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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

RUBEN SOTO et al., Plaintiffs, Respondents, and Cross-Appellants, v. COSTCO WHOLESALE CORPORATION, Defendant, Appellant and Cross-Respondent.	B228428 (Los Angeles County Super. Ct. No. EC048420)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed as modified.

Baraban & Teske, Jeffrey H. Baraban and James S. Link for Defendant, Appellant and Cross-Respondent.

The Homampour Law Firm, PLC and Arash Homampour; Law Offices of Thomas C. Zaret and Thomas C. Zaret; and The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiffs, Respondents and Cross-Appellants.

I. INTRODUCTION

Defendant, Costco Wholesale Corporation, appeals from an August 17, 2010 judgment and denial of its motion for judgment notwithstanding the verdict. Defendant argues: it owed no duty of care of plaintiffs, Ruben, Brunilda and Anabel Soto[1]; there is instructional error; the trial court should not have permitted evidence that a former co-defendant, Robert Livingston, pled no contest to driving under the influence of a drug; it was error to introduce evidence of the use of bollards at other locations operated by defendant. On cross-appeal, Ms. Soto and Anabel argue that the trial court improperly reduced their recovery from defendant to zero because of their settlement with Mr. Livingston. We modify the judgment to reverse the credit provided to defendant by reason of the settlement with Mr. Livingston. We affirm the judgment in all other respects.

II. FACTUAL BACKGROUND

A. Burbank Costco Layout (The Store)

The store opened in 2001. The store's entrance, exit and food court areas are located under an overhang that is supported by large support columns, which are spaced 20 to 25 feet apart. The food court tables are between the columns and under the overhang to the left of the exit and entrance area. The disabled-parking spaces are adjacent to the entry area. On April 17, 2007, there was a car on display next to the area where plaintiffs were seated in the food court.

B. The Accident

[1] For clarity's sake and not out of disrespect we refer to Anabel Soto at times by her first name.

On April 17, 2007, Mr. Livingston backed out of a disabled-parking space in the store parking lot. Because Mr. Livingston had an amputated right foot, his car was modified with the accelerator pedal to the left of the brake. This allowed Mr. Livingston to operate the car using only his left foot. While backing out of the parking area, Mr. Livingston's left foot slipped off the brake on to the accelerator. His car traveled in reverse at a speed of 22 miles per hour past the entryway before entering the outdoor food court. Mr. Livingston collided with the display car. Then Mr. Livingston's car struck Mr. Soto. Mr. Soto ended up being pinned under Mr. Livingston's car. Mr. Livingston did not feel the collision with the display car. Mr. Livingston did not know if he attempted to stop his car before colliding with a support column. He denied being impaired at the time of accident. This accident was Mr. Livingston's first accident in 50 years.

Immediately before the accident, plaintiffs were eating lunch at a food court table. Anabel was seated facing the parking lot while her parents were seated opposite her. Anabel heard a car hit the display car and looked up and saw the car come towards her parents. She told her parents to get out of the way of the car. Mr. Soto got up, turned around and was hit by Mr. Livingston's car. Mr. Soto flew into the air and ended up underneath Mr. Livingston's car, next to a support column. Mr. Soto's left eye socket, nose, cheekbone, jaw, pelvis and right hip were broken in the accident. Mr. Soto also suffered sciatic nerve damage because of the hip fracture.

After the accident, Mr. Livingston was interviewed by Burbank police officer Bruce Slor. Mr. Livingston gave Officer Slor vague information about the accident. According to Officer Slor, Mr. Livingston seemed very sedated and calm unlike most drivers involved in accidents. Officer Slor observed Mr. Livingston's pupils were constricted. In addition, Mr. Livingston's answers were delayed, sarcastic and flippant. Further, Mr. Livingston seemed annoyed by Officer Slor's questions.

No similar accident like this one had happened before at any of defendant's 38 Southern California locations investigated by Brad Avrit, a construction and safety engineer. Mr. Avrit testified on behalf of plaintiffs. Robert Gaytan had been the general

manager of the store since 2004. Mr. Gaytan stated in the 25 years he has been employed by defendant, he was unaware of any other accident where a car entered a food court between the support columns. Because no accident like this had occurred in the past, Mr. Gaytan thought the support columns would protect the food court patrons. He never considered that a car might come between the spaces of the support columns. Mr. Gaytan and his safety staff did not discuss the possibility of a car coming through the space between the support columns. He was unaware some of defendant's stores had installed bollards around their food courts. Mr. Gaytan admitted had he known other stores had bollards to prevent a vehicle from entering the food court, he would have installed them before the accident. Defendant's facility audits did not address placement of barriers or bollards in between the spaces of the support columns in the food court area.

C. Post-Accident Installation of Bollards

After the accident, Mr. Gaytan had bollards installed between the support columns next to the food court to prevent another accident. Mr. Gaytan wanted the bollards placed so that they protected the food court but also maintained functionality. The bollards were spaced 45 to 60 inches apart and placed around the food court and part of the entrance area. Mr. Gaytan stated now customers cannot maneuver flatbeds with large merchandise such as a mattress between the bollards. A customer now exposed his or her back to traffic trying to adjust the merchandise. David King, a mechanical engineer called to testify on behalf of plaintiff, agreed customers would have to adjust an 80-inch wide mattress to pass between the bollards. Mr. King admitted that a car still could enter the food court from the direction where the bollards have not been installed. This area had been left open to permit large merchandise to be moved in and out of the store.

D. Opinion Testimony Concerning Safety Design of Food Court

Mr. Avrit, who testified for plaintiffs, examined the original store plans. Mr. Avrit testified the food court was small and contained only eight tables in the original plans, not the 20 to 30 tables present on the date of the accident. At the time of the accident, the food court tables were next to the display car, which was placed in the entrance area of the store.

In addition, Mr. Avrit stated defendant moved the disabled-parking spaces closer to the entry side of the store than in the original plan. The original plan had a parking island between the disabled parking spaces and the entry area and food court. Mr. Avrit admitted disabled-parking spaces should be near the store entrance. This should be done for the convenience of the disabled individuals. According to Mr. Avrit, the disabled-parking spaces were repositioned directly in front of the store. The placement required drivers backing out of the disabled-parking spaces to back directly towards the food court area. Mr. Avrit stated studies show unintended acceleration is common when drivers are reversing their car but mistakenly think they have put the car in drive and continue to travel backwards. Also, defendant had a choice to place the food court inside or outside the store. According to Mr. Arvit, the outside food court was unsafe when it was built. This was because there was inadequate protection for patrons seated in the outdoor seating area. People seated at tables have a greater risk of getting hit by a car than a pedestrian because: they are less likely to get out of the way of an approaching car; they are exposed to the risk for a longer period than people walking into or out of the store; and those who are seated facing away from traffic cannot see any approaching cars.

Mr. Avrit stated bollards could be installed to protect the food court on the two exposed sides, leaving the entry area open to customer traffic. Further, there is no grade separation between the parking lot and store entrance. Mr. Avrit personally believed bollards should be placed at the store entryway even if there is no food court because people line up at the entrance. Mr. Avrit stated there are bollards that can prevent vehicles driven up to 40 miles per hour from entering the food court. Likewise Mr. King, who also testified for plaintiffs, testified bollards would have stopped Mr. Livingston's car from entering the food court. According to Mr. Avrit, installing bollards around the

food court all the way around to the entrance area would cost from $15,000 up to $20,000. Defendant could have installed removable bollards, which are built with a sleeve in the ground. This would permit the bollards to be removed and such would not interfere when moving large objects.

Robert Douglas, a traffic and transportation engineer, testified nothing indicated defendant needed to install bollards prior to the accident because no such incident had ever happened at the store before. He believed the lack of accidents on the property must be considered when determining safety. In addition, Mr. Douglas stated if bollards are impenetrable, they create a death trap for those in vehicles that hit them. Moreover, the post-accident bollards installed at the store will break and become projectiles if hit by a vehicle going faster than three or four miles an hour.

II. PROCEDURAL HISTORY

A. Complaint And Settlement

On October 28, 2008, plaintiffs filed a complaint against defendant and Mr. Livingston. Plaintiffs asserted a claim against defendant for premises liability based on negligence. In addition, Ms. Soto and Anabel asserted claims of negligent emotional distress infliction against both defendant and Mr. Livingston. Prior to the verdicts being returned, plaintiffs settled with Mr. Livingston.

B. Motion In Limine Concerning Mr. Livingston's No Contest Plea

At the time of the accident, Mr. Livingston, a diabetic with an amputated right foot, had a prescription for Hydrocodone, which he took for nerve pain relief. Mr. Livingston was charged with driving under the influence of a drug because a blood test after the accident showed he had Hydrocodone in his system. He pleaded no contest to a misdemeanor violation of Vehicle Code section 23153, subdivision (a). Both plaintiffs

and Mr. Livingston filed motions in limine to exclude evidence of his no contest plea to driving under the influence, which resulted in a misdemeanor conviction. The motions were granted thereby excluding evidence of Mr. Livingston's no contest plea.

C. Motion In Limine And Evidence Code Section 402 Hearing On Bollards At Other Locations

Defendant moved to exclude evidence of the existence of bollards or barriers at defendant's other stores. Defendant argued such evidence: was irrelevant; more prejudicial than probative; and inadmissible unless plaintiffs proved the circumstances of installation at other locations were substantially similar to those at the store. In opposition, plaintiffs argued the evidence was relevant to all the issues in the case including foreseeability of the risk, duty, breach and causation.

The trial court held a hearing under Evidence Code section 402 to decide the issue of similarity between the store and the five other locations that had bollards or barriers. At the hearing Mr. Avrit described the similarity between the store's food court and parking lot configuration and those at other of defendant's locations. In each of these locations and the store, there was no grade separation between the parking lot and the entry to the food court area. Mr. Avrit testified these five other locations where bollards or barriers were installed were substantially similar to the store with respect to the parking lot and food court structure. Mr. Avrit admitted the Torrance, San Marcos, Signal Hill and Azusa locations did not have bollards at their entrances. Further, the Temecula location had bollards for only a portion of its entrance. After hearing Mr. Avrit's testimony, the trial court ruled plaintiff had sufficiently shown similar circumstances between the store and the other five locations. The trial court allowed plaintiffs to introduce evidence of bollards or barriers at the other five locations that existed prior to the April 17, 2007 accident.

D. Defendant's Nonsuit Motion

Defendant moved for nonsuit, arguing it owed no duty to prevent the accident. Defendant reasoned the accident was unforeseeable because 10 million vehicles have used the parking lot prior without any similar incident. Defendant also argued the imposition of a duty would create a societal burden requiring every business with an adjacent parking to provide barriers to prevent out of control vehicles from hitting patrons. The trial court denied the nonsuit motion, finding defendant had a duty because: the store has been purposefully built; there was no grade separation or barriers between the parking lot and food court; and, defendant had complete control over the parking lot design.

E. Jury Instruction On Definition Of Remote

The trial court's instructions to the jury included Judicial Council of California Civil Jury Instructions ("CACI") No. 430, which defines "substantial factor" for causation purposes as follows: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." During deliberations, the jury sent a note to the trial court requesting definitions for the terms "substantial" and "remote." Plaintiffs suggested "remote" meant "quite insignificant contribution to the result" relying on *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1053 (*Mitchell*, *supra*,). Defendant argued the definition from the case invalidated CACI No. 430 and the trial court should instruct the jury to use their own understanding of "remote." Defendant also inquired about the dictionary definition of "remote" but this suggestion was rejected by the trial court in favor of language from decisional authority. Over defendant's objection, the trial court responded to the jury's written question, '"Substantial' as defined in jury instruction [No.] 430 as used in the instructions, 'remote' means an insignificant contribution to the harm."

F. Jury Verdict and Judgment

The jury returned a special verdict in favor of the plaintiffs on June 25, 2010. Mr. Soto was awarded economic damages of $1,760,349 and non-economic damages of $166,838. Ms. Soto and Anabel were each awarded non-economic damages of $30,000. The jury apportioned 75 percent of the fault of the accident to Mr. Livingston and 25 percent to defendant.

Judgment was entered on August 17, 2010. Mr. Livingston had settled with plaintiffs before trial, paying $530,000 to Ruben Soto and $50,000 each to Brunilda and Anabel Soto. The judgment states in relevant part: "The jury found that the total amount of damages to Ruben Soto was $1,929,347, of which $1,760,509 was economic damages and $166,838 was noneconomic damages. The jury's apportionment of economic and noneconomic damages was 91.25% for economic and 8.75% for noneconomic damages. [¶] When this is applied to the settlement of $530,000, it results in settlement amounts of $42,209.50 (8.75%) in noneconomic damages and $483,625 (91.25%) in economic damages. [¶] Further, the jury found that the percentage of fault for Costco was 25% of the Plaintiffs' injuries and that the percentage for Robert Livingston was 75%. Under Civil Code section 1431.2, Costco is liable for only 25% of the noneconomic damages. This results in Costco being liable for $42,209.50 of net non-economic damages (25% of $166,838). Costco is liable for $1,760,509 of economic damages and the economic offset from the settlement is $483,625. When the offset is subtracted from the award of economic damages, the result is $1,276,884. This is the amount of economic damages for which Costco is liable. When the amount of non-economic damages ($42,209.50) is added to the amount of economic damages ($1,276,884), the total is $1,319,093.50. [¶] As to Anabel Soto and Brunilda Soto, they were both awarded noneconomic damages of $30,000 and with the offset of the $50,000 settlement from Livingston, the judgment for Anabel Soto and Brunilda Soto is reduced to zero and they recover nothing from Costco. However, the Court specifically finds that Costco is not the prevailing party as against Anabel Soto and Brunilda Soto and Costco is not entitled to costs."

G. Post-Trial Motions

Defendant filed a motion for judgment notwithstanding the verdict, arguing it had no duty to protect plaintiffs from the accident caused by Mr. Livingston. In addition, defendant moved for a new trial. Defendant contended the trial court erred by: improperly instructing the jury on the definition of "remote" as an "insignificant contribution of harm"; excluding Mr. Livingston's misdemeanor conviction for driving under the influence; and allowing plaintiffs to introduce evidence of bollards or barriers at the San Marcos, Signal Hill, Temecula and Torrance locations. Defendant's motions were denied.

Plaintiff also filed a new trial motion, arguing the damages awarded were inadequate. Plaintiffs contended the trial court erred in reducing Ms. Soto and Anabel's non-economic damages to zero. Ms. Soto and Anabel argued they were each entitled to damages of $7,500 (25 percent of the jury award of $30,000 each). The trial court denied plaintiffs' motion but did not discuss the settlement credit issue in its order.

III. DISCUSSION

A. Standard of Review

Defendant appeals from the judgment and the denial of its motion for judgment notwithstanding the verdict. The denial of a motion for judgment notwithstanding the verdict is reviewed for substantial evidence to support the verdict while questions of law are reviewed de novo. (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 134-135; *Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 554-555.) Whether a defendant owes a plaintiff a duty of care is a question of law that is reviewed de novo. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771 (*Cabral, supra*); *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)

In addition, defendant asserts the trial court improperly instructed the jury. The propriety of jury instructions is a question of law that is reviewed de novo. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 845; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 418.) Where defendant argues the trial court gave an erroneous instruction, we view the evidence in the light most favorable to the claim of instructional error. We assume the jury might have believed the evidence favorable to defendant and rendered a verdict in its favor on those issues as to which it was misdirected. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674; *Mize-Kurzman v. Marin Community College Dist., supra,* 202 Cal.App.4th at pp. 845-846; *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.) However, a failure to properly instruct a jury is not inherently prejudicial; we review for prejudice. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 58; *Mize-Kurzman v. Marin Community College Dist., supra,* 202 Cal.App.4th at p. 846; *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 655.) Defendant also appeals the trial court's rulings excluding evidence of the no-contest plea and admitting testimony concerning the bollards at other locations. In general, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 420; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.)

B. Defendant's Duty Of Care

Civil Code section 1714, subdivision (a) states, "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself . . . . " Our Supreme Court stated, "In other words, 'each person has a duty to use ordinary care and "is liable for injuries caused by his failure to exercise reasonable care in the circumstances."'" (*Cabral, supra,* at p. 771; *Parsons v. Crown*

Disposal Co. (1997) 15 Cal.4th 456, 472 quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland, supra*).) In *Cabral,* our Supreme Court stressed, "[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only when 'clearly supported by public policy.'" (*Cabral, supra,* at p. 771 quoting *Rowland, supra,* 69 Cal.2d at p. 112.) Our Supreme Court explained, "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Cabral, supra,* at p. 772.)

In *Cabral,* our Supreme Court summarized the *Rowland* factors in determining duty of care: "In the *Rowland* decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the forseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.'" (*Cabral, supra,* at p. 771 quoting *Rowland, supra,* at p. 113; accord *Castaneda v. Olsher, supra,* 41 Cal.4th at p. 1213.) We must evaluate the *Rowland* factors at a broad level of factual generality. (*Cabral, supra,* at p. 772; *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 27.) For instance, as to foreseeability, "[T]he court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. . . .'" (*Cabral, supra,* at p. 772 quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564,

573 fn. 6.)

Defendant argues it does not owe of duty of care to plaintiffs. Defendant contends installation of bollards or a barrier around the store's food court and entrance would be unduly burdensome. Defendant argues only an impregnable barrier around the entire perimeter of the store would have prevented injury from an-out-of-control car. But defendant argues, an impregnable barrier is infeasible because shopping carts and flatbeds must be able to move in and out of stores.

In determining whether to make an exception to the duty of care imposed by Civil Code section 1714, subdivision (a), we evaluate whether foreseeability and policy considerations justify a categorical no-duty rule. Here, defendant's duty to provide a safe outdoor food court does not require an impregnable barrier system around the perimeter of the store. Rather, defendant's duty of care is to provide protection to food-court patrons by preventing vehicles from entering the outdoor food court between the support columns. Defendant could have protected food-court patrons by installing bollards in between the support columns around the food court area up to the entrance area at a cost from $15,000 up to $20,000. Defendant argues the bollards or barriers would create risk to patrons. For example, an out-of-control truck or car could hit the post-accident bollards installed by defendant at the store and cause flying debris that may harm patrons. But Mr. Avrit testified there are bollards that could prevent vehicles driven up to 40 miles per hour from entering the food court. Defendant presented no contrary evidence. There is no evidence such bollards, rather than those installed by defendant post-accident, would break and cause flying debris. Defendant also contends patrons may be injured when negotiating the smaller openings in between the bollards at the entrance area because they will cause crowding and cramped areas. But there is no reason why defendant's duty to protect its food-court patrons from harm requires defendant to install bollards around the entrance area.

Defendant asserts imposing a duty of care would burden not just it but every business that has parking adjacent to any area where patrons may congregate or where they enter or exit the business. Defendant contends imposing duty would compel many

outdoor shopping centers to install impregnable barrier systems that cost thousands of dollars per business. Defendant overstates the societal burdens imposed by our duty determination. There is no evidence other shopping centers or malls have outdoor food courts with layouts similar to the food courts at the store. Moreover, if these other retailers have seated outdoor food courts, there is no reason why they should be exempted from the general Civil Code section 1714, subsection (a) duty of care. The record shows bollards may be installed at these outdoor food courts to protect patrons.

As to foreseeability, defendant contends the accident is not remotely foreseeable because vehicles move at a slow pace given the high level of pedestrian traffic. And, defendant argues, no similar accident had occurred in the past at the store or any of its other Southern California locations despite millions of customer visitors. Defendant's arguments are unpersuasive. It is not categorically unforeseeable that drivers may fail to control their vehicles in a parking lot because of a medical problem, mechanical failure, distraction, intoxication or medication. (*See Cabral, supra,* at p. 775 [foreseeable for freeway drivers to lose control of vehicle because of intoxication, distraction, sleepiness, sickness, being blinded by weather or sun or mechanical problem].)

In addition, defendant's contention that the accident was unforeseeable because no similar accident had occurred before has been rejected in *Robison v. Six Flags Theme Parks, Inc.* (1998) 64 Cal.App.4th 1294, 1301. In *Robison*, a car driven by a developmentally disabled woman failed to stop and hit plaintiffs seated at a picnic table which was placed in a parking lot. The picnic table was separated from the paved exit lane by a 40-foot grass strip. (*Id.* at pp. 1297-1298.) The appellate court ruled the lack of prior similar incidents was not a proper basis for summary judgment. (*Id.* at pp. 1296, 1305.) The Court of Appeal found the accident was foreseeable given the configuration of the traffic lanes and the picnic tables. The Court of Appeal explained: "[I]t was open to simple observation that Magic Mountain has aimed a heavily traveled parking lane (with a speed limit of 25 miles per hour) directly at the picnic table with no separation other than 40 feet of flat grass, and that a car traveling at speed no higher than Magic Mountain's own speed would cover this distance in less than 2 seconds, too short a time

to allow for reliable evasive action by an unsuspecting person seated at a picnic table, possibly with his or her back to the oncoming car. When such an observable danger ripens into an accident, the accident is foreseeable for purposes of duty analysis." (*Id.* p. at 1301.) Here, it was foreseeable that a car coming out of the disabled parking spaces with no grade separation or barriers between the lot and food court, could hit a patron.

To sum up, defendant had a duty of care to take reasonable measures to protect plaintiffs, who were invited by it to sit and eat at the outdoor food court. The accident was foreseeable and there are no policy considerations that support a categorical no-duty rule. Given the potential for serious harm as occurred here and the minimal cost of bollards, no justification exists to exempt defendant from the Civil Code section 1714, subdivision (a) duty of care.

C. Jury Instruction On Definition Of "Remote"

CACI No. 430 defines "substantial factor" for causation as follows: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." Defendant argues the trial court erred in defining "remote" for the jury as an "insignificant contribution to harm." Defendant asserts "remote" for purposes of causation concerns proximity in time or space. Defendant contends the improper jury instruction of "remote" was prejudicial and resulted in a miscarriage of justice. Defendant argues that after "remote" was defined, the jury returned a verdict for plaintiffs in nine minutes.

Defendant's contention that "remote" concerns proximity in time and space is unpersuasive. Defendant's analysis served as the justification for our Supreme Court's decision to discard the proximate cause test for tort causation in *Mitchell*, *supra*, 54 Cal.3d at pages 1050-1052. There, our Supreme Court digested the problems with the proximate cause test: the test means nothing more than "near or immediate"; it incorrectly puts the wrong emphasis on '"the factor of physical or mechanical

closeness"'; it unwisely imputes a spatial or temporal connotation; and it improperly places an "undue emphasis on nearness." (*Id.* at pp. 1051-1052.) Our Supreme Court concluded: "'[P]roximity in point of time or space is no part of the definition [of proximate cause] . . . except as it may afford evidence for or against proximity of causation. [Citation.]'" (*Id.* at p. 1050, quoting *Osborn v. City of Whittier* (1951) 103 Cal.App.2d 609, 616.) Defendant's proposed instruction suffers from the same problems as the former proximate cause test. There is no merit to defendant's assertion any error occurred when the injury question was answered as it was.

Defendant contends the trial court's definition of remote is contrary to that in *Doran v. San Francisco* (1955) 44 Cal.2d 477, 488, a last clear chance case. Likewise, defendant's reliance on the term "remote" used in *Klopfenstein v. Rentmaster Trailer Co.* (1969) 270 Cal.App.2d 811, 815 is without merit. *Klopfenstein* applied the now abandoned proximate cause test. Likewise defendant's citation to *Yates v. Morotti* (1932) 120 Cal.App. 710, 716-718, a contributory negligence case, is misplaced. There is no issue of contributory negligence under California law. Here, the trial court properly instructed the jury on the definition of "remote" as an "insignificant contribution" to the injury. The trial court's language was correctly premised on our Supreme Court's discussion of the substantial factor test in *Mitchell, supra,* at page 1052.

D. Exclusion Of Mr. Livingston's No-Contest Plea To Misdemeanor Of Driving Under Influence

Defendant argues it was error to exclude Mr. Livingston's no-contest plea to the misdemeanor charge of driving under the influence of a drug. On the day of the accident, Mr. Livingston took Hydrocodone for nerve pain. After the accident, he was initially charged with a felony violation of Vehicle Code section 23153, subdivision (a) for driving under the influence of a drug. But the complaint was later amended to allege a single misdemeanor count. Mr. Livingston pled no contest to the misdemeanor charge.

Penal Code section 1016, subdivision (3) provides in relevant part: "The legal effect of [a nolo contendere] plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." Defendant argues evidence of Mr. Livingston's no-contest plea should have been admitted pursuant to *Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 285-287. Defendant reasons Vehicle Code section 23153, subdivision (a) is an offense punishable by imprisonment either in state prison or in a county jail. (Veh. Code, § 23554.) But this case is different than *Drews*. In *Drews*, the defendant pled no contest to a *felony*. Later her conviction was reduced to a misdemeanor under Penal Code section 17, subdivision (b). (*Rusheen v. Drews, supra,* 99 Cal.App.4th at p. 282.) The Court of Appeal held the trial judge erred by excluding evidence of the defendant's no contest plea. The court explained Penal Code section 17, subdivision (b) did not change the fact defendant pled no contest to a crime punishable as a felony. Thus, the plea was admissible in the subsequent civil action under Penal Code section 1016, subdivision (3). (*Rusheen v. Drews, supra,* 99 Cal.App.4th at pp. 285-287.) Here, Mr. Livingston was charged with and pled no contest to a misdemeanor offense. Because Mr. Livingston pled no contest to a misdemeanor, his plea was inadmissible under Penal Code section 1016, subdivision (3). (*County of Los Angeles v. Civil Service Com.* (1995) 39 Cal.App.4th 620, 630-631.)

E. Admission Of Evidence Of Bollards And Barriers At Defendant's Other Locations

Defendant contends the trial court erred by admitting evidence of the existence of bollards or barriers at other locations. Defendant argues the bollards at the other locations were not installed all the way around the entryway. Thus, defendant reasons the bollards at other locations would not have prevented the type of accident that occurred

here. Defendant asserts there was a lack of substantial similarity of the circumstances between the store and the other locations. Defendant relies on *Pacific Gas & Electric Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 530-531.

We review this contention for an abuse of discretion. Here, the trial court held a separate hearing under Evidence Code section 402 to determine the relevance of the bollards at other locations with outdoor food courts. At the hearing, Mr. Avrit testified each of the locations were substantially similar because of their parking lot and food court configuration. Given Mr. Avrit's testimony, no abuse of discretion occurred. Defendant also argues the challenged evidence should have been excluded under Evidence Code section 352. Prejudicial evidence but otherwise relevant evidence may be excluded pursuant to Evidence Code section 352 if it poses an intolerable risk to the fairness of the proceedings or the verdict's reliability. (*Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 11; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 596.) Here, there no suggestion that evidence of the bollards at other locations caused an emotional response that had little to do with the issues at trial. Accordingly, the trial court did not abuse its discretion in admitting evidence of the bollards at other locations.

F. Settlement Credit For Non-Economic Damages

On cross-appeal, plaintiffs argue the trial court erred in reducing Ms. Soto's and Anabel's noneconomic damages awards to zero because the jury's award was smaller than the amount of Mr. Livingston's settlement. Civil Code section 1431.2, subdivision (a) provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against the defendant for that amount." Civil Code section 1431.2, subsection (a) retains the traditional joint and several liability doctrine for plaintiff's

economic damages. But the statute adopts a rule of several liability for noneconomic damages. Thus, each tortfeasor is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that wrongdoer's degree of fault for the injury. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198; *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 272.) In cases governed by Civil Code section 1431.2, subdivision (a), where the damages awarded consist entirely of noneconomic damages, the nonsettling defendant is entitled to no settlement credit. (*Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 863-864; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 35-36.) Thus, where all the damages are noneconomic, a plaintiff who negotiates a favorable settlement can obtain a double recovery. (*Wilson v. John Crane, Inc. , supra*, 81 Cal.App.4th at p. 864; *Torres v. Xomox Corp., supra*, 49 Cal.App.4th at pp. 35-36.)

Here, the award to Ms. Soto and Anabel consists entirely of non-economic damages. They were not struck by Mr. Livingston's car. They witnessed the injury to Mr. Soto. Defendant is entitled to no settlement credit under Civil Code section 1431.2, subdivision (a). Instead, Anabel and Ms. Soto should have been awarded $7,500 each because the jury awarded each of them noneconomic damages of $30,000. Thus, defendant's share of liability was 25 percent of $30,000.

IV. DISPOSITION

The judgment against defendant, Costco Wholesale Corporation, is modified to reflect noneconomic damages of $7,500 each to Anabel and Brunilda Soto. The judgment is affirmed in all other respects. Plaintiffs shall recover their costs on appeal from defendant.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.