Filed 2/27/04

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

RONALD MICHAEL GRADLE et al., Plaintiffs and Appellants, v. DOPPELMAYR USA, INC., Defendant and Respondent.	C041861 (Super. Ct. No. 12815)

APPEAL from a judgment of the Superior Court of Mono County, Edward Forstenzer, J. Reversed.

Michael Roffian and Steven P. Scandura for Plaintiffs and Appellants.

Schaffer, Lax, McNaughton & Chen, Clifford L. Schaffer and Susan Rousier for Defendant and Respondent.

Plaintiff Ronald Gradle fell into the machinery of a ski lift and lost his leg. He and his wife brought suit against Doppelmayr USA, Inc., the company that designed and provided the

equipment for the retrofit of the ski lift, alleging a design defect and negligence. The jury returned a verdict for Doppelmayr. The Gradles appeal, contending the trial court erred in excluding evidence of California Occupational Safety and Health Act (Cal-OSHA) rules and regulations to establish negligence per se. They assert such evidence is admissible under recent amendments to Labor Code section 6304.5. The Gradles also contend the court erred in excluding Doppelmayr's notice of motion for summary judgment, which they wanted to use as an admission to impeach an expert witness. Finally, the Gradles contend the court erred in finding a settlement offer of $25,000 was reasonable and awarding Doppelmayr expert witness costs of $70,373 under Code of Civil Procedure section 998.

We find merit in the first contention. Under amended Labor Code section 6304.5, evidence of Cal-OSHA standards are now admissible to establish negligence per se except as against the state for violation of a mandatory duty. The error in excluding this evidence requires reversal of the judgment. We address the two remaining contentions for guidance of the trial court on remand. The notice of the summary judgment motion was not an admission and was properly excluded under Evidence Code section 352. We find, however, that the trial court abused its discretion in awarding Doppelmayr expert witness fees as costs.

FACTUAL AND PROCEDURAL BACKGROUND

Following a serious accident, involving the failure of a Yan detachable chair lift, at Whistler in British Columbia, California required all Yan lifts be modified. Mammoth Mountain

Ski Area contracted with Doppelmayr to modify their four Yan lifts, including lift J-6 at June Mountain. The retrofit involved converting the Yan detachable grip system to a Doppelmayr detachable grip system. Doppelmayr provided the design and engineering for the retrofit, and new sheave assemblies, grips, chairs and hangers, and machinery for the terminals.

Ronald Gradle worked for Mammoth Mountain as the electrical supervisor at June Mountain. He was a good, safe employee, with an impeccable record. When he went to work on the morning of January 5, 1997, it was cold, windy and snowing with ice. There was a problem with the proximity switch on lift J-6. The proximity switch prevents two chairs from being in the safety zone at the same time to avoid collisions. Gradle adjusted the switch at the bottom of the lift while the lift was stopped. He then took a snowmobile to the top of the lift.

A mechanic asked Gradle if he wanted the lift stopped and Gradle said no. Gradle climbed into the operator shack at the terminal. There is a three and a half foot high tub wall that is a barrier to the machinery. Gradle climbed on top of the tub wall and made his way to the switch. There was snow and ice on the top of the tub wall. Gradle yelled to the mechanic, who was 20 feet away, to take the lift to start speed and then stop it. The mechanic replied, "okay," but apparently did not hear the command to stop the lift. Gradle squatted on top of the tub wall waiting for the lift to stop and slipped. He got caught in the machinery and lost a leg.

In the fall of 1997, Gradle and his wife brought suit against Doppelmayr and others. As to Doppelmayr, the amended complaint alleged design defect due to the lack of safety guards on the machinery and negligence.

On August 31, 2000, Doppelmayr made an offer to compromise pursuant to Code of Civil Procedure section 998, offering $24,000 to Gradle and $1,000 to his wife. The Gradles did not respond to the offer.

Several months later Doppelmayr moved for summary judgment on two grounds: that it did not manufacture the portion of the lift involved in the accident and assumption of the risk. The trial court denied the motion.

Before trial Doppelmayr filed numerous motions in limine to exclude certain evidence. One motion sought to exclude evidence of alleged Labor Code violations and Cal-OSHA findings. The Gradles wanted to admit evidence of a preliminary safety order requiring safety guards for the machine and machine parts and guards for the V-belts on the accelerator and decelerator systems. The trial court granted Doppelmayr's motion. The Gradles renewed the objection during trial and it was again denied.

The Gradles wanted to introduce Doppelmayr's notice of the motion for summary judgment as an admission to show that Doppelmayr falsely claimed it did not manufacture the machinery involved in the accident. The court ruled it was not a judicial admission, but requested briefing on whether it was a party admission. The court subsequently ruled the notice was not

admissible; it was not a declaration, but argument of counsel. If the notice was relevant, the court would exclude it under Evidence Code section 352 because it had minimal probative value and a great potential to consume time as counsel would need to explain it.

The old Yan lifts had removable cover plates or guards over the machinery. The Gradles offered expert testimony that the guarding was a part of a complete design and it was below the standard of care not to provide guarding. Doppelmayr countered that guarding was not part of the contract, it was to be done by Mammoth Mountain, and it could not be done until the project was complete.

Doppelmayr had retained an engineer to review and certify its design. A load test on the lift was conducted in mid-December 1996. The engineer recommended that the J-6 lift not be opened until construction, including the enclosure and guarding, was complete. Mammoth Mountain opened the J-6 lift before construction was complete. The morning of the accident, Mammoth Mountain was anxious to get the lift open. Doppelmayr had provided an emergency pull cord to stop the machinery; it was be installed a few feet above the tub wall. Mammoth Mountain had not installed the cord at the time of the accident.

Mammoth Mountain had a "lock out/tag out" safety procedure that the lift maintenance people used. The lift was turned off and the key pulled out of the main control so the lift could not be started while maintenance was working on it. There was testimony that Gradle violated this safety procedure. Gradle

testified the maintenance mechanic smelled "boozy" and appeared a little hung over the morning of the accident.

The jury returned a special verdict, finding no design defect and that Doppelmayr was negligent but its negligence was not the cause of the injuries.

Doppelmayr moved for costs of $117,371, including $70,373 for expert witness fees due to the Gradles's rejection of the $25,000 section 998 offer. The Gradles moved to tax costs, including all of the expert witness fees. They argued the $25,000 offer was not reasonable. The court granted the motion only as to certain computer and mediation costs and awarded Doppelmayr costs of $111,601.68.

The Gradles appeal.

DISCUSSION

I

The Gradles contend the trial court erred in excluding evidence of Cal-OSHA regulations and the preliminary order issued in this case. They contend they established the foundation necessary under Evidence Code section 669 for a presumption of negligence per se, and Cal-OSHA regulations are admissible in personal injury actions by an employee against a third party other than his employer under amended Labor Code section 6304.5. They contend the court's erroneous ruling gutted their case.

The issue of whether Cal-OSHA regulations are admissible in an employee's action against a third party to establish the standard of care or a presumption of negligence is currently

pending before the California Supreme Court in *Elsner v. Uveges*, review granted April 30, 2003, S113799.

The Gradles concede Cal-OSHA regulations were not admissible in actions against third parties under the prior version of Labor Code section 6304.5 (section 6304.5), but they contend the 1999 amendments to that section now permit the admission of such evidence. Former section 6304.5, by its plain language, clearly limited application of Cal-OSHA standards and safety orders to actions between an employee and his employer. The previous version of section 6304.5 provided: "It is the intent of the Legislature that the provisions of this division shall only be applicable to proceedings against employers brought pursuant to the provisions of Chapter 3 (commencing with Section 6500) and 4 (commencing with Section 6600) of Part 1 of this division for the exclusive purpose of maintaining and enforcing employee safety. [¶] Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer." (Stats. 1971, ch. 1751, p. 3780, § 3.)

"Every appellate court in the State of California which has considered the question of legislative intent of this section has concluded Cal-OSHA regulations are not applicable to nor admissible in an employee's action against a third person not his or her employer. The legislative intent of Labor Code

section 6304.5 is patent and clear." (*Widson v. International Harvester Co.* (1984) 153 Cal.App.3d 45, 52.)

The amended version of section 6304.5 is not so clear. Section 6304.5, as amended in 1999, provides:

"It is the intent of the Legislature that the provisions of this division, and the occupational safety and health standards and orders promulgated under this code, are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety.

"Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards. It is the intent of the Legislature that the amendments to this section enacted in the 1999-2000 Regular Session shall not abrogate the holding in Brock v. State of California (1978) 81 Cal.App.3d 752." (Stats. 1999, ch. 615, § 2.)

"As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by

examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . [Citation.]' [Citation.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

We begin by examining the words of the amended statute. Section 6304.5 contains two paragraphs. The first is a single sentence that provides Cal-OSHA standards "are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety." At first glance, under the maxim *expression unius est exclusion alterius* (the expression of one thing is the exclusion of another), this provision might be interpreted to limit the applicability of Cal-OSHA standards to proceedings against an employer. "The maxim is not immutable and is inapplicable if its operation would contradict a discernible and contrary legislative intent. [Citations.]" (*People v. Anzalone* (1999) 19 Cal.4th 1074, 1079.)

We do not read the first paragraph of section 6304.5 in isolation to limit the applicability of Cal-OSHA standards to only proceedings against employers. In 1999, the Legislature reworded the first paragraph, changing its wording from "shall only be applicable" to "are applicable." This change has considerable significance. The Gradles contend this change from a restrictive provision to a merely descriptive provision lifted

the previous ban of Cal-OSHA evidence in third party cases. We agree the first sentence does not require the exclusion of Cal-OSHA standards in third party cases; it does not speak to that situation, but merely sets forth the exclusive purpose of such standards in proceedings against employers.

The second paragraph of section 6304.5 contains four sentences and addresses the rules for admission of Cal-OSHA standards in personal injury and wrongful death cases. The first restricts evidence of the issuance of or the failure to issue a citation to personal injury or wrongful death actions between an employee and his or her employer. If the first paragraph limited admissibility of Cal-OSHA standards to actions between an employee or an employer, this provision would not be necessary. In interpreting a statute we reject an interpretation that renders one of its provisions nugatory. (*People v.* Craft (1986) 41 Cal.3d 554, 560.) By limiting the admissibility only of the issuance of or failure to issue citations to employee-employer actions, this provision suggests that other evidence of Cal-OSHA standards are admissible in a broader array of cases.

The next sentence of section 6304.5 provides that Evidence Code 459 and 669, relating to judicial notice and a presumption of negligence, apply to Cal-OSHA standards "in the same manner as any other statute, ordinance, or regulation." There is no express limitation on the type of cases or parties to which these Evidence Code provisions may apply. Read alone, this provision strongly supports admission of Cal-OSHA standards in

any case, provided the requirements of Evidence Code sections 459 or 669 are met. The Gradles sought to admit the Cal-OSHA evidence under the provisions of Evidence Code section 669.

Usually Evidence Code sections 459 and 669 will only apply in cases involving a defendant other than the employer because the exclusivity provisions of workers' compensation will bar actions against an employer. (Lab. Code, § 3601.) We recognize there are some situations where an action against the employer is allowed, such as where the employer fails to carry compensation insurance. (Lab. Code, § 3706.) Previous law allowed evidence of Cal-OSHA standards in such cases without any reference to the Evidence Code. The addition of the reference to Evidence Code section 459 and 669 implies an intent to broaden the scope of cases in which Cal-OSHA standards are admissible.

The third sentence of the second paragraph of section 6304.5 prohibits an employee of the Division of Occupational Safety and Health from testifying as an expert. Again, there is no limitation on the type of case. This provision is not at issue here.

Finally, the last sentence of section 6304.5 states the express legislative intent not to abrogate the holding in *Brock v. State of California* (1978) 81 Cal.App.3d 752. Thus, we must construe section 6304.5 and the admission of Cal-OSHA standards consistent with the holding in *Brock*. The parties disagree on the scope of that holding. The Gradles contend the holding in *Brock* is a limited one: the State cannot be sued for a failure

to inspect under Cal-OSHA. Doppelmayr contends the holding in *Brock* is broader: Cal-OSHA standards cannot be used to establish the duty of care of a third party who is not the employee's employer.

Brock v. State of California, supra, 81 Cal.App.3d 752 is a case from this court. It arose from a fire at a paper plant that killed or injured several employees. (*Id.* at p. 754.) Plaintiffs filed personal injury actions against several defendants, including the State of California. Two causes of action were alleged against the state. The first alleged that the state had a mandatory duty to inspect manufacturing facilities to assure they were reasonably safe places for workers, through inspections the state knew of violations at the paper plant but failed to exercise their mandatory duty to ensure compliance. (*Ibid.*) The second cause of action against the state alleged the state had a mandatory duty for inspection, maintenance and general safety of the premises and knowingly conspired with officials and employees of the paper plant to violate certain laws, codes and regulations the state had a mandatory duty to enforce. (*Id.* at p. 755.)

The state demurred to the complaint on the ground that section 6304.5 prohibits reliance on Cal-OSHA as a basis for a personal injury or wrongful death action except as between an employee and employer. (*Brock v. State of California, supra*, 81 Cal.App.3d at p. 755.) It was undisputed that plaintiffs' complaint was based on Cal-OSHA duties. The trial court

sustained the demurrer and this court found that ruling "was correct." (*Id.* at p. 756.)

In reasoning that section 6304.5 precluded the case, the *Brock* court stated: "The fact that the state has a mandatory duty to inspect and to enforce CAL/OSHA provisions is irrelevant to the issue of whether those provisions can be relied upon in a personal injury action against the state when the state is not the employer. It is evident that the purpose of section 6304.5 is to prevent the technical CAL/OSHA safety provisions from enlarging the personal injury liability of third parties beyond basic common law liability." (*Brock v. State of California, supra*, 81 Cal.App.3d at p. 757.) The court reasoned there was a practical need for such limitation as only employers, not third parties, had day-to-day operating control over safety conditions. (*Id.* at pp. 757-758.) "[T]he Legislature sensibly limited the applicability of the CAL/OSHA safety provisions to actions involving employers alone." (*Id.* at p. 758.) Finally, the court made clear its holding was not limited to actions against the state. "This has nothing to do with sovereign immunity, . . . Labor Code section 6304.5 does not undertake by its terms to immunize the state from suits by injured employees based on common law liability . . . ." (*Ibid.*) The court concluded, "Since plaintiffs' allegations against the state are based upon CAL/OSHA provisions, the demurrers were properly sustained." (*Ibid.*)

We recognize the language of *Brock, supra,* 81 Cal.App.3d 752 is expansive, but we determine its holding is not as

expansive as its language for two reasons. First, the expansive language was wholly dependent upon the prior version of section 6304.5, which unambiguously stated that "the provisions of this division shall only be applicable to proceedings against employers." (Stats. 1971, ch. 1751, § 3, p. 3780.) Since, as explained above, that language has significantly changed, the holding of *Brock* must be limited to reconcile the decision with the new wording of section 6304.5.

Second, the language of the case "must, of course, be read in the light of the facts of the case and the question presented for determination." (*Leonard v. Watsonville Community Hosp.* (1956) 47 Cal.2d 509, 517.) The question presented in *Brock, supra,* 81 Cal.App.3d 752 was whether a cause of action could be stated against the state for its failure to comply with a mandatory duty under Cal-OSHA. The court was not called upon to decide whether Cal-OSHA standards are admissible to establish the standard of care of third parties. The facts before the court in *Brock* serve to limit its holding. Indeed, had the Legislature intended the holding of *Brock* to be construed as broadly as Doppelmayr contends, it had a choice of several cases to cite. (See *Widson v. International Harvester Co., supra*, 153 Cal.App.3d 45, and cases cited therein.) By choosing *Brock,* the Legislature intended the more narrow holding.

An examination of the language of amended section 6304.5, both provision by provision and as a whole, leads to the conclusion that Cal-OSHA standards are now admissible in actions against third parties other than the state. The language of

section 6304.5 was changed considerably and this change has significance. "In general, 'a substantial change in the language of a statute . . . by an amendment indicates an intention to change its meaning.' [Citation.] It is presumed the Legislature made changes in wording and phraseology deliberately [citation] and intended different meanings when using different words [citation]." (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 939.)

The legislative history of the 1999 amendments to section 6304.5 not only supports this interpretation, but also provides some insight as to why the Legislature chose such an indirect way to change the rule that Cal-OSHA standards could not be the basis of a personal injury or wrongful death action against one who was not the employer of the injured party. As originally drafted, Assembly Bill No. 1127 amended section 6304.5 to expressly permit Cal-OSHA standards (but not evidence of citations or lack of citations) to be introduced into evidence in any personal injury or wrongful death action. (Assem. Bill No. 1127 (1999-2000 Reg. Sess.) as introduced Feb. 25, 1999.) In part, Assembly Bill No. 1127 amended section 6304.5 to add the following language: "This division and the occupational safety and health standards and orders promulgated under this code may have application to, be considered in, or be admissible into, evidence in any personal injury or wrongful death action." (*Ibid.*)

The Senate then made three significant changes to the portion of Assembly Bill No. 1127 that amended section 6304.5.

First, in August 1999, the Senate deleted the language quoted in the preceding paragraph and added the following: "Sections 452 and 669 of the Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation." (Sen. Amend. to Assem. Bill No. 1127 (1999-2000 Reg. Sess.) Aug. 23, 1999.) On September 2, 1999, the Senate added this sentence: "The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards." (Sen. Amend. to Assem. Bill No. 1127 (1999-2000 Reg. Sess.) Sept. 2, 1999.) The next day, the Senate added the final sentence: "It is the intent of the Legislature that the amendments to this section enacted in the 1999-2000 Regular Session shall not abrogate the holding in Brock v. State of California (1978) 81 Cal.App.3d 752." (Sen. Amend. to Assem. Bill No. 1127 (1999-2000) Reg. Sess.) Sept. 3, 1999.) It was in this form that the amendments to section 6304.5 were passed. (Stats. 1999, ch. 615, § 2.)

It could be argued that this legislative history indicates the Legislature rejected a proposal that would have unambiguously permitted the introduction of Cal-OSHA standards into all personal injury and wrongful death actions. "'The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the

omitted provision.' [Citations.]" (*Beverly v. Anderson* (1999) 76 Cal.App.4th 480, 485-486.)

The Gradles contend the deletion of the original language and its replacement with the reference to sections 452 and 669 of the Evidence Code was simply a change in wording but not effect. Cal-OSHA standards could still be used to establish the third party's negligence under the presumption of Evidence Code section 669. We find this argument persuasive. The adoption of the last sentence of section 6304.5 and the reference to *Brock* indicates a compromise to limit the effect of the amendments. Cal-OSHA regulations are now admissible in third-party lawsuits, except to impose liability on the state for failure to comply with a mandatory duty.

If we were to accept Doppelmayr's interpretation of amended section 6304.5, the result would be ironic. Assembly Bill No. 1127 was designed to protect employee safety; it extends the period for filing complaints, increases penalties for violations, and reaffirms the duty of the standards board to adopt ergonomics standards. (Stats. 1999, ch. 615.) Under Doppelmayr's interpretation of amended section 6304.5, Cal-OSHA standards might be admissible in personal injury cases against third parties for some purposes other than to establish the standard of care of the third party, for example to show the employer or employee was at fault for the accident or to show the product could not be designed as plaintiff suggests because such a design would violate Cal-OSHA standards. If so, the amendment to section 6304.5, that started out as an attempt to

aid injured employees by allowing the admission of Cal-OSHA standards in all cases, would result in a rule that permits admission of the standards against an injured employee but not in his favor.

The trial court erred in excluding under section 6304.5 evidence of Cal-OSHA standards. The Gradles contend the error was reversible because the court's ruling "gutted" their case. A judgment will be reversed due to an error in excluding evidence only where a miscarriage of justice is shown. (Cal. Const., art. VI, § 13; Evid. Code, § 354.) We find a miscarriage of justice; after an examination of the entire cause we are of the opinion that it is reasonably probable that a result more favorable to the Gradles would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

The Gradles contend the trial court erred in not permitting them to offer into evidence Doppelmayr's notice of summary judgment. The notice stated that Doppelmayr sought summary judgment on the basis that it did not manufacture the portion of the ski lift involved in the accident. The Gradles contend this statement was false and it was relevant to impeach Doppelmayr and its experts. They contend the statement was relevant to show that Doppelmayr "has the ability to make people lie on its behalf."

On appeal the Gradles offer two bases for admissibility. First, they assert the statement is a judicial admission.

Second, they contend its is admissible under Evidence Code section 721, subdivision (a), to impeach Doppelmayr's liability expert. The expert testified in his deposition that he relied on documents provided by Doppelmayr in forming his opinions, he reviewed the summary judgment papers, and he did not see anything that indicated defense counsel had been untruthful in its presentation of the case.

A judicial admission is an admission made in pleadings or during trial, such as by stipulation. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleadings, § 413, p. 510.) An admission in pleadings is not treated as evidence but as a waiver of proof by conceding the truth of the matter admitted and its effect is to remove the matter from the issues of the case. (*Id.* at pp. 510-511.) The Gradles did not intend to use the contents of notice of the summary judgment motion as a judicial admission, that is, as a concession of the truth of the assertion that Doppelmayr did not manufacture the portion of the lift involved in the accident. Rather, they sought to use the statement as a prior inconsistent statement to impeach Doppelmayr and its witnesses.

In its summary judgment motion, Doppelmayr had argued that it had only manufactured the grip system and the grip system was not involved in Gradle's injuries. During argument on the admissibility of the notice, Doppelmayr noted there was no question that it manufactured the conveying system and at the time of summary judgment there was a lot of confusion as to what was involved in the accident. Doppelmayr would have to explain the basis of the statement and that testimony would invade the

attorney-client privilege. Doppelmayr's expert did not say he based his opinions on the notice; rather, he stated he reviewed the summary judgment papers very "briefly."

The trial court ruled the statement was not admissible for two reasons. First, it ruled it was not binding on Doppelmayr because it was a statement by counsel made in argument, not in a sworn declaration. Second, the court excluded the statement under Evidence Code section 352 because it had minimal probative value and a great potential for consuming time. We find no error in these rulings.

It is well established that "[s]tatements of counsel in argument (or otherwise) are not evidence and, unless in the form of a stipulation or admission, are not binding on the client [citation]." (*Haynes v. Hunt* (1962) 208 Cal.App.2d 331, 335.) The Gradles offer no authority for the proposition that statements made in the notice of argument are binding on the client.

In any event, the trial court did not abuse its discretion in excluding the statement of marginal impeachment value where it would entail an undue consumption of time. (*People v. Brown* (2003) 31 Cal.4th 518, 545.) There was no evidence that Doppelmayr's expert based his opinion on the belief that Doppelmayr had not manufactured the portion of the lift involved in the accident, so the probative value of the statement was minimal. Its admission would be time consuming because counsel for Doppelmayr told the court the defense would attempt to explain exactly what was meant by the statement and what

portions of the ski lift Doppelmayr always admitted it had manufactured. A trial court has discretion to exclude impeachment evidence if it is collateral, cumulative, confusing, or misleading. (*People v. Price* (1991) 1 Cal.4th 324, 412.)

III

The Gradles contend the trial court abused its discretion in awarding Doppelmayr expert witnesses fees as costs. The court's ruling was based on the Gradles' rejection of Doppelmayr's offer to compromise of $25,000. Under Code of Civil Procedure section 998, where an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the court, in its discretion, may require the plaintiff to pay defendant's reasonable costs of expert witnesses. (Code Civ. Proc., § 998, subd. (c)(1).) The Gradles contend the court abused its discretion because the offer of $25,000 was not reasonable.

In *Wear v. Calderon* (1981) 121 Cal.App.3d 818, at page 821, to accomplish the legislative purpose of encouraging settlements, the court read into Code Of Civil Procedure section 998 a requirement of good faith. "In other words, the pretrial offer of settlement required under section 998 must be realistically reasonable under the circumstances of the particular case." (*Ibid.*)

A token or nominal offer usually does not satisfy this good faith requirement. "A plaintiff may not reasonably be expected to accept a token or nominal offer from any defendant exposed to this magnitude of liability unless it is absolutely clear that

no reasonable possibility exists that the defendant will be held liable. If that truly is the situation, then a plaintiff is likely to dismiss his action without any inducement whatsoever. But if there is some reasonable possibility, however slight, that a particular defendant will be held liable, there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial." (*Wear v. Calderon, supra*, 121 Cal.App.3d at p. 821, fn. omitted.)

In *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, this court accepted the good faith requirement and discussed when an offer is made in good faith. "Whether a section 998 offer is reasonable must be determined by looking at circumstances when the offer was made. [Citation.]" (*Id.* at p. 699.) Where the defendant obtains a judgment more favorable than its offer, the judgment is prima facie evidence that the offer was reasonable. (*Id.* at p. 700.) Whether the offer was made in good faith and was reasonable is left to the sound discretion of the trial court. (*Ibid.)*

The trial court found the offer reasonable, so the burden is on the Gradles to show it was not. They point to the large damages in the case and argue there was no reasonable expectation they would accept a $25,000 offer.

In light of the enormous damages in the case, an offer of $25,000 may be viewed as nominal. Doppelmayr's trial brief conceded the medical damages alone were $1.7 million. "Even a modest or 'token' offer may be reasonable if an action is

completely lacking in merit. [Citation.]" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) This is not a case like *Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, in which pretrial discovery revealed the lack of merit in plaintiff's case. In *Culbertson*, plaintiff sued the manufacturer of a ladder for injuries when he fell after the ladder slid. Pretrial discovery revealed that the ladder had been modified after it left the manufacturer and cast doubt on the extent and cause of plaintiff's injuries as he was seen engaging in strenuous activities and had a pre-existing back injury. (I*d.* at pp. 706-707.)

Here, offer was made almost three years after the lawsuit was filed when presumably most of the discovery was complete. The question of Doppelmayr's liability remained close. Indeed, the jury found Doppelmayr negligent, although it found no causation. Indisputably the machinery lacked guarding which was required by Cal-OSHA regulations. There was conflicting testimony whether Doppelmayr was responsible for providing guarding. Experts testified guarding is a part of a complete design and the lack of guarding was below the standard of care. The issue of whether Cal-OSHA standards were admissible was not resolved until a year and a half after the offer was made. Given the lack of clarity in amended Labor Code section 6304.5, the Gradles could reasonably believe evidence of Cal-OSHA standards would be admissible.

Certainly, the case presented problems for the Gradles in terms of either comparative negligence or assumption of the risk

and they could not reasonably expect a finding of complete liability on the part of Doppelmayr. But even a finding of fault of only a few percent in a multimillion dollar case would exceed the $25,000 offer. In *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, a defendant in a wrongful death case made an offer of $2,500 and later received judgment in its favor. In upholding the trial court's finding that the offer was not reasonable, the court noted that although liability was tenuous, given the enormous exposure, the trial court could find defendant had no reasonable expectation that its offer would be accepted. (*Id.* at p. 63.)

We find the trial court abused its discretion in finding the offer of $25,000 was reasonable. Given the enormous damages presented by the case and the possibility that Doppelmayr would be held liable in part, there was no reasonable prospect of acceptance. (*Elrod v. Oregon Cummins Diesel, Inc., supra,* 195 Cal.App.3d 692, 698; *Wear v. Calderon, supra*, 121 Cal.App.3d 818, 821-822.)

DISPOSITION

The judgment is reversed. The Gradles shall recover their costs on appeal.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.