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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FLOYD L. HARLAN, Individually and as Trustee, etc. et al., Plaintiffs and Appellants, v. DEPARTMENT OF TRANSPORTATION, Defendant and Appellant.	F045339 (Super. Ct. No. 02 CE CG 01290) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Wild, Carter & Tipton and Steven E. Paganetti for Plaintiffs and Appellants.

Bruce A. Behrens, Chief Counsel, Brelend C. Gowan, Deputy Chief Counsel, Richard B. Williams, Assistant Chief Counsel, Maxine F. Ferguson and O. J. Solander for Defendant and Appellant.

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This case involves a dispute between a landowner and the state regarding the terms of an agreement under which the state took possession of land to build highway

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication only as to the Introduction, the Factual and Procedural Histories, Part I.C., and the Disposition.

improvements. The landowner, a farmer, sued to enforce a provision he contends required the state to build an underpass beneath the improved highway to link parts of his farm on both sides of the road—an underpass that was never built. In his appeal, he contends that the trial court erred in (a) interpreting the agreement as imposing on the state only a duty to negotiate in good faith toward the building of an underpass, not a duty to build one; (b) limiting the owner's damages to the cost of pursuing the fruitless negotiations (i.e., attorneys' fees); and (c) ruling that he was not entitled to an order directing the state to build the underpass.

The state cross-appeals, arguing that the landowner's suit should have been barred for several procedural reasons, that the evidence was insufficient to support the jury's $40,000 verdict for failure to negotiate in good faith, and that certain evidentiary rulings and the refusal of a jury instruction were erroneous. We reject both parties' contentions and affirm the judgment.

We publish our discussion of one of the state's procedural issues: whether the trial court had discretion, after it sustained a demurrer, to accept the plaintiffs' late-filed amended complaint, even though plaintiffs did not move for leave to file late. We hold that the court did have that discretion.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs Floyd L. Harlan (as an individual and a trustee of certain trusts), Leola R. Harlan (as a trustee), and Harlan Land Company (collectively "Harlan") own a farm in Fresno County. Highway 168 crosses the farm. Formerly, Highway 168 was a two-lane road that Harlan's employees could cross at any point to move equipment and personnel from one part of the farm to the other. The California Department of Transportation (the state) wanted to take a strip of Harlan's land to improve the highway by widening it to four lanes and erecting walls to limit cross-traffic. Harlan asked the state if it would include in the improvement project an undercrossing for his equipment and personnel.

For reasons related to its construction timetable, the state wanted to secure rights of possession and use of the land before formally obtaining ownership through eminent domain proceedings. The parties entered into an Agreement for Possession and Use (the Agreement) for this purpose. The Agreement provided that the state would receive irrevocable rights of possession and use and would pay Harlan $1,041,300. It contemplated a future "ultimate settlement" or an "award or verdict" in an eminent domain proceeding, which could result either in greater compensation to Harlan or a partial refund by Harlan. It was further "understood and agreed by" the parties that "in addition to the monetary compensation," the "State's ultimate settlement will include" construction by the state of an underpass at a stated approximate location. The Agreement stated that it was "made with the understanding that [the state] will continue to negotiate in good faith with [Harlan] to acquire its interest in the Parcels by direct purchase," but that if no settlement was reached within a reasonable time, the state would proceed to acquire title by eminent domain.

The parties did not reach a settlement. The state filed an eminent domain action and Harlan filed this case. The two actions were consolidated. Before Harlan's claims were tried in September 2003, the parties settled the eminent domain action and entered into a stipulation for judgment. The stipulation provided that Harlan would receive total compensation of $1,750,000 and reserved all the parties' claims and defenses in this case.

In this case, Harlan's second amended complaint was the operative complaint at the time of trial. It alleged that the state agreed in the Agreement to build an underpass and breached the Agreement by failing to build one. It further alleged that if the achievement of a final settlement was a condition precedent to the state's obligation to perform its promise to build the underpass, that condition was waived by the state's failure to negotiate in good faith toward a final settlement. The second amended complaint also alleged a cause of action for breach of the implied covenant of good faith

and fair dealing. It requested damages and a declaration that the state was obligated to build an underpass.

The state moved in limine to limit Harlan's damages to his out-of-pocket expenses in attempting to negotiate with the state about the underpass. The court granted the motion. It stated that the Agreement required the state to build an underpass only if an ultimate settlement was reached, and "[i]n the event there was not an ultimate settlement … matters would be resolved either through continuing negotiations or through an eminent domain action. In either event, the requirement of the State to build the underpass was not fixed, but was the subject of further negotiation." Quoting *Copeland v. Baskin Robbins, U.S.A.* (2002) 96 Cal.App.4th 1251, 1262-1263, the court ruled that, under these circumstances, Harlan could only recover "'out of-pocket-costs in conducting the negotiations,'" and that he "'cannot recover for lost expectations (profits) because there is no way of knowing what the ultimate terms of the agreement would have been or even if there would have been an ultimate agreement.'"

The jury found that the state breached the agreement and the implied covenant of good faith and fair dealing. It also found that "the State's conduct excused, waived or estops the State from claiming any obligation to construct an undercrossing was subject to [there] first being a final settlement." It awarded Harlan damages of $40,000, consisting of fees Harlan paid an attorney to conduct negotiations.

The state filed a post-trial motion requesting a determination that Harlan was not entitled to specific performance or a declaration that the state was required to build an underpass. The court granted the motion and issued a Statement of Decision. The Statement of Decision noted that in ruling on the state's motion in limine, the court construed the "obligation of [the state] under the contract with respect to an undercrossing to be an agreement to negotiate toward a final settlement, not an agreement to build an undercrossing subject to a precondition of a final settlement." The "parties never reached an agreement to construct an underpass," so there was nothing specifically

to enforce, and a declaration that the state was required to build an underpass would have no basis. The court observed that, "[a]lthough the jury found that State's conduct excused, waived or estopped State from claiming any obligation to construct an underpass is subject to a condition precedent of final settlement, such finding of the jury is irrelevant in view of the court's construction of the contract."

The court entered judgment for Harlan for $40,000 on the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. It entered judgment for the state on Harlan's claim for declaratory relief. Harlan filed a notice of appeal and the state filed a notice of cross-appeal.

DISCUSSION

I. Procedural issues

The state makes three arguments which, if correct, would dispose of Harlan's claims on procedural grounds. We reject these arguments.

A. Claimed failure to allege timely filing of pre-suit administrative claim

Our Supreme Court recently held that the filing of a pre-lawsuit administrative claim is an element of a cause of action against the state and must be pleaded in the complaint. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1244 (*Bodde*).) The state contends that the allegations in the second amended complaint implicitly admit that Harlan filed his claim too late. As a result, the second amended complaint failed to state a cause of action, and judgment should have been entered for the state on that basis alone. The state made this argument in a motion in limine to exclude all of Harlan's evidence. The trial court rejected it.

The state's motion was in the nature of a motion for judgment on the pleadings. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27.) Therefore, the trial court was required to accept all material factual allegations in the second amended complaint as true, unless contrary to law or judicially noticeable facts. The only issue to be decided was whether the second amended complaint stated a cause of action as a

matter of law. (*Ibid.*) In reviewing the ruling, we apply the same standards as the trial court. (*Id.* at p. 28.)

The second amended complaint alleged that "[o]n January 29, 2002[,] Plaintiffs timely served their Governmental Claim for the Defendants' … failure to perform under the terms of the written Agreement for Possession And Use." The government claim form Harlan submitted to the state asserts that the claim arose on December 26, 2001, a date on which the second amended complaint alleged the state "further breached" the Agreement by "failing to construct an underpass." Copies of the claim and the state's letter rejecting it were attached.

The state's argument that the second amended complaint failed to allege timely submission of the claim is based on two other allegations. First, the second amended complaint alleged that the acts constituting the state's failure to negotiate included "filing a condemnation action in July, 1999 in an effort to avoid constructing the [underpass] …." Second, it alleged that when the state signed the Agreement in April 1999, it "never intended to negotiate in good faith or otherwise toward reaching a final settlement agreement which included the [underpass] …."

According to the state, "the court may infer" from these allegations that Harlan "had a suspicion" no later than July 1999 (when the state filed the condemnation or eminent domain action) that the state would refuse to build an underpass. Therefore, the state maintains, July 1999 was the date of accrual of Harlan's cause of action, and his claim was required to be filed before July 2000 (one year later), a year and a half before Harlan filed it. (Gov. Code, §§ 905.2, 911.2.) In essence, the state's argument is that, even though the second amended complaint explicitly alleges that a pre-suit claim was timely filed, other allegations contradict this by establishing July 2000 as the latest accrual date of the cause of action.

A pre-suit claim against the state for breach of contract must be filed within one year of accrual of the cause of action. (Gov. Code, § 911.2.) The cause of action accrues

for this purpose when it would accrue within the meaning of the applicable statute of limitations. (Gov. Code, § 901.) In general, a cause of action for breach of contract accrues at the time of breach. (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1042; *Niles v. Louis H. Rapoport & Sons* (1942) 53 Cal.App.2d 644, 651.) The rule, often applied in tort cases, that a cause of action does not accrue until the plaintiff discovers or has a reasonable opportunity to discover the injury, is ordinarily not applicable to breach of contract, absent a special factor such as fraud or a fiduciary relationship between the parties. (*Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 221-222; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 830-831.)

In this case, the claimed breach occurred after the state stopped negotiating in good faith. This is true regardless of which interpretation of the Agreement is correct. If, as Harlan argues and the second amended complaint alleges, it included a binding agreement to build an underpass with a condition precedent of agreeing on a final settlement, a breach occurred when the state failed to act in good faith to reach a final settlement, and then failed to build the underpass. If, as the state argues and the trial court held, the Agreement contained only a promise to negotiate in good faith toward building an underpass, a breach occurred when the state abandoned efforts to negotiate in good faith toward that goal.

Even if we inferred from the second amended complaint, as the state urges, that Harlan suspected in July (or April) 1999 that the state would not build an underpass, we would not conclude that Harlan's cause of action accrued then. A party's suspicion that another party will breach a contract is not equivalent to a breach and does not result in the accrual of a cause of action. Even an anticipatory repudiation does not result in the accrual of a cause of action and trigger the running of the statute of limitations if the time for performance has not expired and the plaintiff chooses to continue to give the repudiating party an opportunity to perform. In *Romano v. Rockwell Internat., Inc.*

(1996) 14 Cal.4th 479, the Supreme Court stated: "'The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately.'" (*Id.* at p. 489, quoting 4 *Corbin on Contracts* (1951 ed.) § 989, p. 967.) Consequently, it does not matter what the state intended in April or July 1999 or what Harlan suspected or knew about the state's intentions at those times. Harlan had the option of giving the state more time to perform its alleged promise until the time for performance ran out.[1] In fact, paragraph 7 of the Agreement provides that even if the state files eminent domain proceedings, "this agreement shall continue in effect until either a settlement is reached or a Final Order of Condemnation … is entered by the court." The parties anticipated that negotiations would continue even after the filing of the eminent domain case.[2]

The state relies on tort cases such as *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1112, in asserting that the cause of action accrued whenever Harlan had reason to suspect that he was injured and his injury was caused by wrongdoing. While this is the settled law in tort cases, it does not help the state here. First, the rule that accrual of a cause of action is delayed until the plaintiff discovers it generally does not apply to breach of contract. Second, as stated in *Romano*, the rule in contract cases is that if the time for performance has not run out, the plaintiff can give the repudiating

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[1]The Agreement does not state a particular time for the performance of any obligation to build an underpass or to reach a final settlement that would include an underpass. Instead, it states only that the matter is to be settled within a reasonable time. The state does not argue that a reasonable time for settlement expired more than one year before Harlan filed his pre-suit claim.

[2]The filing of the eminent domain action was not a particularly strong signal of any intent not to negotiate about an underpass. The filing of a lawsuit often occurs in the middle of negotiations between parties and frequently fuels a settlement. Harlan could still have reasonably believed that the state intended to negotiate.

party a chance to perform without incurring the penalty of having the limitations period start to run.

For these reasons, we reject the state's contention that the second amended complaint implicitly admits that Harlan's pre-suit claim was filed too late. Its allegations are consistent with a breach (the termination of the state's good faith efforts to reach agreement on an underpass) occurring within one year before the alleged filing date of the pre-suit claim, January 29, 2002.

B. Failure to prove filing of pre-suit administrative claim

The state contends, and Harlan admits, that neither the pre-suit claim itself nor any other evidence that Harlan ever filed the pre-suit claim was proffered or admitted at trial. *Bodde*, *supra*, 32 Cal.4th at page 1244 held that a plaintiff's satisfaction of the pre-suit claim presentation requirement is an element of the plaintiff's cause of action against the government and must be pleaded in the complaint. Failure to do so subjects the complaint to a general demurrer. The state argues that because there was no evidence to prove this element, the judgment must be reversed.

The situation is unusual. Harlan's Government Claim form, dated January 29, 2002, was attached to the second amended complaint. Apart from the general denial in its answer, the state at no time raised any kind of challenge to the authenticity of the document and never contended that it did not receive the claim.

In *Bodde*, the Supreme Court adopted a position supported by "overwhelming case law and history" when it held that compliance with or excuse from the claim presentation requirement of the Government Claims Act is an element of a cause of action in a lawsuit to enforce a claim against the government. (*Bodde, supra*, 32 Cal.4th at p. 1243.) It disapproved a small number of cases holding that the claim presentation requirement was not an element of the plaintiff's cause of action. (*Id.* at p. 1244.) Evidence Code section 500 provides that, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for

relief or defense that he is asserting." Therefore, Harlan had the burden of proving that he had satisfied the claim presentation requirement.

Based on actions by the state's counsel during a conference on jury instructions, Harlan argues that the state implicitly stipulated that his claim was filed. The state requested an instruction that "[a] person must file a timely written claim with the State of California for breach of contract within one year from the date the claim accrues." The court inquired whether any evidence was placed before the jury of when the claim was filed. Harlan's counsel said no, opining that failure to file a timely government claim was an affirmative defense. The state's counsel asserted that the burden of proving timely claim submission was Harlan's. Agreeing that failure to submit was an affirmative defense, the court told the state's counsel, "It seems to me that you have got to figure out a way to ask [the jury] to make [the] determination" of whether there was a timely claim, even though there was no evidence of when the claim was filed. "You are a day late and a dollar short on this particular defense," the court continued. Then the court asked the state's counsel, "When [was] the claim filed?" Counsel responded, "February 1st, 2002." On this basis, the state agreed to a jury instruction stating: "If you find the Harlans' claim accrued before February 1, 2001, you must return a verdict for the defendant."

We cannot conclude that the state entered into a stipulation based on this discussion. The jury instruction to which counsel agreed meant only that, *assuming* Harlan filed a claim on February 1, 2002, his action was time-barred if his claim accrued more than one year earlier. It did not imply that Harlan actually filed the claim. Further, counsel agreed to the jury instruction and answered the court's question about when the claim was filed only after the court erroneously allocated the burden of proof on the issue to the defense. A party does not waive a claim of error by taking defensive action made necessary by action of the court. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 393, p. 443.)

In spite of this, we still conclude that the state has failed to preserve this issue for appellate review. Until the state filed its cross-appeal, the fact that Harlan had filed the government claim and attached it to the second amended complaint was undisputed. After Harlan rested his case without placing the claim in evidence, it was open to the state to file motions for nonsuit, directed verdict, or judgment notwithstanding the verdict based on a failure to comply with the claim presentation requirement. It never did so, although it filed motions for a directed verdict and judgment notwithstanding the verdict on other grounds.

The main purpose of these motions is to spare the defendant further litigation when the plaintiff has failed to present sufficient evidence to prove its claim. (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750.) However, they also serve to provide the trial court with an opportunity to reopen the plaintiff's case and permit the plaintiff to correct the deficiency. (See 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 424, at p. 485; § 428, p. 488.) It is hard to imagine a more correctable deficiency than this one. The reason behind the general rule that a point not properly raised at trial is waived on appeal "is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 445.) "'The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'" (*Sommer v. Martin* (1921) 55 Cal.App. 603, 610.) Under the circumstances, the state cannot complain for the first time on appeal that Harlan did not put into evidence a document that all parties possessed, especially when its authenticity and receipt by the state were never in dispute.

The state contends that it is entitled to raise the issue for the first time on appeal because it presents a pure issue of law involving undisputed facts. No rule, however, *requires* us to entertain a pure issue of law presented for the first time on appeal. Rather, the decision whether to do so is within our discretion. The case the state relies on, *California Pools, Inc. v. Pazargad* (1982) 131 Cal.App.3d 601, 604, confirms this. "[I]t is settled that when a pure question of law is raised by undisputed facts, it *may* be considered for the first time on appeal." (Italics added.) (See also *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [whether purely legal question presented for first time on appeal will be entertained "is largely a question of the appellate court's discretion"].) Consequently, we decline to consider the issue.

C. Failure to file the second amended complaint by the court-ordered deadline

The trial court sustained the state's demurrer to Harlan's first amended complaint on September 12, 2002, and gave Harlan 10 days to amend again. The second amended complaint was not filed until September 30, 2002. Harlan never requested an extension of time. On October 30, 2002, the state filed a motion to strike the second amended complaint on grounds of untimeliness. The trial court denied the motion, stating that "the delay in filing was brief and inconsequential. The court will exercise its discretion in favor of denial of the motion. (Code Civ. Proc., § 475.)" The court also denied the state's motion in limine to dismiss or exclude all of Harlan's evidence on the ground that the late filing of the second amended complaint deprived the court of jurisdiction. It reasoned that the law-and-motion judge had acted within his discretion in excusing the late filing and denying the motion to strike. On appeal, the state again contends that the court lacked jurisdiction to hear the case because of the late filing.

Code of Civil Procedure section 475, which the trial court cited, provides that "[t]he court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court,

does not affect the substantial rights of the parties." The trial court believed that Harlan's late filing did not affect the substantial rights of the parties.

The state, however, relies on Code of Civil Procedure section 473, subdivision (a)(1), which provides:

> "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code."

According to the state, this section means that after the trial court sustained the demurrer and ordered Harlan to amend within 10 days, it was powerless to alter the filing deadline without a noticed motion by Harlan.

The state is mistaken. Code of Civil Procedure section 472a, subdivision (c), provides that "[w]hen a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed." Where, as here, leave to amend is granted because the court sustained defendant's demurrer, defendant can hardly claim to have been deprived of the "notice" mentioned in Code of Civil Procedure section 473, subdivision (a)(1). It makes no difference that the state did not receive additional notice before the court accepted the filing several days late, effectively fixing a new time for amendment. The court could have given Harlan 20 days to amend instead of 10 in the first place, and the state would have had no grounds to object. While the court had discretion to require a noticed motion before permitting Harlan to file the second amended complaint late, we think it also had discretion under these circumstances to accept the filing without a noticed motion.

Code of Civil Procedure section 581, subdivision (f)(2) (on which the state's motion to dismiss was based), also undermines the state's view that a noticed motion was required before the court could extend Harlan's deadline. That statute provides: "The court *may* dismiss the complaint … when: [¶] … [¶] … after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." (Italics added.) The state's argument is, in effect, that upon the state's motion the court *must* dismiss if Harlan fails to amend within the time allowed by the court and never moves for leave to file late. But section 581, subdivision (f)(2), places the decision within the court's discretion.

The state relies on *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, in which the trial court sustained the defendant's demurrer with leave to amend within 20 days. The plaintiffs failed to file an amended complaint on time and did not attempt to file one until arriving at a status conference with a proposed amended complaint in hand, more than a month after the court-ordered deadline. (*Id*. at p. 608.) The court directed the plaintiffs to file a motion for leave to file the amended complaint. Then it denied that motion and granted the defendant's motion to strike and to dismiss. (*Id.* at pp. 610-611.) In affirming, the Court of Appeal stated that "to obtain the court's permission [to file the amended complaint after the court-ordered deadline], plaintiffs were required to file a noticed motion for leave." (*Id.* at p. 613.)

We decline to apply this proposition. First, the *Leader* court did not need to do so since it also held that the trial court acted within its discretion under Code of Civil Procedure section 581, subdivision (f)(2), in granting the plaintiffs' motion to dismiss for failure to file the amendment in time. More importantly, the point is not supported by the authorities the *Leader* court cited for it: *Loser v. E. R. Bacon Co.* (1962) 201 Cal.App.2d 387 and Code of Civil Procedure section 473, subdivision (a)(1). (See *Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App. 4th at p. 613.) In *Loser*, the plaintiff filed a first amended complaint and then, although there was no demurrer and the defendant

had already answered, filed a second amended complaint without first moving the court for leave to do so. The trial court granted the defendant's motion to strike without prejudice to the plaintiff's right to file a motion for leave to amend. (*Loser v. E. R. Bacon Co., supra*, 201 Cal.App.2d at p. 389.) The Court of Appeal affirmed, holding that a plaintiff has no right to amend as a matter of course after the defendant answers and must request leave. (*Id.* at pp. 389-390.) This holding has no bearing on the situation where, as here and in *Leader*, the trial court has already granted leave to amend in an order sustaining a demurrer.

Similarly, although Code of Civil Procedure section 473, subdivision (a)(1), gives the court discretion to permit amendment of any pleading only after notice to the adverse party, the adverse party has already received notice when the court sustains a demurrer with leave to amend pursuant to Code of Civil Procedure section 472a, subdivision (a). In sum, *Leader* goes beyond the statutory requirements to the extent it holds that where the court has properly sustained a demurrer, granted leave to amend, and fixed a time for filing the amended complaint, it has no discretion subsequently to extend the time without a noticed motion by the plaintiff.

The state also relies on *Remainders, Inc. v. Superior Court* (1961) 192 Cal.App.2d 411. That case is not on point. It involves a trial court's order setting aside a defendant's default that had been entered by the clerk. The default was entered the day after the defendant's answer was due, and the defendant filed an answer the same day. The plaintiff filed a motion to strike the answer, but the court denied it and set aside the default on its own motion. (*Id.* at p. 412.) The Court of Appeal granted a writ of mandate, holding that relief from a properly entered default can be granted only upon an application by the defendant. (*Id.* at pp. 412-413.) This holding was based on Code of Civil Procedure section 473, subdivision (b), which provides that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or

her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein …."

This provision does not apply here. The state characterizes Harlan's late filing as a default, but the fact is that no "judgment, dismissal, order or other proceedings" had been taken against Harlan, so there was nothing from which to relieve him.[3]

Finally, the state's reliance on *Lincoln Holding Corp. v. Union Indem. Co*. (1933) 129 Cal.App. 399, 401-402 is also misplaced. That case involved a conditional denial of a motion for judgment on the pleadings that, by its terms, became an order granting the motion when the plaintiff failed to file an amended complaint by a stated date. The Court of Appeal held that after the plaintiff failed to file in time and the order became one that granted judgment, the trial court could not grant relief from the order except upon a noticed motion. There was no such conditional order in this case and therefore nothing from which Harlan needed relief.

II. Court's interpretation of the Agreement and decision on the measure of damages

The heart of Harlan's appeal is the question of whether the trial court interpreted the Agreement correctly when it ruled that Harlan could recover only his out-of-pocket expenses incurred in attempting to negotiate with the state about the proposed underpass. Harlan argues that the court ignored extrinsic evidence it should have considered, which

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[3]That fact also defeats the state's argument that because relief from a default must be requested by motion within six months after the default is taken (Code Civ. Proc., § 473, subd. (b)), the court lacked jurisdiction to deny the state's motion in limine, which was filed more than six months after the expiration of the court-ordered filing deadline. The state's reasoning is that the court lost jurisdiction because six months passed from a default without any request by Harlan for leave to file the second amended complaint late. But there was no default in the relevant sense. Code of Civil Procedure section 473, subdivision (b), concerns relief from "a judgment, dismissal, order, or other proceeding taken against" a party. The court took no action like this against Harlan.

proved that the Agreement included a binding promise by the state to build an underpass. He also asserts that even if the court properly disregarded extrinsic evidence, the language of the Agreement itself shows that the state was bound to build an underpass. If the court had adopted his interpretation, Harlan contends, he would have been entitled to damages equal to the cost of constructing an underpass. This would be true even though the parties never reached a final settlement, because the jury found that the state's conduct estopped it from claiming that its obligations were conditioned on the achievement of a final settlement.

We review de novo the trial court's interpretation of a written instrument if the interpretation was based on the contractual language alone or on undisputed extrinsic evidence. If the interpretation was based on properly admitted extrinsic evidence that was in dispute or in conflict, we uphold the interpretation if it was reasonable and supported by substantial evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-913; *Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit-Kenny* (1997) 59 Cal.App.4th 676, 682, fn.2; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 681, p. 615.) Extrinsic evidence is admissible to show the meaning of an integrated writing only if it is relevant to prove a meaning of which the contractual language is reasonably susceptible. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 435.) The Agreement includes no integration clause.

After identifying the parties, the Agreement describes its purposes. These were to give the state possession of the property and to give Harlan fair compensation, all before the formal transfer of title:

> "It is hereby agreed by and between the parties that the State requires possession of the Owners' real property to construct a State highway project.… The Parcels are required for the purpose of constructing a portion of State Highway Route Fre-168. The purposes of this agreement are to allow State to proceed with the construction of its State highway project without delay and to allow Owners to avoid litigation

> at this time. [¶] It is agreed by the parties that any delay in the start of construction of this project is contrary to the public interest. It is the intent of this agreement to offer fair market compensation to the Owners for permission to enter the Parcels and construct the project."

In paragraph 1, the Agreement sets forth the essential terms by which the Agreement attains these objectives: Harlan will irrevocably grant the rights of possession and use to the state, and the state will tender $1,041,300. Paragraph 2 states the terms of the escrow.

All but a few of the provisions in the rest of the agreement (paragraphs 3 through 15) pertain to either of two possible methods by which the land transfer could be finalized: an "ultimate settlement" in which the land would be purchased or eminent domain proceedings. Paragraph 3(a) states that an underpass will be part of an ultimate settlement:

> "(3) It is understood and agreed by and between the parties hereto that, in addition to the monetary compensation included in Section 1 hereinabove, the State's ultimate settlement will include the following additional items:
>
> "(a) State shall, as part of State's construction and at no expense to Owners, construct an equipment undercrossing at approximate Engineer's Station 209+17.50 as indicated on Exhibit "B" attached hereto and made a part hereof."

Other provisions of the planned ultimate settlement included an access easement in favor of Harlan serving a stated portion of his property (paragraph 3(b)); reimbursement to Harlan for drilling new water wells to replace wells on the property transferred to the state (paragraph 3(c)); and reimbursement to Harlan for building a wall at the boundary of the remainder property (paragraph 4).

Paragraph 7 sets forth the parties' understanding of their obligations and expectations concerning negotiations toward an ultimate settlement:

> "This agreement is made with the understanding that State will continue to negotiate in good faith with Owners to acquire its interest in the Parcels by direct purchase. It is further understood that in the event a settlement is not

reached within a reasonable period of time, such failure will be an acknowledgement that the negotiations to acquire the Parcels have proved futile. At that time, State shall begin timely preparations for the filing of a complaint in eminent domain to acquire title to the parcels. If State begins proceedings in eminent domain, it is understood and agreed that this agreement shall continue in effect until either a settlement is reached or a Final Order of Condemnation under Section 1268.030 of the California Code of Civil Procedure is entered by the court."

An Addendum to the Agreement, executed at the same time as the Agreement and incorporated into it, included the following two provisions further addressing the underpass and the negotiations toward a final settlement:

> "(E) The Owners request the undercrossing referenced in Section (3)(a) be designed, constructed, installed and maintained by State as a lighted vehicle undercrossing at no cost to Owners using the same specifications as were utilized by State in connection with the vehicle undercrossing located at Rancho Sespi on State Route 126 between Interstate 5 and State Route 101, copies of photographs of same being attached hereto as "Exhibit D" and incorporated by this reference; and the Owners further request that the actual location of that undercrossing with reference to Engineer's Station 209+17.50 be mutually agreed and fixed at a place which will maximize access north and south under State Route 168 with a minimum of damage or interference with Owners' remainders in the 'after' condition. [¶] … [¶]
>
> "(K) The negotiations between the parties under Section (6) of this Agreement shall include consideration of further revisions to the acquisition and further construction, repair, replacement, relocation or reimbursement with regard to the project and the remainders in the 'after' condition. In the event State is unable to comply, for whatever reason, with Owners' requests under items (E) and (J) of this Addendum, it is understood that those issues will be resolved to the mutual satisfaction of both parties by further negotiations or as the result of the findings of a condemnation action."[4]

Harlan contends that several people on both sides of the transaction "testified the State was obligated to build [an] undercrossing under the terms of the agreement and that

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[4]The reference to "Section (6)" is evidently intended to refer to paragraph 7. Paragraph 6 addresses payment of property taxes.

the only further negotiation was whether the undercrossing would be designed as a Box Culvert or something closer to the Ventura Design," the two designs that were under consideration. Harlan mentions the names of five witnesses and cites many pages of the trial transcript, but only one witness's testimony actually supports this assertion.[5] Lee Stephenson, the attorney who represented Harlan in the transaction, testified that he was surprised when the state first informed him, at a point after the Agreement was signed, that it would build the underpass only if it concluded the cost was justified. He had not previously heard that there were any circumstances under which the state would refuse to build the underpass and believed that the only issue to be resolved was what type of

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[5]One of the passages cited is directly contrary to the claim in support of which Harlan cites it. Doug Maxson worked for the Fresno County Transportation Authority, which was involved in the project. His testimony supported the view that a decision not to build the underpass due to unfeasibility was a possibility from the beginning:

> "Q Did you participate in any discussion prior to April 6th, 1999 [the date the Agreement was signed], where there was a determination made at that point that the under crossing would not, in fact, be constructed?
>
> "A No.
>
> "Q And in fact, you thought there would be further negotiations as to the design and location; is that correct?
>
> "A There would be further negotiations as to that as well as other items that would determine whether the equipment crossing was or was not feasible."

Another witness, Joseph Cazares, an employee of an engineering firm involved in the project, gave an affirmative answer when Harlan's counsel asked him if his understanding was that paragraph 3 of the Agreement meant that the "Fresno County Transportation Authority had committed to construct a 12 by 12 reinforced concrete box culvert at an approximate estimated price of $400,000." This testimony is of no significance, since paragraph 3 says nothing about the Fresno County Transportation Authority, a box culvert, or a price.

design would be used. He also believed the Agreement expressed "a contractual commitment" to build an underpass.

Other testimony indicates that, at some stage, the state developed a cost estimate for a box culvert underpass and offered to build it, but that Harlan rejected that proposal, insisting on the other design. Stephenson testified that he rejected another state proposal because of a provision making Harlan responsible for maintenance of the underpass. Harlan argues that the state's development of definite proposals to build an underpass is "consistent with" the existence of a binding agreement between the parties requiring the state to build an underpass.

On the basis of the contractual language and extrinsic evidence just described, Harlan urges us to reject the trial court's conclusion that the Agreement bound the state only to negotiate in good faith toward a final settlement that would include an underpass. Instead, he contends, the Agreement contains the state's binding promise to build an underpass, conditioned on the parties' first reaching a final settlement. Because the state failed to negotiate in good faith toward a final settlement, he argues, the condition was waived and the state is now obligated to perform its promise to build an underpass.

Harlan's interpretation of the Agreement is logically inconsistent with the Agreement's language, and the extrinsic evidence on which he relies provides no material support for his view. The Agreement states that the *ultimate settlement*, to be reached in the future, will include an agreement to build an underpass. It follows that a promise to build an underpass was not part of the Agreement itself, subject to a condition of reaching an ultimate settlement. The underpass cannot be both a conditional term of the Agreement itself and an anticipated term of the future ultimate settlement. The Agreement compels our conclusion that it is the latter. Further, the fact that the state developed a number of underpass proposals has no bearing on this conclusion. The state's action in that regard is perfectly consistent with negotiating toward a future agreement rather than attempting to perform an already settled one. Finally, the

testimony of Harlan's attorney, Stephenson, amounts to little more than a legal conclusion, with which we disagree.

Harlan makes the additional argument that regardless of what the Agreement actually says, we must reject the trial court's interpretation because of a position the state took earlier in the litigation. Harlan relies on the following affirmative defense set forth in the state's answer to the second amended complaint: "To the extent the First Cause of Action of the second amended complaint seeks recovery of damages for failure to construct an underpass … any such contractual duty to construct an underpass … is subject to the express condition precedent of ultimate settlement …." Harlan asserts that this statement constitutes a judicial admission that the Agreement contained a binding promise to build an underpass, subject to the stated condition. We disagree. The quoted passage does not admit anything. It only says that *if* any contractual duty to build an underpass exists, then it is subject to a condition.

Because the Agreement bound the parties only to negotiate in good faith, Harlan's out-of-pocket expenses in attempting to negotiate were the correct measure of his damages. In *Copeland v. Baskin Robbins U.S.A., supra*, 96 Cal.App.4th 1251, the parties signed an agreement where Copeland would buy an ice cream factory from Baskin Robbins and the parties would enter into a separate agreement requiring Baskin Robbins to buy ice cream from the factory. (*Id.* at pp. 1253-1254.) Then Baskin Robbins backed out, citing changes in its business plans. When Copeland sued for breach of contract, his claimed damages included profits lost on the anticipated ice cream sales to Baskin Robbins. (*Id.* at pp. 1254-1255.) He admitted that the signed agreement did not include a binding commitment by Baskin Robbins to buy ice cream. Instead, he contended that the parties had concluded a contract to negotiate in good faith toward an agreement for the purchase and sale of ice cream. Then he claimed he was entitled to expectation damages consisting of the profits that would have arisen from an ice cream sales contract if Baskin Robbins had negotiated toward such a contract in good faith, as it promised to

do. (*Id.* at p. 1256.) The Court of Appeal held that a contract to negotiate in good faith is enforceable in California and is not a mere agreement to agree. (*Id.* at p. 1257.)

Copeland was not, however, entitled to expectation damages:

> "For obvious reasons, damages for breach of a contract to negotiate an agreement are measured by the injury the plaintiff suffered in relying on the defendant to negotiate in good faith. This measure encompasses the plaintiff's out-of-pocket costs in conducting the negotiations and may or may not include lost opportunity costs. The plaintiff cannot recover for lost expectations (profits) because there is no way of knowing what the ultimate terms of the agreement would have been or even if there would have been an ultimate agreement." (*Copeland v. Baskin Robbins U.S.A., supra*, 96 Cal.App.4th at pp. 1262-1263, fns. omitted.)

The same reasoning applies here. Harlan cannot recover the cost of building an underpass. There is no way of knowing what kind of underpass would have been agreed on (and therefore no way of knowing how much it would have cost) or even if there would have been an ultimate agreement that included an underpass.

In sum, the trial court interpreted the Agreement correctly and reached the correct conclusion about the measure of damages when it ruled on the motion in limine to limit Harlan's damages to out-of-pocket expenses incurred in attempting to negotiate. Consideration of extrinsic evidence compels the same result.

Our conclusion also disposes of Harlan's contention that the trial court erred when it granted the state's post-trial motion for an order that Harlan was not entitled to specific performance or a declaration that the state was required to build an underpass. Because the parties only had a contract to negotiate in good faith toward an underpass, Harlan was entitled only to damages based on his negotiation costs.

III. Sufficiency of evidence supporting the verdict

The state argues that Harlan presented insufficient evidence to prove that it negotiated in bad faith or that his out-of-pocket negotiation costs due to bad faith were $40,000 or any other specific amount. "When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review

the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

The state does not contend that Harlan's evidence as a whole shows no bad faith or fails to support the $40,000 figure. (In fact, it concedes that Harlan paid his attorney Lee Stephenson $40,000 to handle the negotiations.) Instead, it argues that the evidence does not show bad faith or $40,000 of out-of-pocket expenses in "the relevant time frame." By this the state means there was no evidence that negotiations took place or attorneys' fees were incurred after February 1, 2001. This is the earliest date for accrual of Harlan's cause of action, according to the jury's verdict.

There is no rule, however, that evidence of a bad faith failure to negotiate (or of out-of-pocket expenses from attempts to negotiate) must consist of facts taking place after the accrual of the plaintiff's cause of action. Nor is there any reason for us to create such a rule. We would normally expect evidence of bad faith to include the defendant's actions and omissions leading up to the point at which it becomes reasonable to conclude that the agreement has been breached and the cause of action accrues. It would make no more sense to hold that evidence of breach of contract to negotiate in good faith exists only after the cause of action accrues than to hold that negligence in a car accident may only be proved by facts occurring after the vehicles collide.

Because this is the state's only argument, we do not need to consider the sufficiency of the evidence any further. The state does not argue that the evidence of bad faith or damages is insufficient if periods earlier than February 1, 2001, are factored in.

IV. Court's rulings on evidence and jury instructions

A. Rulings on testimony of attorney Maxine Ferguson

Harlan filed a motion in limine pointing out that the state had filed no expert witness designation and requesting that the court therefore exclude any expert testimony

"pertaining to damages, design, or scope of the subject underpass and whether the underpass is reasonable or justifiable." The court granted the motion. The state argues that when the court later sustained several objections Harlan made during the examination of Maxine Ferguson, a state attorney involved in the negotiations, it did so "[p]ursuant to" its ruling on the motion in limine. In a somewhat puzzling argument, the state maintains that the testimony should have been admitted, but does not contend that the ruling on the motion in limine was erroneous. Instead, it challenges individual rulings on objections made during Ferguson's testimony, arguing that each contested item of testimony should have been admitted as a lay opinion under Evidence Code section 800.

"Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) Even if we were to review de novo the rulings at issue, however, we would conclude that the state's contentions are without merit. As we will explain, the record discloses that the objections were properly sustained or that the state was not harmed by the court's ruling.

First, the state's counsel showed Ferguson a copy of the Agreement and then went on to ask about other documents:

> "Q Are you familiar with that agreement?
>
> "A Yes, I am.
>
> "Q Did you prepare papers other than that agreement in order to acquire property from the Harlans for the 168 project?
>
> "A Yes, I did.
>
> "Q And when you prepared those papers, what normally do you do with them after they are prepared?
>
> "A The papers that I prepared were papers to acquire the property through the condemnation process and the court system, so—

"[Harlan's counsel]: Objection, your Honor, in limine.

"THE COURT: Sustained.

"[State's counsel]: They were papers to acquire the property; is that correct?

"THE WITNESS: Yes. We did prepare them in my office."

It is not clear which motion in limine Harlan's counsel was referring to, or what the court was relying on when it sustained the objection. (The court granted several motions in limine seeking to exclude evidence regarding the condemnation action, but did so "only to the extent defendant may not refer to the settlement or the amounts paid to the Harlans without prior court approval.") The objection was sustained properly, however, because the reference to the condemnation process was not responsive to the question. Further, counsel continued his line of questioning after the objection was sustained. Only the reference to "the condemnation process" was excluded. The state has not given us any plausible explanation of how it could have been prejudiced by this. It contends that the court's ruling prevented it from "identifying the eminent domain basis for its negotiations," but that simply does not describe what happened in the portion of Ferguson's examination quoted above. The question did not ask for the eminent domain basis of the state's position.

Next, the state argues that the court ruled incorrectly in the following instance, which followed immediately after the above passage:

"[State's counsel]: And then are they sent someplace?

"A Yes, we typically send them to the district, which in this case is our district 6, Fresno Office. And there we correspond with the right of way agent when they should be filed with the court.

"Q And do you expect those papers then to be given to the property owners by the district office representative?

"A That's part of the legal procedure is that they be served on the parties, yes.

"Q Okay. Do you recall the approximate date when you prepared these papers, other than the [Agreement], and put them into the formal process?

"A I can tell you that I know—

"[Harlan's counsel]: Objection, your Honor, in limine and relevancy.

"THE COURT: Court will sustain it on relevance grounds.

"[State's counsel]: Your Honor, could I be heard?

"THE COURT: Yes, I'll meet with you in the hallway.

"(Thereafter, a discussion was had between the Court and Counsel at bench, not reported.)

"THE COURT: All right. You may proceed, [counsel]."

The state's counsel went on to question Ferguson about a meeting she attended at which representatives of the two sides discussed the underpass.

All that happened here is that the court excluded, as irrelevant, testimony about the approximate date on which Ferguson prepared papers and "put them into the formal process." The state has offered no explanation of how this date was relevant or why the testimony that was permitted after the hallway conference did not include all the admissible evidence the state wished to present.

Third, the state's counsel asked Ferguson what she said at the meeting discussed in the previous passage:

"Q What did you say in regard to the under crossing?

"A I had read the [Agreement] and the under crossing was what we would have called a cost to cure item.

"[Harlan's counsel]: Objection, your Honor.

"THE COURT: Court will sustain the objection to the extent it is interpreted as a legal conclusion.

"[State's counsel]: Did you feel the cost of the under crossing was something that should be addressed under the possession and use agreement?

"[Harlan's counsel]: Objection, your Honor, legal conclusion.

"[State's counsel]: Did you understand that to be the case, Ms. Ferguson?

"THE COURT: Ladies and Gentlemen, the witness may testify with respect to her understanding or the position that the Department of Transportation took in the proceedings, but you are directed that the only statement of law that you will receive with respect to the meaning of the contract will come from [the] court.

"THE WITNESS: I had, my only purpose to be there was to acquire property for the project 168, so all of the issues in my mind, dealt with acquiring the property, and as such, the under crossing would be a cost to cure item which, under the, under the relevant items—

"[Harlan's counsel]: Objection, your Honor.

"THE COURT: Court will sustain the objection.

"[State's counsel]: Q All I would like, Ms. Ferguson, is if you could explain to the jury what you told the parties there at the, at the meeting in relation to the under crossing."

Ferguson then related that she had explained to Harlan's representatives her view that the state could build an underpass only if the damage caused by the project to Harlan's property would equal or exceed the cost of the underpass, and that therefore Harlan would have to provide the state with information showing the amount of the damage.

The state again argues that the court's rulings prevented it from "identifying the eminent domain basis for its negotiations" in order to "balance" the testimony of Harlan's attorney, Stephenson, that the state's demand to justify the cost of the underpass was "an attempt to try to keep [Harlan] from asserting claims that were otherwise valid, and shave them down." The record does not support the state's contentions. Ferguson's testimony following the passage just quoted did include an explanation of her view of the matter.

The court only ruled that the jury was not to accept any legal conclusions except those included in the court's instructions. We see no error.

Next, the state contends that the court erred in sustaining an objection to Ferguson's answer to a question about a subsequent meeting:

> "[State's counsel]: At this meeting, did you request Mr. Lee Stephenson for the information that you had requested in February of 2000?
>
> "THE WITNESS: His responses were late. I had filed appropriate motions—
>
> "[Harlan's counsel]: Objection, your Honor.
>
> "THE COURT: Court will sustain the objection and strike the response as non-responsive."

The state's counsel then repeated the question, and Ferguson explained that she and Stephenson discussed the matter and agreed that Stephenson would provide the information by letter.

Again, there is no error. The record shows that the answer was nonresponsive. Counsel repeated the question and the witness provided a responsive answer.

The last item the state points to arose during Ferguson's cross-examination by Harlan's counsel. Harlan's counsel asked whether Ferguson raised the issue of justifying the cost of the overpass at a certain meeting:

> "Q … At this meeting[,] did you make the statement [that] before any of those costs would be paid, they would have to be justified?
>
> "A The word 'justified,' you know, is how you define it. To justify it under the eminent domain procedure that I am used to—
>
> "[Harlan's counsel]: Move to strike, your Honor[.] [D]id you use the word 'justify'[?]
>
> "THE COURT: Court will grant the motion to strike and you may rephrase your question.
>
> "[Harlan's counsel]: Thank you, your Honor.

"Q Did you use the word specifically 'justify'?

"A The concept, I cannot tell you whether I used the word justify. I can tell you if I discussed the concept that that would be with."

In response to further questioning, Ferguson testified that her intent at various meetings was to explain the state's position that it would not pay for an underpass unless Harlan showed the cost was justified by the damage to his property.

The state again contends that the court's rulings interfered with its ability to show the jury why it took the position it did on justifying the cost of the underpass. Again, there is no error. Ferguson began to explain how a property owner justifies the cost of remediating damage to remainder property in eminent domain proceedings. This explanation was not responsive to the question Harlan's counsel asked, which was about her statements at a meeting. The court properly sustained the objection and granted the motion to strike. Under further cross-examination, Ferguson was able to explain that she intended at the meetings in question to set forth the state's position that cost justification was necessary. We do not see how these events stopped the state from making its case.

In sum, the trial court did not prejudicially err in any of these individual rulings. Further, there is no merit to the point that Ferguson should have been allowed to say that in an eminent domain case the state can force a property owner to prove that the cost of a remedial measure is justified by damage the condemnation causes to the remainder property. That testimony would not have supported the state's defense. The legal doctrines applicable in eminent domain are not evidence of the meaning of the Agreement. If the state's point is that Ferguson intended to give Harlan only what the state could be forced to give in eminent domain, it could not have been prejudiced by any exclusion of evidence of that intention. The state could not have shown its good faith by proving it intended to do only what a court would have forced it to do if the Agreement had never been signed.

B. Refusal of jury instruction

The state requested a jury instruction that when an agent receives notice of a material fact while acting within the scope of his or her agency, the principal is charged with constructive notice of the fact. The court refused to give it. The state argues that the refusal was error and that it was prejudiced because Harlan's attorney was notified at a meeting on June 9, 2000, that the state did not intend to build an underpass. The state contends this was constructive notice to Harlan that the state refused to build an underpass, which meant that the cause of action for breach of contract accrued then, and Harlan was required to submit a pre-suit claim to the state by June 9, 2001, not February 1, 2002.

If the refusal of the instruction was error, it was harmless. As discussed before, the state does not argue that the time for performance (i.e., a reasonable time) had passed earlier than February 1, 2001, so the events of June 9, 2000, were at most an anticipatory repudiation. Harlan's claim did not accrue at that time because he was entitled to wait and see if the state would perform.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs.

_____
Wiseman, J.

WE CONCUR:

_____
Dibiaso, Acting P.J.

_____
Dawson, J.