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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HEIDI GONGGRYP, Plaintiff and Appellant, v. BMW OF NORTH AMERICA LLC et al., Defendants and Respondents.	B279895 (Los Angeles County Super. Ct. No. YC063950)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael B. Harwin, Judge. Affirmed.

Daniels, Fine, Israel, Schonbuch & Lebovits, Moses Lebovits and Parham Nikfarjam for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Steven E. Meyer and Caroline E. Chan for Defendants and Respondents.

Heidi Gonggryp (Gonggryp) sued the manufacturer (Bayerishe Motoren Werke AG) and distributor (BMW of North America LLC) (collectively, BMW) of her automobile for injuries allegedly arising out of a defective seatbelt. Before trial, the trial court ruled that Dr. Daniel Lu (Lu), Gonggryp's neurosurgeon and one of her retained experts, could not testify that her car's seatbelt was defective and the cause of her alleged injuries. In addition, the court precluded Lu from offering any opinions based on biomechanics or occupant kinematics.[1] At trial, the jury rendered a unanimous verdict that the seatbelt was not defective.

Gonggryp moved for a new trial on the ground that the trial court erroneously limited Lu's opinions. The trial court denied the motion. BMW subsequently moved to recover its costs of almost $400,000—most of which were expert witness fees—pursuant to section 998 of the Code of Civil Procedure.[2] Gonggryp moved to tax those costs, arguing that BMW's section 998 settlement offer—$20,000 plus a waiver of costs—was a token offer. The trial court denied Gonggryp's motion to tax.

On appeal, Gonggryp argues that the trial court abused its discretion with regard to the limitations it placed on Lu's expert testimony and on its decision to deny her motion to tax. We are not persuaded by her arguments on either issue and, accordingly, affirm the judgment.

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[1] Biomechanics is the study of the "effect of forces on organic bodies" and kinematics is the study of "how objects behave when a force acts on them." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 998.)

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

BACKGROUND

I. The accident

On July 29, 2009, as Gonggryp was driving to work, another vehicle suddenly made a left turn in front of her. At the time she saw the other car, Gonggryp was traveling at approximately 35 miles per hour. Although Gonggryp "hit the brakes" and "tried with all [her] might to avoid hitting" the other car, the cars collided at an oblique angle, with the left front of Gonggryp's vehicle, a 1999 BMW 323i, striking the other vehicle. As the cars struck, Gonggryp felt herself "slamming forward" and believed that she hit her head on the steering wheel. At the time of the accident, Gonggryp was wearing her seatbelt. After the accident, Gonggryp's sister took her to the emergency room, where she complained of pain in her neck and lower back and where she was treated for a possible head injury. In the two years immediately following the accident, Gonggryp, as observed by her executive assistant, "changed drastically," because she was in a "lot of pain" and suffered from pronounced "memory lapses."

II. The lawsuit

On January 3, 2011, Gonggryp sued BMW for negligence, failure to warn, design/manufacturing defect, and breach of express and implied warranties.[3] BMW denied Gonggryp's allegations.

In May 2012, the parties attempted to settle their dispute through mediation, but were unsuccessful. In July 2012, BMW,

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[3] Gonggryp reached a settlement with the driver of the other car for $100,000.

pursuant to section 998, offered to settle the case for $20,000 and a waiver of costs. Gonggryp rejected BMW's offer.

In January 2015, Gonggryp served BMW with her expert witness designations. Among her retained experts, Gonggryp included Lu, who was designated to testify on Gonggryp's cervical disk injuries, causation, treatment and damages. In June 2011, Lu had operated on Gonggryp, performing a diskectomy and fusion at the C5-C6 levels of her cervical spine.

A. LU'S CAUSATION OPINIONS

In March 2015, BMW deposed Lu. At his deposition, Lu offered two causation opinions. First, he opined that the injury to Gonggryp's cervical spine was not the result of degenerative changes, but of trauma, namely the automobile accident. Second, he opined that the trauma to Gonggryp's cervical spine was caused by the automobile's seatbelt. According to Lu, he had never seen physical findings in a patient severe enough to warrant surgery where that patient was wearing his/her seatbelt in a 30 miles per hour accident. In fact, Lu opined that it was "not possible" for Gonggryp's injury to have occurred if the seatbelt in her car had been working properly. Lu testified further at his deposition that his causation opinions were based solely on his clinical experience as a trauma surgeon.

B. LIMITATION OF LU'S OPINIONS

1. BMW's motion in limine

In April 2015, BMW moved to exclude, among other things, Lu's causation opinions. With regard to Lu's opinion that trauma, not degenerative change, was responsible for the damage to Gonggryp's neck, BMW argued that it was not based on "substantial medical evidence." Specifically, BMW argued that the basis for Lu's opinion—his experience as a trauma

physician—was an insufficient foundation for his opinion. Among other things, BMW noted that Lu had not distilled his prior experience treating automobile accident victims into a scientific study or even maintained a log cataloging the circumstances of his patients' accidents. Moreover, Lu had not searched the database of his patients when formulating his opinion or searched the medical literature for articles or clinical studies supporting his opinion.[4] In addition, at the time he offered his opinion, Lu "did not have the full range of medical evidence" regarding Gonggryp. For example, at the time he formed his opinion, Lu did not have any medical records predating the accident and none of the radiological films (e.g., X-rays and CT scans) from the date of the accident.

As for Lu's opinion that the seatbelt was the cause of Gonggryp's alleged injuries, BMW argued that this opinion was also without the necessary scientific foundation. Among other things, BMW noted that Lu had no detailed knowledge of the accident, such as the speed or the make and model of the other vehicle, the " 'primary direction of force,' " whether Gonggryp's

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[4] Lu was deposed a second time in January 2016. At that second deposition, Lu produced two articles that he had found the night before during a search of the PubMed database. One article concerned the effect of seatbelts on morbidity and health care costs in motor vehicle accidents and it concluded that "in an urban setting, safety belt utilization was associated with decreased severity of injury from motor vehicle trauma and reduced the medical care costs of injured motorists." The other article summarized a study of the effects of speed, direction of force, and safety restraints on motor vehicle crash mortality; it found that deaths were associated with high speeds and nonseatbelt use in lateral crashes.

car rotated following the collision, the angle of her seat or what direction Gonggryp moved inside the vehicle as a result of the collision. In addition, BMW observed that Lu had not taken any steps to acquire such knowledge: he did not review any accident reconstruction materials or review the transcripts of any other expert's deposition.[5]

In opposing BMW's motion, Gonggryp stressed the breadth and depth of Lu's experience. Among other things, Lu, at the time, was a board certified spinal surgeon, who for the last 10 years had practiced at UCLA, a level I trauma center; as a result, he had treated "a lot" of patients who had suffered injuries as a result of an automobile accident.[6] In addition, Lu completed a biomechanics fellowship before running a laboratory that addressed spinal cord injury, work which involved "a lot" of kinematic analysis and motion analysis. Gonggryp argued that Lu's failure to cite specific studies in support of his opinions went to "the weight of [his] opinions, not their admissibility."

On June 8, 2016, the trial court granted BMW's motion in part. On causation-related issues, the trial court allowed Lu to testify regarding other patients with similar injuries that he had treated, but precluded him from testifying that the seatbelt caused Gonggryp's alleged injuries or offering any opinions about the design and function of her car.

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[5] At his second deposition, Lu testified that he had reviewed videos of two accident reconstruction sled tests, but had not reviewed any other work by any other expert or read the transcript of any other expert's deposition.

[6] At a subsequent hearing, Lu testified that over the course of a decade he had treated approximately 1,000 patients for cervical trauma while practicing as a neurosurgeon.

2. Evidence Code section 402 hearing on biomechanical opinions

As part of its ruling on BMW's motion in limine, the trial court precluded Lu from offering any biomechanical opinions on how Gonggryp moved within her car at the time of the accident. However, immediately before Lu testified at trial, the court held a preliminary hearing pursuant to Evidence Code section 402 to determine whether Lu had the necessary foundation to offer biomechanical opinions.

At the preliminary hearing, Lu opined that Gonggryp's neck injury was caused by trauma consistent with her head having hit something in her car and that his opinion was based on his 10-years experience as a trauma surgeon. At the hearing, however, Lu conceded that at his laboratory he did not do any testing of cadavers to see what level of force would be required to cause medical problems similar to those suffered by Gonggryp (i.e., disc damage at the C5-C6 level of the cervical spine). In addition, Lu admitted that he did not hold himself out as a biomechanic specialist, had not taken any biomechanic classes, and had never been retained as an expert witness to testify about biomechanics. Lu admitted further that in order to give a biomechanical opinion he would need certain data, such as the speed of Gonggryp's car at impact, the direction of force during the accident and how Gonggryp moved within her car following the collision, but that he did not possess such information.

At the conclusion of the hearing, the trial court ruled that Lu could testify about Gonggryp's medical treatment and that hitting her head could be one possible cause of her injuries, and that her injuries were consistent with other trauma patients whom he had treated. However, the trial court also ruled that Lu

could not opine that Gonggryp's injuries could have been caused only by hitting her head.

C. THE VERDICT AND GONGGRYP'S NEW TRIAL MOTION

As set out in the special jury verdict form, the jury was to determine first if the seatbelt in Gonggryp's car was defective under the consumer expectation test. Only if the jury found the seatbelt to be defective would it need to consider whether it was a substantial factor in causing Gonggryp's alleged injuries and, if so, the amount of her damages.

On June 21, 2016, after less than two hours of deliberations, the jury returned its verdict, finding unanimously that the seatbelt in Gonggryp's car was not defective. On July 25, 2016, the trial court entered judgment in favor of BMW.

On August 19, 2016, Gonggryp moved for a new trial on the sole ground that the exclusion of Lu's causation testimony was an error.[7] Gonggryp argued that because Lu's causation opinions were based on his training, knowledge and experience they were not speculative. BMW opposed the motion, arguing, inter alia, that Lu's experience was an insufficient foundation upon which to base his causation opinions and that, in any event, any error in precluding Lu's causation opinions was harmless because the jury found that there was no defect, which meant that there was no need to determine causation.

On September 20, 2016, after hearing oral argument on the matter, the trial court denied Gonggryp's motion for a new trial. In reaching its decision, the court noted as follows: "The jury

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[7] Although the motion indicates that it was supported by a declaration by Gonggryp's trial counsel, no such declaration is in the record before us and the docket sheet for the proceedings below does not indicate that any such declaration was filed.

voted 12-0 that there was no defect in the seatbelt operation. [¶] I saw no affidavits from any jurors that they would have voted differently. In fact, the jurors disbelieved plaintiff's expert which they mentioned. [¶] Both sides were outside the courtroom after the jury verdict, and I was, as well, observing, not asking questions but observing. [¶] And the jurors indicated that they not only disbelieved but disliked plaintiff's expert regarding seatbelts. The jurors also indicated that they felt that the defense experts and witnesses were more credible than plaintiff's experts."

D. THE MOTION TO TAX COSTS

On July 28, 2016, BMW filed a cost memorandum seeking to recover $389,677.89; of that amount, expert witness fees constituted $332,491.65. Gonggryp filed a motion to tax BMW's costs, arguing in the main that BMW's recovery of expert witness fees was unwarranted under section 998 because BMW's settlement offer of $20,000 plus a waiver of costs was a token offer not made in good faith and with no reasonable prospect of acceptance.

In opposing the motion, BMW argued that the settlement offer was made in good faith for two principal reasons. First, at the time of the settlement offer, Gonggryp had indicated to BMW that her estimated special damages to be in the range of approximately $185,000 to $200,000; and, at the time, she had already received $100,000 from the other driver. Second, Gonggryp's theory (she hit her head on the steering wheel) was not supported by the known evidence at the time the offer was made: although Gonggryp's car was inspected twice, no impact marks were found on the steering wheel or on the interior of the car; moreover, BMW's accident reconstruction expert showed that

Gonggryp's car was not struck head on, but at an angle—that is, the primary direction of force was 20 to 23 degrees counterclockwise from the car's center line, which meant that Gonggryp's head would have moved to the left of the steering wheel; in addition, the diagnostic downloads from the car's onboard computer showed that the car's restraint system worked as designed.

On September 20, 2016, the trial court heard oral argument on the motion to tax costs and then took the matter under submission. On October 7, 2016, the trial court denied Gonggryp's motion to tax, finding that BMW's section 998 offer was "made in good faith, especially in light of unanimous verdict of which [BMW] was confident based on its expert[']s reports, investigation reports, and discovery."

On December 6, 2016, the trial court entered an amended judgment in favor of BMW, awarding it $389,677.89 in costs. Gonggryp timely appealed.

DISCUSSION

I. Limitations on Lu's opinions

A. STANDARD OF REVIEW

"[W]e review [the trial court']s ruling excluding or admitting expert testimony for abuse of discretion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*).) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] But the court's discretion is not unlimited, especially when, as here, its exercise implicates a party's ability to present its case. Rather, it must be exercised within the confines of the applicable legal principles." (*Ibid.*)

"It is prejudicial error to exclude relevant and material expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinion. [Citation.] Conversely, the courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) We will not reverse a judgment for the erroneous exclusion of evidence unless there is a reasonable probability the jury would have reached a result more favorable to the appellant, absent the error. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432.)

B. STANDARDS FOR EXPERT TESTIMONY

Under Evidence Code section 801, subdivision (a), a person who qualifies as an expert may give opinion testimony related to a subject that " 'is sufficiently beyond common experience' " when " 'the opinion of [an] expert would assist the trier of fact.' " (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116 (*Jennings*).) For this reason, "qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation." (*Id.* at p. 1117.)

Nonetheless, an expert, including a medical doctor, "does not possess a carte blanche to express any opinion within the area of expertise." (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117.) Subdivision (b) of Evidence Code section 801 provides that expert opinion must be "[b]ased on matter . . . that is of a type that

reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." Furthermore, Evidence Code section 802 provides that an expert witness "may state . . . the reasons for his opinion and the matter . . . upon which it is based," unless precluded by law. As our Supreme Court has explained, under these provisions, the court acts as a "gatekeeper," and "may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning." (*Sargon*, *supra*, 55 Cal.4th at p. 771.)

As a gatekeeper, the trial court excludes "expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, *supra*, 55 Cal.4th at pp. 771–772.) However, in its role as gatekeeper, a trial court "does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion." (*Id*. at p. 772.) In other words, "the gatekeeper's focus 'must be solely on principles and methodology, not on the conclusions that they generate.' " (*Ibid*.)

When an expert's showing is lacking, " 'there is simply too great an analytical gap between the data and the opinion proffered.' " (*Sargon*, *supra*, 55 Cal.4th at p. 771, quoting *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146.) Thus, "when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the

ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' " (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117.)

Instructive applications of these principles are found in *Jennings*, *supra*, 114 Cal.App.4th 1108, and *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493. In *Jennings*, medical personnel accidently left a retractor inside the plaintiff during a surgery. (*Jennings*, *supra*, 114 Cal.App.4th at p. 1112.) Later, when the retractor was removed, doctors found a grave infection near the original incision, but some distance from the retractor. (*Id*. at pp. 1113–1114.) In the plaintiff's medical malpractice action, his expert opined that the retractor caused the internal infection. (*Id*. at pp. 1114–1115.) To support his opinion, the expert posited that bacteria on the retractor multiplied and migrated to the site of the infection. (*Ibid*.) As there was no physical evidence of migration, the expert presented scenarios regarding how the migration might have occurred without leaving physical traces. (*Id*. at pp. 1115–1116.) The trial court excluded the opinion as speculative and unfounded. (*Id*. at p. 1116.) The Court of Appeal affirmed, holding that the expert's testimony regarding the migration was conjectural and conclusory. (*Id*. at pp. 1116–1121.)

In *Bushling*, *supra*, 117 Cal.App.4th at page 497, the plaintiff underwent surgery to remove his gall bladder and to biopsy a mole on his abdomen. Following the surgery, he discovered an injury to his left shoulder. (*Ibid*.) In his medical malpractice action, the defendant surgeons sought summary judgment on the ground that they engaged in no negligent conduct that caused his shoulder injury. (*Id*. at pp. 497–501.)

The plaintiff's experts opined that the injury occurred because the plaintiff was improperly positioned on the surgery table or mishandled during the procedure. (*Id*. at pp. 503–505.) In affirming summary judgment, the appellate court held that the opinions of the plaintiff's experts lacked evidentiary value, reasoning that the experts "assume[d] the cause from the fact of the injury," as there was no evidence that the plaintiff was mis-positioned or mishandled during the surgery. (*Id*. at p. 510.)

C. NO ABUSE OF DISCRETION

Here, the trial court properly excluded Lu's causation opinions, because there was too great of an analytical gap between the data upon which Lu relied and the opinions he sought to offer to the jury.

For his causation opinions, Lu relied solely on his experience as a trauma surgeon. As a trauma surgeon, he treated approximately 1,000 patients for cervical trauma over the course of a decade. However, Lu did not explain how many of those 1,000 patients sustained their injuries in automobile accidents, how many were injured in off-center front-end collisions, how many were injured while traveling at 30 miles per hour, how many were restrained or unrestrained by their seatbelts at the time of the accident, how many were injured by hitting their head on the steering wheel or another part of the interior of the car, such as a roof support pillar or window, how many were injured in BMWs, or how many of his other patients had injuries comparable to the injury allegedly suffered by Gonggryp. Lu did not offer any such details about his experience because he could not—he had not conducted a rigorous, scientifically reliable study of his cervical trauma patients who were injured in automobile accidents; nor had Lu maintained a

log cataloging information about such patients; in fact, before testifying at his deposition, he had not even taken the time to search the database of his patients to refresh his recollection about the nature and extent of his experience with automobile accident victims. Consequently, Lu's opinion that he had never seen physical findings in a patient severe enough to warrant surgery where that patient was wearing his/her seatbelt in a 30 miles per hour accident lacked foundation because he never reviewed his patients' record to have a basis for his opinion.

Compounding matters further, Lu lacked detailed knowledge of Gonggryp's accident. Among other things, he did not examine Gonggryp's car or the seatbelt; in fact, he did not even know the make or model of either Gonggryp's car or the other vehicle. More critically, he did not know the angle at which the two cars collided—he mistakenly believed that the cars collided head-on, when in fact they collided at an oblique angle. Lu lacked pertinent specifics about the accident, because he did not request or was not provided access to Gonggryp's car or the deposition transcripts and materials relied upon by experts who did examine the car and its seatbelt.

In sum, the trial court did not abuse its discretion. "[T]he gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' " (*Sargon*, *supra*, 55 Cal.4th at p. 772.) Here, Lu's causation opinions were merely conclusory and, as a result, they lacked the requisite factual foundation for admission. (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117.) Lu based his causation opinions largely on " ' "assumptions of fact without

evidentiary support [citation], or on speculative or conjectural factors." ' " (*Sargon*, at p. 770.) " '[E]ven an expert witness cannot be permitted just to testify in a vacuum by [*sic*] things that he might think could have happened.' " (*Hyatt v. Sierra Boat Co*. (1978) 79 Cal.App.3d 325, 338.)

Moreover, even if the jury had heard and credited Lu's excluded causation opinions, Gonggryp would not have achieved a more favorable result. The jury's verdict reveals that the jury never reached the issue of causation, having found that there was no defect in the seatbelt or its operation and, therefore, no liability on the part of BMW. (Cf. *Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1139, 1143 [any error in causation instruction was harmless because jury's verdict revealed it never reached issue of causation].)

II. The motion to tax costs

A. GUIDING PRINCIPLES AND STANDARD OF REVIEW

Section 998 permits the recovery of expert witness fees following the nonacceptance of a pretrial settlement offer. (*Martinez v. Brownco Construction Co*. (2013) 56 Cal.4th 1014, 1019.) It states that if a plaintiff rejects a pretrial settlement offer and then fails to obtain a more favorable judgment or award at trial, the plaintiff "shall pay the defendant's costs from the time of the offer." (§ 998, subd. (c)(1).)

"The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.' [Citations.] To effectuate this policy, section 998 provides 'a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.' [Citation.] At the same time, the potential for statutory recovery of expert

witness fees and other costs provides parties 'a financial incentive to make reasonable settlement offers.' " (*Martinez v. Brownco Construction Co.*, *supra*, 56 Cal.4th at p. 1019.)

"[A] section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, ...' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262–1263.)

The amount demanded by the plaintiff, however, does not by itself indicate "whether [the] defendant's compromise offer is 'realistically reasonable,' in 'good faith,' 'token' or 'nominal.' It is only one of the many factors to be taken into consideration by the trial judge in making his decision. To hold otherwise could force a liability-free defendant to pay for damages not of his doing." (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) Accordingly, when the "defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer." (*Ibid.*) If the plaintiff refuses such an offer, it is also consistent with the legislative purpose for the defendant to proffer expert witnesses at trial to establish the defendant's lack of liability. (*Id.* at pp. 710–711.) And under these circumstances, it is also consistent with the legislative

purpose for the plaintiff to reimburse the defendant for these costs. (*Id*. at p. 711.)

Where, as here, " ' "the offeror obtains a judgment more favorable than its [section] 998 offer, the judgment constitutes prima facie evidence that the offer was reasonable." ' " (*Adams v. Ford Motor Co*. (2011) 199 Cal.App.4th 1475, 1484.) The burden is on the offeree to show otherwise. (*Ibid*.) Courts evaluate the reasonableness of a section 998 offer in light of what both parties knew or should have known at the time of the offer, and not by virtue of hindsight. (*Id*. at p. 1485.)

We review for abuse of discretion the trial court's determination that the section 998 offer was reasonable and made in good faith. (*Adams v. Ford Motor Co*., *supra*, 199 Cal.App.4th at p. 1484.) Having presided over the proceedings below, trial courts are in the best position to evaluate the respective strengths of the parties' cases, and as such, they "are in the best position to evaluate the reasonableness of" section 998 offers. (*Id*. at p. 1486.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) We should not reverse unless the court exercised its discretion in an arbitrary, capricious, or patently absurd way. (*Culbertson v. R. D. Werner Co., Inc*., *supra*, 190 Cal.App.3d at p. 710.) Put a little differently, "[a]n appellate court may reverse the trial court's determination only if the court finds that in light of all the evidence viewed most favorably in support of the trial court, no judge could have reasonably reached a similar result." (*Adams v. Ford Motor Co*., *supra*, 199 Cal.App.4th at p. 1484.)

Adams v. Ford Motor Co., *supra*, 199 Cal.App.4th 1475, is instructive. In that case, the defendant made a section 998

settlement offer of $10,000 and a mutual waiver of costs, which the plaintiffs rejected. After the jury returned a verdict in favor of the defendant, the defendant sought $167,570 in expert witness fees pursuant to section 998. The trial court denied the plaintiffs' motion to tax costs, noting that the evidence against Ford was " 'pretty attenuated,' " and that it " 'was not surprised at all by the jury's verdict.' " (*Id.* at p. 1480.) The trial court determined that the offer was not " 'out of the ballpark' " given both the settlements with other defendants and the significant value of the costs waiver. (*Id.* at p. 1481.) The Court of Appeal affirmed. (*Id.* at p. 1484.) In reaching its decision, the court rejected the plaintiffs' argument that the $10,000 offer was unreasonable "in light of the hundreds of thousands of dollars in costs, and $2 million in damages" they sought. (*Id.* at p. 1485.) The Court of Appeal reasoned that the offer "could not be evaluated simply in comparison to the judgment [they] sought, but it should have been measured in light of the likelihood that [they] would prevail at trial." (*Id.* at pp. 1485–1486.) Moreover, the Court of Appeal found that the cost waiver had "significant value" because it would have "protected [plaintiffs] from exposure to the costs which [were] the very reason for th[e] appeal." (*Id.* at p. 1486.)

Similarly, in *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, the Court of Appeal held that a defendant's section 998 offer for $100,000 was prima facie reasonable in light of the fact that the defendant had secured a verdict of no liability at trial, despite the fact that the plaintiff sought to recover $900,000 in damages. (*Id.* at pp. 117–118.)

B. NO ABUSE OF DISCRETION

Gonggryp argues that from her perspective, "the [section] 998 offer had no reasonable expectation of being accepted at the time it was made."[8] Her argument misstates the law. "[F]or a section 998 offer to be reasonable, the defendant must reasonably believe that the plaintiff might accept his offer, and the plaintiff must have access to the facts that influenced the defendant's determination that the offer was reasonable." (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1485.) In other words, Gonggryp's beliefs about the reasonableness of the offer are not germane.

Here, BMW reasonably believed based on the state of discovery in 2012 that Gonggryp might accept its offer. According to BMW, discovery at the time of the offer showed, inter alia, that it was physically impossible for Gonggryp to have struck her head on the steering wheel due to the oblique angle of the collision and that her car's restraint system worked as designed. Gonggryp did not dispute that characterization of the state of discovery at the time of the section 998 offer below and does not do so on appeal, merely noting that the evidence

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[8] Gonggryp also argues, that the trial court erred when it purportedly took the verdict into consideration when ruling on the motion to tax. Gonggryp's argument is without merit. First, many of the comments upon which she relies were made by the trial court, not with regard to the motion to tax, but with regard with to her motion for a new trial. Second, the trial court is not precluded from considering the verdict when considering whether a section 998 offer was made in good faith. Indeed, as noted above, the judgment constitutes prima facie evidence that the offer was reasonable. (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1484.)

supporting BMW's defense was not "insurmountable." Moreover, BMW's offer had " 'significant value' " beyond the monetary component due to the costs waiver, which " 'if accepted, . . . would have eliminated [her] exposure to the very costs which are the subject of this appeal.' " (*Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1485.) Put a little differently, BMW's settlement offer was nothing like the $1 settlement offer in *Wear v. Caldron* (1981) 121 Cal.App.3d 818, 821, that was found to be a "token or nominal offer."

In sum, Gonggryp failed to show that the trial court, which heard all of the evidence, acted in an arbitrary, capricious or patently absurd manner when it denied her motion to tax.

DISPOSITION

The judgment is affirmed. Bayerishe Motoren Werke AG and BMW of North America LLC are awarded their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, Acting P. J.

We concur:

BENDIX, J. CURREY, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.