanded to the trial court. Zamora's appeal as against Cushman is dismissed as moot and the judgment in favor of Brake Parts is affirmed. Cushman and Brake Parts are entitled to recover their costs on appeal from Zamora.

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Siggins, J.

We concur:

_____
McGuiness, P.J.

_____
Jenkins, J.