DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARIZONA SCHOOL RISK RETENTION TRUST, an Arizona non-profit corporation; LEXINGTON INSURANCE COMPANY, a Delaware corporation,	No. 1 CA-CV 12-0503
	DEPARTMENT E
Plaintiffs/Appellees,	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
URS CORPORATION, an Arizona corporation, as Successor to BRW, INC.,	
Defendant/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-016580 & CV2009-024068 (Consolidated)

The Honorable George H. Foster Jr., Judge

AFFIRMED

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D O W N I E, Judge

¶1 URS Corporation, as successor to BRW, Inc. ("BRW"), appeals from an adverse judgment entered after a jury trial in subrogation litigation filed by Arizona School Risk Retention Trust and Lexington Insurance Company (collectively, "Plaintiffs"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 BRW provided civil engineering services relating to water and sewer utilities, grading, and drainage in connection with the 1999 construction of Desert Sun Elementary School ("School") in the Cave Creek Unified School District ("District"). Because the site was in a flood plain, BRW's plans included retention basins, a man-made channel to re-route the flow of runoff water ("Channel"), and a recommendation to elevate certain buildings. The contract governing BRW's work required the design to accommodate "flow of a 100-year storm event, or any lesser storm event, around all buildings on the School's property."

¶3 After the School was built, "upstream" development occurred, including North 64th Street improvements, the Saguaro

Highlands subdivision, North Ridge Community Church, and East Calle de Mandel. In 2007, a storm caused a large volume of water and sediment to flow toward the School and escape the Channel. The School sustained damages in excess of $1.3 million.

¶4 Plaintiffs sued BRW and other entities involved with the School's construction. They also sued various entities associated with the upstream development, alleging those defendants had negligently altered drainage conditions and patterns. Wood, Patel & Associates ("Wood Patel") was one such defendant. Plaintiffs alleged Wood Patel had negligently designed drainage improvements for the Saguaro Highlands subdivision and the 64th Street improvements.

¶5 Plaintiffs disclosed civil engineer Edo Bove as their expert witness in September 2009. Bove opined that upstream development and inadequate drainage at the School site were to blame for the damages. Wood Patel disclosed civil engineer George Geiser as its expert. Geiser attributed the damages to the Channel's inability to accommodate "a flow rate well below" its design capacity and to building elevations "too low to properly pass off-site flows from upslope areas."

¶6 BRW moved for summary judgment in April 2011, which the court denied. By December 2011, Wood Patel and BRW were the only remaining defendants. Less than a week before trial began

on December 12, 2011, Plaintiffs settled with Wood Patel. Two days later, Plaintiffs stated they were dropping Bove as their expert and would instead use Geiser at trial. The court overruled BRW's objection to the substitution.

¶7 During the ensuing jury trial, Plaintiffs sought to prove that BRW was solely responsible for the damages. BRW's position was that non-parties at fault were responsible.[1] Ultimately, the jury was asked to determine fault as to BRW, Wood Patel, the District, and the City of Scottsdale. The jury awarded Plaintiffs $1,317,664.43 in damages and found BRW 90% at fault and the City of Scottsdale 10% at fault. BRW's post-verdict motion for new trial and/or JMOL was denied.

¶8 BRW timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(A).

DISCUSSION

I. BRW's Motion for Summary Judgment

¶9 The denial of a motion for summary judgment is not generally reviewable on appeal after a trial on the merits. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 539, ¶ 19, 96 P.3d 530, 537 (App. 2004) (citations omitted). BRW contends, though, that its motion raised pure

[1] BRW had previously named the original defendants as non-parties at fault, as well as the City of Scottsdale and the District.

questions of law, such that its denial is subject to our review.[2] *See Ryan v. S.F. Peaks Trucking Co. Inc.*, 228 Ariz. 42, 48, ¶ 20, 262 P.3d 863, 869 (App. 2011). "A purely legal issue or question is one that does not require the determination of any predicate facts, namely, 'the facts are not merely undisputed but immaterial.'" *John C. Lincoln*, 208 Ariz. at 539 n.5, ¶ 19, 96 P.3d at 537 n.5. Examples include claim preclusion and immunity defenses and challenges to the facial constitutionality of a statute. *Id.*

¶10 BRW's motion asserted: (1) Plaintiffs could not establish the standard of care or prove a breach of that standard because Bove was unqualified to testify about hydrology or hydraulics; and (2) Plaintiffs could not prove causation because Bove's opinions were based on a 100-year storm. In response, Plaintiffs conceded the "tributary used and flow calculations performed by BRW in its design of the channel were adequate," focusing instead on Bove's opinion that the Channel, as designed, "could not handle the water [BRW] predicted." Plaintiffs maintained Bove was qualified to opine regarding the

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[2] BRW does not contend it reasserted the same arguments made in the motion for summary judgment in a Rule 50, Arizona Rules of Civil Procedure, or other post-trial motion. *See Ryan v. S.F. Peaks Trucking Co. Inc.*, 228 Ariz. 42, 48, ¶ 20, 262 P.3d 863, 869 (App. 2011) ("[I]n cases that have proceeded to trial, a party that wishes to preserve a summary judgment issue for appeal must reassert it during or after trial in a Rule 50 motion for judgment as a matter of law or other motion.").

Channel's design.

¶11 In denying BRW's motion for summary judgment, the court labeled it "more a motion *in Limine* or even a Frye or Daubert motion regarding the qualifications of [Bove]." The court ruled BRW had "misstated" the substance of Bove's opinions, which were based "on the design of the system constructed" and not "hydrology studies or the other matters argued by [BRW]." As to the opinions actually being offered by Bove, the court concluded that "based on his credentials, it appears he has years of relevant experience."

¶12 BRW's motion did not present pure questions of law. In *Ryan,* the issue posed by the motion for summary judgment was whether a defendant could rely solely on the plaintiff's disclosures to prove the liability of non-parties alleged to be at fault. 228 Ariz. at 48, ¶ 21, 262 P.3d at 869. No such discrete issue of law was presented by BRW's motion. The trial court correctly characterized it as one challenging Bove's credentials –- an intensely factual question.

¶13 Additionally, BRW's argument illustrates why an order denying summary judgment is generally not reviewable following a trial on the merits. "Summary judgment is a method of resolving meritless claims." *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 466, 957 P.2d 1007, 1009 (App. 1997). A denial of summary judgment does "not involve the merits and necessarily

affect the final judgment;" it merely indicates the trial court's belief that a matter should proceed to trial. *Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 12 Ariz. App. 424, 428, 471 P.2d 309, 313 (1970). To review the denial of summary judgment now "could lead to the absurd result that one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless be reversed on appeal because he had failed to prove his case fully at the time of the hearing of the motion for summary judgment." *Id.* This is especially true here because BRW's summary judgment motion related to a specific point in time when Bove was expected to be Plaintiffs' trial expert, which ultimately did not occur.

¶14 For the reasons stated, BRW's motion for summary judgment is not subject to our review.

II. Expert Witness Testimony

¶15 BRW next contends the court erred by permitting Plaintiffs to call Geiser as their trial expert. To place this issue in perspective, some background information is important. Wood Patel disclosed Geiser as its expert in September 2010, stating he would testify regarding: (1) Wood Patel's compliance with the standard of care; (2) the nature of the 2007 storm; (3) "deficiencies with the civil engineering design;" and (4) lack of causation between the School's damages and Wood Patel's design of upstream improvements. Geiser had previously issued a

report that included the following opinions:

- Finished floor elevations at the School were too low.

- The Channel was "inadequately designed to protect the road, capture the design inflow, drop it into the new realigned channel, and turn it sharply to the right without inducing significant local erosion."

- Had the School buildings and drainage "been correctly designed and constructed, both the storm water runoff and its sediment load . . . would have 'missed' the [School] buildings."

¶16 Geiser later submitted an addendum report stating that although other experts had suggested several "causative factors," most had "little or no direct link to the flood damage." The exceptions were: (1) the Channel "failed at a flow rate well below that for which it was supposed to be designed;" and (2) the finished floor elevations were too low given their flood zone designation and "more importantly, too low to properly pass off-site flows from upslope areas."

¶17 Bove's preliminary report stated: (1) the School would not have flooded but for "unanticipated upstream conditions and inadequate design of the school facilities;" (2) upstream changes caused "unanticipated amounts of uncontrolled sediment" to flow toward the School; and (3) although the School's design "potentially allowed some flooding, the predominenance [sic] of the observed damage is attributable to the work of others and/or

improvements and maintenance that is the responsibility of the City of Scottsdale or upstream property owners." In his supplemental report, Bove described specific problems with the Channel, including an entrance "insufficient to withstand the momentum of the water and turn the flow toward the channel to the west." Bove further opined that building elevations would not have been an issue had the Channel been properly designed and that "[o]nsite drainage design was a factor in the flooding." Bove concluded that "the major factors causing the damage were the poorly designed diversion channel, and sediments generated by upstream properties."

¶18 In determining whether the court erred by permitting Geiser to testify as Plaintiffs' expert, we consider only those arguments that the parties advanced below. *See Alano Club 12, Inc. v. Hibbs*, 150 Ariz. 428, 434-35, 724 P.2d 47, 53-54 (App. 1986) (appellate courts do not consider issues and theories not presented in trial court); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.,* 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (appellate review is limited to record before the trial court). We do not address several arguments included in BRW's opening brief because they were not made below.

¶19 BRW's objections in the trial court to Geiser's testimony were: (1) it was irrelevant to Plaintiffs' theory of the case; (2) Plaintiffs had not timely disclosed Geiser as

their expert; and (3) Plaintiffs had not shown "cause to warrant the *substitution*." Plaintiffs responded that Geiser was disclosed as Wood Patel's expert in September 2010 and as Plaintiffs' fact witness in March 2011, that Geiser's disclosed opinions had not changed, and that BRW had deposed him. Plaintiffs argued BRW would not be prejudiced by Geiser testifying as their expert rather than Wood Patel's, calling it a "distinction without difference."

¶20 More specifically, BRW argued below that Geiser's opinions were irrelevant because Plaintiffs had avowed that "hydrology and hydraulics issues related to the subject flood are not the focus of Mr. Bove's [i.e. Plaintiffs'] opinions regarding BRW's negligence." Plaintiffs responded that Geiser's opinions were relevant to refute BRW's defense that non-parties at fault were solely responsible for the damages.

¶21 We agree that Geiser's trial testimony was relevant. BRW has not identified trial testimony by Geiser regarding hydraulics or hydrology issues that Plaintiffs had previously disavowed. And he clearly provided relevant testimony regarding BRW's allegedly negligent designs and the effects of upstream development.

¶22 Turning to BRW's other objections raised in the trial court, we begin with the well-established tenet that trial judges have broad discretion in resolving discovery and

disclosure issues, including whether to permit substitution of an expert witness. *Awsienko v. Cohen*, 227 Ariz. 256, 261 n.5, ¶ 22, 257 P.3d 175, 180 n.5 (App. 2011). In reviewing for an abuse of discretion, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring)). Deference is particularly appropriate where, as here, a trial judge has presided over a case for an extended period of time, including substantial pretrial litigation, and is thus well-equipped to assess the practical effect of late disclosures or witness substitutions.

¶23 Witnesses should not be "automatically exclude[d] . . . where no good cause for their late disclosure has been shown." *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 285, 287, 896 P.2d 254, 255, 257 (1995). Instead, courts should employ "a 'common sense' approach" to avoid "results that are unduly harsh, overly punitive, and inconsistent with the purposes of the" rules, interpreting the rules to "maximize the likelihood of a decision on the merits." *Id.* at 287, 896 P.2d at 257.

¶24 The trial court here pursued a "common sense" approach -- considering when and by whom Geiser was disclosed, whether BRW had an opportunity to learn of his opinions and cross-examine him about them, whether Geiser's opinions had changed over time, and whether BRW had demonstrated prejudice arising from the substitution. The facts of this case are distinguishable from several appellate decisions cited by BRW. *See, e.g., Link v. Pima County*, 193 Ariz. 336, 339, ¶¶ 5-7, 972 P.2d 669, 672 (App. 1998) (evidence supporting expert's opinion not timely disclosed); *Dunn v. Yager*, 58 So. 3d 1171, 1191-93 (Miss. 2011) (denying request to substitute expert because plaintiff failed to investigate medical expert's qualifications for six years). Moreover, the fact that some trial courts have exercised their discretion to preclude expert substitutions (and been affirmed on appeal) does not mean the court here was required to do the same. "One of the primary reasons an issue is considered discretionary is that its resolution is based on factors which vary from case to case and which involve the balance of conflicting facts and equitable considerations." *State v. Chapple*, 135 Ariz. 281, 296, 660 P.2d 1208, 1223 (1983).

¶25 "Delay, standing alone, does not necessarily establish prejudice. . . . [t]he relevant question must be whether it is harmful to the opposing party or to the justice system."

Allstate, 182 Ariz. at 288, 896 P.2d at 258. At oral argument, the court probed the issue of prejudice, as the following colloquy with BRW's counsel demonstrates:

> THE COURT: [H]ad they not settled with Wood Patel, you would still be defending your client from the opinions of Mr. Geiser. And because of that, he's not going to offer anything more than what Mr. Geiser was going to state in the first place. And, accordingly, there's no prejudice to [BRW] from having to defend only because somebody new is calling him.
>
> . . . .
>
> Maybe I don't understand what the prejudice is other than he is being called by a different party. I don't know if you want to address that.
>
> MR. OTT: Well, Your Honor, we've had the opportunity to depose Mr. Geiser vis-à-vis his retention by Wood Patel, but we know nothing about the circumstances of him being retained by plaintiffs.
>
> Who suddenly is paying him now? What happened there? We don't know any of that. So we believe that there is some prejudice here.
>
> I mean, suddenly we have Mr. Geiser being presented basically for a different

purpose by the plaintiffs. You know, there is some prejudice there, Your Honor. We don't know anything about the circumstances of his sudden appearance on their side. We don't know anything about the circumstances of the sudden settlement with Wood Patel.

Those are all areas that we believe BRW has a right to inquire into and we weren't allowed to do that by how this was presented to us.

. . . .

THE COURT: If [Geiser's] being paid, I guess you get to know that and how much. That's a matter of impeachment. I am not sure what else you need to know where what's really happening here is the opinion seems to indicate that -- and any time I guess you've got an expert saying that some other party -- and when it is your client, that other party is your client, that they fell below the standard of care there's a certain amount of prejudice there. But that's the type of prejudice for which I'm not sure that the law would exclude that testimony.

. . . .

I know you folks have been in here strenuously arguing about Mr. Bove and his lack of qualifications in the area

> of hydrology.
>
> And I think we've had discussions ad nauseam about the fact that he wasn't going to give any hydrology opinions other than an ancillary opinion to say that the defendants didn't adequately investigate how much water was coming into this area, which is not a hydrology opinion, per se.
>
> But in light of the fact that [Geiser] has always been disclosed, nobody has indicated to me otherwise, and it appears that he's always been timely disclosed and in the absence of any demonstrated prejudice, because he would have been called even had Mr. Bove been called -- he would have been called by Wood Patel had they not settled, it seems to me that there's not a -- there's not good cause for excluding him.

¶26 Neither in its written objection nor at oral argument did BRW articulate prejudice sufficient to mandate Geiser's exclusion.[3] BRW's alternative request was for a trial

[3] BRW argues it was prejudiced because Geiser's opinions were significantly different from Bove's. This, however, is not the argument BRW made below, and the record reveals less difference in the respective opinions than BRW posits. BRW was fully prepared to rebut Geiser's opinions at trial through its own expert witness. Finally, to the extent BRW suggests the court should have limited Geiser's testimony to the opinions disclosed in Bove's reports, we note that BRW never asked the court for such relief.

continuance so it could depose Geiser about "any new opinions he may express on behalf of Plaintiffs as well as issues concerning his compensation." But even post-trial, BRW has identified no "new opinions" offered by Geiser, and the court allowed BRW to question Geiser regarding his retention, his compensation, and the fact he had worked previously as an expert for Wood Patel and other parties for approximately two years.

¶27 Geiser's opinions were fully disclosed and did not change over time. BRW had ample opportunity to depose and cross-examine him. Even if we might have ruled differently regarding the expert substitution, we cannot say the trial court committed clear and manifest error by permitting Geiser's testimony. *See State v. Jones*, 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002) ("Clear and manifest error . . . is really shorthand for abuse of discretion. . . .").

III. Evidentiary Rulings

¶28 BRW also contends the court erred by: (a) not allowing it to introduce the complaint into evidence and question witnesses about it; (b) not permitting cross-examination of Geiser about Bove's opinions; (c) sustaining objections to evidence about settlements; (d) allowing undisclosed testimony by Douglas McCarthy; and (e) ruling regarding post-flood remedial work.

¶29 "We review evidentiary rulings for an abuse of

discretion and generally affirm a trial court's admission or exclusion of evidence absent a clear abuse or legal error and resulting prejudice." *Ryan*, 228 Ariz. at 46, ¶ 12, 262 P.3d at 867 (internal quotation marks omitted). "An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Jenkins v. Jenkins*, 215 Ariz. 35, 37, ¶ 8, 156 P.3d 1140, 1142 (App. 2007).

A. Complaint

¶30 BRW contends it repeatedly asked to question witnesses about Plaintiffs' complaint and to admit the complaint into evidence, but the court denied its requests. A review of the record, though, reveals that the court never ruled the complaint *per se* inadmissible. It instead sustained foundation objections to questions about the complaint posed to witnesses who "had no knowledge of it."[4] When BRW argued the complaint was an admission by a party opponent and could be read to the jury without a foundational basis, the court delayed ruling in order to research that issue. It subsequently permitted BRW to read

[4] The opening brief cites Sue Zittel as an example of what BRW might have gained by questioning witnesses about the complaint. In fact, BRW *did* question Zittel – the Trust's adjuster -- about the complaint, but she had never seen or read it. Plaintiffs' counsel objected on foundation grounds. Geiser testified he "may have" seen the complaint, but did not "really get into the legal things very much."

the complaint to the jury.

¶31 According to BRW, the court unduly delayed its reading of the complaint. But BRW has identified no corresponding prejudice of a non-speculative nature. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) ("We will not disturb a trial court's rulings on the exclusion or admission of evidence unless a clear abuse of discretion appears and prejudice results."). BRW suggests the complaint lost its probative value because it was read "out of context and without the benefit of explanation by witnesses." It is unclear, though, what explanation witnesses with no knowledge of the complaint could have provided. Similarly unclear is the alleged lack of "context." BRW's defense was that non-parties at fault were responsible for the damages, and the jury was instructed on this theory. BRW introduced the complaint to inform the jury that Plaintiffs had originally sued "a number of parties." (It had already elicited such testimony from several witnesses.) And the jury was instructed to consider the complaint as "admissions of the plaintiffs' belief at the time it was filed, that certain persons were at fault and responsible for plaintiffs' losses."

¶32 The trial court's rulings relating to the complaint do not constitute an abuse of discretion.

B. Impeachment of Geiser

¶33 During cross-examination, BRW questioned Geiser about the substance of Bove's reports -- specifically, Bove's criticisms of Wood Patel and others. Plaintiffs objected on hearsay grounds. BRW responded that it was attempting to show that "up until two weeks ago the plaintiffs were pointing their finger at Wood Patel." The court sustained Plaintiffs' objection and cited Rule 403, Arizona Rules of Evidence ("Rule"), as an additional basis for precluding the line of questioning.

¶34 We discern no abuse of discretion. Geiser did not rely on Bove's opinions in formulating his own. *See, e.g.*, *Sharman v. Skaggs Co.s, Inc.*, 124 Ariz. 165, 169, 602 P.2d 833, 837 (App. 1979) (error to permit party to impeach testifying expert with non-testifying expert's report). Rule 613 permits a witness to be impeached with *his own* prior inconsistent statement, but that rule has no application here. BRW was clearly trying to use Bove's out-of-court statements to persuade the jury that non-parties at fault were to blame and that Plaintiffs' previous expert believed this to be true. And to the extent BRW was attempting to show that Plaintiffs had been "pointing their finger" at others, the evidence would have been cumulative. BRW repeatedly informed the jury that Plaintiffs had blamed Wood Patel and others. Geiser himself testified on

cross-examination that "some kind of an agreement" had been reached.

C. Settlement Agreements

¶35 Plaintiffs filed a motion in limine to prevent BRW from offering evidence at trial about settlements with other defendants. In response, BRW argued the evidence was admissible "for the limited purposes of alleviating jury confusion and revealing witness bias."[5] Stating that it had no intention of using settlement evidence to prove liability, BRW asserted it would be illogical to prevent it from explaining "why only three of the defendants named in this action appear in the courtroom." BRW further contended the settlements were "highly probative regarding the degree of the remaining defendants' contribution to Plaintiffs' damages." At oral argument, BRW stated:

> [T]he jury is entitled to know that Bove came in with opinions that implicated just about everybody that ever set foot around this school property . . . .
>
> And the defendants have a right to seek to have fault allocated to those parties that were defendants and some other nonparties that were designated for the things that they did do, in our opinion, that contributed to that. . . .
>
> But we are asking the Court for the liberty in examining Mr. Bove and all the other

[5] The "witness bias" related to Bove because BRW expected him to emphasize its liability at trial and disavow his earlier views about others' fault. Because Bove did not ultimately testify, this particular argument is moot.

> plaintiffs' witnesses about, well, why did you go after [the other defendants] so that [the jury] can hear and make a determination of the allocation of fault as to these other parties and nonparties.

¶36 The court denied BRW's motion in part and granted it in part. The court permitted BRW to "talk about the fact that these other defendants who have settled the case are no longer here and may argue that they may have some culpability and the jury will have to determine how much culpability they have." But based on Rule 408, the court prohibited mention of settlements or reference to dollar amounts. The court further ruled BRW could tell the jury about "all the other people that were sued."

¶37 The court did not abuse its discretion. Rule 408, precludes use of settlement agreements to prove or disprove the validity of a claim or for impeachment as a prior inconsistent statement or contradiction. Such evidence may be offered "for another purpose, such as proving a witness's bias or prejudice" if the evidence is relevant and unfair prejudice does not substantially outweigh its probative value. Rule 408(b); *Hernandez v. State*, 203 Ariz. 196, 200, ¶ 15, 52 P.3d 765, 769 (2002).

¶38 The trial court noted that the witnesses BRW sought to question had no "first-hand knowledge" of the settlements, and BRW did not argue otherwise. Moreover, as discussed *supra,* BRW

repeatedly informed the jury that Plaintiffs had blamed others who were no longer parties and even got Geiser to testify that "some kind of an agreement" had been reached with them. Finally, and perhaps most significantly, BRW's own statements in the trial court conveyed an intention to use the settlement evidence to establish liability of the non-parties at fault –- an impermissible purpose under Rule 408. The trial court did not abuse its discretion in precluding the settlement evidence.

D. McCarthy Testimony

¶39 BRW contends the court should have sustained its objections to testimony by District employee Douglas McCarthy. BRW fleetingly suggests it was misled by Plaintiffs' initial mis-identification of McCarthy as an employee of Kitchell CEM (the construction project manager). But BRW's only developed argument on appeal is that the substance of McCarthy's testimony was inadequately disclosed.[6]

¶40 In its initial disclosure statement filed in 2009, BRW itself disclosed McCarthy as a District employee, stating:

[6] McCarthy was identified early in the litigation as a District employee by various parties, including BRW. In an amended disclosure, Plaintiffs clarified that McCarthy was a District employee. BRW did not ask the court to extend the deposition deadline to depose McCarthy because it believed the case was about "the design, not the construction" of the Channel, and therefore McCarthy's testimony would have "no relevance."

> Mr. McCarthy was a primary point of contact at the District. BRW believes that Mr. McCarthy possesses information concerning the general nature and history of the School project, the design and construction of the drainage system, and compliance with applicable government standards.

Wood Patel made a similar disclosure, adding that McCarthy would testify about "any communications with any party or non-party regarding the issues which are the subject of this litigation." During trial, the court reviewed pretrial disclosures and determined Plaintiffs had adequately disclosed the subject matter of McCarthy's testimony.

¶41 BRW argues Plaintiffs did not disclose that McCarthy "would testify about statements BRW allegedly made to the District, or the District's reliance on those statements." Not only is this not the objection BRW made below, but such testimony may be presumed from a witness who, by BRW's own description, was "a primary point of contact," with information about "design and construction" issues. Plaintiffs were not required to disclose a script of McCarthy's testimony. Further, BRW did not object when Plaintiffs questioned McCarthy about his understanding of the District's expectations for BRW, what BRW told the District, or how the District relied on those statements. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 286, ¶ 9, 9 P.3d 314, 317 (2000) ("An objection to proffered testimony must be made either prior to or at the

time it is given, and failure to do so constitutes a waiver."). The court did not abuse its discretion in overruling BRW's objections to McCarthy's testimony.

E. Subsequent Remedial Measures

¶42 Prior to trial, Wood Patel moved to exclude evidence regarding engineer Leonard Erie's post-flood work. BRW joined the motion in part, seeking to exclude testimony about Erie's post-flood calculations regarding water flow into the Channel. The court precluded the Erie evidence, labeling it "akin to a subsequent remedial measure," in violation of Rule 407.

¶43 During trial, BRW sought to admit City of Scottsdale documents discussing flooding problems around 64th Street and Calle de Mandel in 2008; a 2009 report recommending certain action, including construction of a culvert, to mitigate flooding at Calle de Mandel; and a 2010 report detailing the culvert's construction. Plaintiffs objected, arguing that if the "culvert comes in," they should be permitted to introduce evidence of Erie's post-flood work "to explain why that culvert was put in." The court and counsel discussed the issue during a bench conference, culminating in the following exchange:

> THE COURT: [W]e've had a bunch of testimony that the entire topography has changed since the original design.
>
> And whether these changes were merely necessary and

> therefore they owe damage, then the other side gets to explain why those things are necessary.
>
> It seems to me that it may be relevant for the jury's determination to know that if the changes were necessary if this is a fact and I don't know because of the changes in the topography. I mean, I don't know why you would want to make the case that complicated for them.
>
> It is up to you. Okay.
>
> MR. HAYS: What do you want to do?
>
> MR. SHELY: I am going to stick to where -- just move forward.

¶44 Appellate courts review *rulings* of trial courts. *Burns v. Davis*, 196 Ariz. 155, 165, ¶ 40, 993 P.2d 1119, 1129 (App. 1999) (emphasis added) (citation omitted). The court made no reviewable ruling here, merely stating that the Erie evidence "may be relevant" if BRW presented post-flood remedial evidence. The court did not abuse its discretion by waiting to hear how BRW's evidence came in before definitively ruling on whether BRW had opened the door to evidence previously excluded.

CONCLUSION[7]

¶45 For the reasons stated, we affirm the judgment of the superior court.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
PHILIP HALL, Judge

[7] We do not separately address BRW's argument that the trial court erred by denying its post-trial motion for JMOL and/or new trial. The motion was based on the same substantive grounds we have previously addressed and rejected.