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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ISIDRO AYALA et al.,	
Plaintiffs and Appellants,	E028639, E029242
v.	(Super.Ct.No. RIC297648)
PARDEE CONSTRUCTION COMPANY,	**OPINION**
Defendant and Respondent.	

APPEAL from the Superior Court of Riverside County. Victor Miceli, Judge. Affirmed.

Quintrall & Associates, Albert F. Quintrall and Brian C. Andrews; Gladych & Associates, Inc., and John A. Gladych for Plaintiffs and Appellants.

Koeller, Nebeker, Carlson & Haluck, Robert C. Carlson, Christopher J. Hallman and Stephen C. Wichmann for Defendant and Respondent.

In this construction defect case, the trial court precluded the appellants from presenting expert testimony, on the ground that they had failed to provide discovery; it then granted a motion to exclude all of their evidence, on the ground that, without expert

testimony, they could not prove their case. The appellants challenge these rulings. They also challenge the award of costs against them. Finding no error, we will affirm.

I

PROCEDURAL BACKGROUND

In 1997, Robin Rochelle and others (the Rochelles), represented by attorney Rob L. Rochelle, filed this construction defect action against Pardee Construction Company. Pardee cross-complained against a laundry list of subcontractors; some of the subcontractors cross-complained among themselves and/or against Pardee.

On April 6, 1998, the trial court entered a case management order.[1] In the order, it appointed Harold Coleman, Jr., as referee. It required all parties to serve an initial expert designation by September 10, 1998, and any supplemental designation by October 15, 1998. It established a document depository and required the parties to place all relevant documents in the depository. Each expert's file was to be deposited at least five days before that expert's deposition was set to begin. The plaintiffs were to deposit a "Final Defect List," itemizing the claimed defects in their homes, and a "Final Repair Cost Estimate," itemizing the method of repair and the cost to repair each such defect. Every deposit was to be accompanied by an index of all documents being deposited. The party making the deposit was to serve all other parties with a "Notice of Compliance," describing the documents deposited. The case management order further provided:

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[1] From time to time, the case management order was amended. The amendments themselves, however are not in the record. No party has ever claimed that any of the amendments are relevant to the issues before us. We must presume they are not. (Cal. Rules of Court, rule 52.)

"This order is intended to constitute a demand upon all parties for an exchange of expert information pursuant to California Code of Civil Procedure §2034 and to eliminate the need for all parties to generate their individual demands."

Pursuant to the case management order, Pardee and the Rochelles designated experts and produced expert documents. The Rochelles designated William Tuell as their architectural expert and Paul Hastie as their cost-to-repair expert.

Meanwhile, Isidro Ayala and others (collectively the Ayalas), represented by both Rob Rochelle and Quintrall & Associates, filed another construction defect action against Pardee. On February 8, 1999, the trial court ordered the Rochelle action and the Ayala action consolidated. It also ordered: "[T]he current Case Management Order will be binding on all parties in Ayala . . . ."

On or about March 17, 2000, Rob Rochelle attempted to withdraw from his representation of the Ayalas by filing a "Notice of Disassociation of Counsel." It indicated that the Ayalas would continue to be represented by Quintrall & Associates. The trial court, however, rejected this notice. On May 3, the Ayalas filed substitutions of attorney, replacing Rob Rochelle with Quintrall & Associates. Rob Rochelle continued to represent the Rochelles.

On April 12, 2000, at a discovery conference, the referee ordered that no additional site inspections could be conducted without notice to the parties and leave of the referee.

Also on April 12, 2000, the Rochelles moved to substitute Robert Carroll in place of William Tuell as their architectural expert. The Ayalas did not join in the motion. On

May 1, 2000, the referee granted the motion. He reiterated his previous order that no additional site inspections could be conducted without notice and leave.

On June 7, 2000, Carroll's deposition began. He testified that he was not a consultant for the Ayalas, and he would not be offering any opinions regarding the Ayalas' homes.

On June 12, 2000, the second day of Carroll's deposition, counsel for the Ayalas represented that they were going to retain Carroll. Carroll testified, however, that they had not retained him yet, he had not inspected their homes, he had not prepared any reports for them, and he had no opinions regarding their homes.

On June 13, 2000, the third day of Carroll's deposition, Carroll testified that the Ayalas had not retained him yet and that he had "not done anything" regarding their homes.

On June 28, 2000, the fourth and final day of Carroll's deposition, he testified that the Ayalas still had not retained him, and he still had not inspected their homes.

Trial was set for August 7, 2000. On or about July 21, 2000, Pardee filed motions in limine to exclude any testimony by Carroll regarding the Ayalas' homes and to exclude any testimony by any undesignated expert. Pardee also joined in a motion in limine filed by some of the subcontractors to exclude any expert testimony either about, or based on, any work done after the expert's deposition.

Meanwhile, on July 18 and 19, 2000, Carroll inspected the Ayalas' homes. He did so without leave of court and without notice to the other parties, and hence in violation of the referee's order.

On August 4, 2000, Hastie's deposition began. He testified that, back in December 1998, counsel for the Ayalas had contacted him and had discussed retaining him, but he had declined. Fifteen minutes before the deposition, counsel for the Ayalas told him they had designated him as their expert. However, they still had not retained him, and he had not given them permission to designate him. He did not have any opinion on the cost to repair the Ayalas' homes. He testified that, if and when the Ayalas did retain him, he would need an additional two to three weeks to prepare a final repair cost estimate for them.

On August 10, 2000, the trial court heard argument on the motions in limine. In opposition to the motion to exclude Carroll's testimony, counsel for the Ayalas argued that the testimony of the Rochelles' experts would also be relevant to the Ayalas' case and that Pardee had never designated any experts to testify specifically in the Ayala case, and hence it could not object to the Ayalas' failure to designate experts. The trial court granted Pardee's motions to exclude testimony from undesignated experts and to exclude postdeposition expert testimony. It continued the motion to exclude Carroll's testimony.

On August 15, 2000, the trial court heard further argument on the motions in limine. Counsel for the Ayalas argued that they had never received a demand to exchange expert witness information. He repudiated the notion that the Rochelles' designation was "operative" as to the Ayalas. He also argued again that Pardee had not made separate expert designations in the Ayala case and the Rochelle case. The trial court ordered the Ayalas to designate their experts by August 17.

On August 16, 2000, a venire was called and sworn.

On August 21, 2000, counsel for Pardee advised the trial court that the Ayalas had failed to designate experts by August 17. Nevertheless, the parties stipulated that the Ayalas would deposit their expert documents by August 23; the trial court so ordered.

The trial court set a settlement conference for August 24. The parties agreed that the trial judge could participate in the settlement conference without being disqualified from the trial. The trial court continued the trial to September 6 and dismissed the venire.

Late in the day on August 21, the Ayalas finally designated their experts. The designation itself is not in the record, but they evidently designated the same experts as the Rochelles.

On August 24 and 25, 2000, the trial court presided over settlement discussions. On August 25, 2000, counsel for the Ayalas was absent. He had notified the court that he had to attend another hearing but said he would arrive by 9:30 or 10 a.m. By 3 p.m., however, he still had not arrived.

Counsel for Pardee advised the trial court that the Ayalas had failed to deposit any expert documents. Pardee therefore moved to preclude them from introducing any expert testimony. The trial court ruled that, if in fact the Ayalas had not deposited their final repair cost estimate and their other expert documents by August 23, then their experts would be precluded from testifying.

Later, counsel for the Ayalas finally appeared. He was told of the trial court's ruling, but he did not ask to be heard regarding it.

In the settlement discussions, Pardee offered $1.57 million. The Rochelles demanded $1.4 million and the Ayalas demanded $240,000, for a total of $1.64 million. Accordingly, no settlement was reached.

On September 6, 2000, Pardee filed a written motion to exclude all of the Ayalas' evidence, on the ground that they could not carry their burden of proof without expert testimony. In response, counsel for the Ayalas claimed that the Rochelles had deposited documents which also pertained to the Ayalas: "It would require a search of the depository. . . . [I]f we obtain a declaration of Mr. Hastie, along with [the] transcript of his deposition, we could indicate to the [c]ourt what documents are there . . . ." He also argued that the preclusion order had been issued in violation of due process, because the Ayalas' counsel had not been present, and that the preclusion order had been "a squeeze play" to coerce the Ayalas to settle. The trial court granted the motion.

Over that day and the next, all of the parties other than the Ayalas entered into a settlement agreement.

On October 23, 2000, the trial court entered judgment against the Ayalas and in favor of Pardee.

On November 21, 2000, Pardee filed a memorandum of costs. On December 12, 2000, the Ayalas filed a motion to tax costs. On February 16, 2001, the trial court awarded Pardee $51,754.98 in costs.

II

THE ORDER PRECLUDING EXPERT TESTIMONY

The Ayalas contend the trial court erred by precluding them from presenting any expert testimony.

A. *Statutory Background*.

Discovery regarding expert witnesses is governed by Code of Civil Procedure section 2034. From here on, we will refer to this section simply as section 2034, and undesignated references to subdivisions will be to this section.

Under subdivision (a), any party may demand an exchange of expert witness information. Upon such a demand, each party must provide either "[a] list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial" or "[a] statement that the party does not presently intend to offer the testimony of any expert witness." (§ 2034, subd. (f)(1)(A), (B).)

As to any retained experts (see § 2034, subd. (a)(2)), "the exchange shall also include or be accompanied by an expert witness declaration signed . . . by the attorney for the party designating the expert . . . ." (§ 2034, subd. (f)(2).) This declaration must contain:

"(A) A brief narrative statement of the qualifications of each expert.

"(B) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

"(C) A representation that the expert has agreed to testify at the trial.

"(D) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

"(E) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney." (§ 2034, subd. (f)(2).)

If the demand includes a demand for production of reports and writings (see § 2034, subd. (a)(3)), each party must produce all discoverable reports and writings made by each retained expert. (§ 2034, subd. (g).)

Subdivision (k) states the conditions under which a party can augment its expert witness information. It provides: "On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to . . . augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained . . . . The court shall grant leave to augment . . . an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party either (1) would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness, or (2) failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, provided that the moving party (1) has sought leave to augment or amend promptly after

deciding to call the expert witness or to offer the different or additional testimony, and (2) has promptly thereafter served a copy of the proposed expert witness information . . . on all other parties who have appeared in the action. Leave shall be conditioned . . . on such other terms as may be just, including, but not limited to, . . . a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion."

Subdivision (*l*), by contrast, states the conditions under which a party can cure a complete failure to exchange expert witness information. It provides: "On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date. . . . [¶] The court shall grant leave to submit tardy expert witness information only after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, and determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party (1) failed to submit that information as the result of mistake, inadvertence, surprise, or excusable neglect, (2) sought that leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter served a copy of the proposed expert witness information . . . on all other parties who have appeared in the action. This order shall be conditioned . . . on such other terms as may be just, including, but not limited to, . . . a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion."

Subdivision (m) provides that: "A party may call as a witness at trial an expert not previously designated by that party if: (1) that expert has been designated by another party and has thereafter been deposed . . . , or (2) that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion."

Finally, subdivision (j) provides that: "Except as provided in subdivisions (k), (*l*), and (m), on objection of any party who has made a complete and timely compliance with subdivision (f), the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

"(1) List that witness as an expert . . . .

"(2) Submit an expert witness declaration.

"(3) Produce reports and writings of expert witnesses . . . ."

"The standard of review of trial court discovery orders is . . . abuse of discretion. [Citations.] 'Abuse of discretion is a deferential standard of review. [Citation.] Under this standard, a trial court's ruling "will be sustained on review unless it falls outside the bounds of reason." [Citation.]' [Citations.]" (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 117 [Fourth Dist., Div. Two], quoting *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

B. *Statutory Violations and/or Abuses of Discretion*.

Preliminarily, the Ayalas claim the trial court "accepted" their belated expert witness designation and based its preclusion order solely on their failure to deposit expert documents. Not so. It was prepared to overlook their failure to designate their experts on time, provided they deposited their expert documents on time. However, they did not. The trial court then made it clear that its preclusion order had been based on their failure to comply with the case management order and their failure to designate their expert witnesses by August 17, as well as their failure to deposit documents.

Under subdivision (j), the trial court can exclude expert testimony only if it finds that there has been an "unreasonabl[e]" failure to disclose. The Ayalas argue that their failure to exchange expert witness information pursuant to the case management order was not unreasonable. They claim their counsel was "confus[ed]" about the status of their expert witness designation. However, there was no *evidence* to this effect. To the contrary, the trial court specifically found that their attorneys "ha[d] not been honest with the [c]ourt." It further found that: "[W]hat you were doing is you were tagging along . . . , not intending to do any discovery, not intending to incur any expenses, but hoping that there would be a global settlement and then you would come in at the last minute and say, [w]e've got 15 houses or 16 houses we want [to get] paid for." In effect, the trial court found that the Ayalas' counsel were not confused in the least; they deliberately failed to disclose, as a matter of gamesmanship.

Originally, the Rochelles' designation was intended to be binding on the Ayalas. When the Ayalas first appeared in the action, Rob Rochelle represented them as well as

the Rochelles. Moreover, he agreed to the Ayalas being bound by the case management order (or, at least, he did not object). Inasmuch as the date the case management order specified for designating expert witnesses had already passed, it necessarily follows that the Ayalas did not intend to make a separate designation.

The Ayalas' claim below that they were never served with a demand is untenable. The case management order itself specified that it was to "constitute a demand upon all parties for an exchange of expert information . . . ." Thus, if their counsel had really believed that the Rochelles' designation was not binding on them, they would have served a separate designation; at a minimum, they would have sought leave to submit tardy expert witness information. Obviously, the Ayalas *knew* they were bound by the Rochelles' designation.

Later, however, for strategic reasons, counsel for the Ayalas disavowed the Rochelles' designation. By doing so, they waived any claim that they had *already* designated their experts. At that point, the trial court could properly find -- and it did find -- that the Ayalas had unreasonably failed to make a timely designation. Nevertheless, it gave them another chance.

Thus, the Ayalas argue next that their failure to designate their experts by August 17 was not unreasonable, because the trial court gave them only two days. Nonsense! The case had been set for trial on August 10. On that date, the trial court began hearing motions in limine. Meanwhile, on August 16, a venire was called and sworn. With trial so close, their counsel should have been able to dictate their expert witness designation off the top of his head! Two days was more than enough time -- particularly as, in the

end, they designated the same experts as the Rochelles. Certainly, absent evidence to the contrary, the trial court had discretion to so find.

Third and finally, the Ayalas argue that their failure to deposit expert documents was not unreasonable. Once again, they argue that the trial court did not give them enough time. Their counsel waived this claim by stipulating to deposit the documents within six days. In any event, with trial so close, they should have known what expert documents pertained to their case.

They also argue that the necessary documents had already been deposited by the Rochelles. Again, there was no *evidence* of this. The trial court did not have to accept their counsel's unsworn assertion to this effect, particularly given its finding that their counsel had been less than honest. The assertion was inconsistent with their counsel's stipulation, just six days earlier, that they *would* deposit documents. Moreover, their counsel admitted that, without a "search of the depository," they could not identify any of the pertinent documents.

To overcome this evidentiary gap, the Ayalas claim Pardee admitted, in its respondent's brief, that the Ayalas' documents were "intermingled" with the Rochelles'. Not true. In the cited portion of the respondent's brief, Pardee correctly stated that *the Ayalas' counsel argued below* that the documents were intermingled. Calling Pardee's restatement of the Ayalas' own argument an "admission" is sheer bootstrapping.

In their reply brief, the Ayalas baldly state: "All the deposited documents . . . were applicable to, and relevant to, *all* of the houses." (Some emphasis omitted.) They do not cite any support in the record for this claim; they cannot, because there is none.

They never made so broad a claim below. Instead, they claimed that *some* of the documents already deposited by the Rochelles were relevant to their houses, but "[i]t would require a search of the depository" to identify them. Moreover, their counsel squarely contradicted it by representing that Hastie had inspected the Ayalas' homes and had deposited the resulting photographs and notes.

Even assuming this representation was true, it fell short of fulfilling the Ayalas' discovery obligations. They were required to deposit their own final repair cost estimate. They failed to do so. On September 6, 2000, their counsel claimed that, just one day earlier, he had brought the final repair cost estimate to what he expected would be Hastie's deposition; Pardee, however, had canceled the deposition. This was not a deposit by August 23, as the trial court required; it was not a deposit five days before the deposition, as the case management order required; in fact, it was not a *deposit* at all.

And even assuming all of the documents the Ayalas had agreed to produce were already in the depository, at a minimum they were required to serve a notice of compliance describing them. They failed to do so. As the trial court observed: "When we have other documents in there . . . , that puts the defendants at a burden to determine what [an expert is] going to rely on." The Ayalas' counsel admitted that the Ayalas themselves could not yet do so. How, then, could Pardee? We conclude that the trial court did not abuse its discretion by finding that the Ayalas had failed to comply with their expert discovery obligations and that this failure was unreasonable.

Under subdivision (j), the trial court can exclude expert testimony only "on objection of any party who has made a complete and timely compliance . . . ." The

Ayalas argue that Pardee did not comply because, if they had to make a separate designation, then so did Pardee. This argument is, once again, untenable. As already noted, originally, the Ayalas did *not* have to make a separate designation. Their need to do so arose only because they *claimed* they were not bound by the Rochelles' designation. If that was really the case, however, then they had to serve a separate statement that their experts had agreed to testify for *them* and state what testimony *they* expected their experts to give. Pardee, by contrast, had already designated its experts. It was not required to make separate designations as to the Rochelles and as to the Ayalas.

The Ayalas argue that the trial court should have allowed them to submit tardy expert witness information under subdivision (*l*). In their opening brief, they conceded that they never moved for leave (although they argued they did not have enough time to do so). In their reply brief, they claim they *did* move for leave; they attribute the concession in their opening brief to "an error in communication" between their attorneys. We fail to see what that has to do with it. Any such statement of fact should be cited to the record. (Cal. Rules of Court, rule 14(a)(1)(C).) The Ayalas' assertion that they moved for leave is not adorned by any such citation. The fact is that they *never* moved for leave to submit tardy expert witness information. Nevertheless, the trial court, sua sponte, allowed them to submit a tardy expert witness designation and, thereafter, to submit expert witness documents tardily. This argument therefore seems directed at a nonissue.

The Ayalas also argue that the trial court should have allowed them to augment their expert witness designation under subdivision (k). This argument seems aimed at the

same nonissue. In any event, the Ayalas took the position below that they had not yet exchanged any expert witness information. Thus, they waived the application of subdivision (k).

The Ayalas argue that the trial court abused its discretion by ordering what turned out to be a terminating sanction, rather than some lesser sanction, such as a continuance and/or an award of costs and litigation expenses. They rely on subdivisions (k) and (*l*), which provide that, *if* the trial court grants leave to submit or augment expert witness information, it *may* also grant a continuance or award costs and litigation expenses. Here, the trial court did grant the Ayalas leave to submit tardy expert witness information. They failed, however, to meet even the extended deadlines. At that point, they did not move for relief under subdivision (k) or (*l*). Even if they had, they would not have qualified for such relief; they offered no evidence that their failure to meet the extended deadlines was due to mistake, inadvertence, surprise, or excusable neglect.

Instead, Pardee moved to exclude their expert witnesses' testimony under subdivision (j). Subdivision (j) provides that, if a party has unreasonably failed to exchange expert witness information, "the trial court *shall* exclude the expert opinion of any witness" offered by that party. (Italics added.) It did not require the trial court to resort to any lesser sanctions.

And finally, even assuming the trial court had discretion to select a lesser sanction, it did not abuse that discretion. A terminating sanction was justified by the Ayalas' failure to disclose expert information even when trial was about to begin, and by the trial court's finding of gamesmanship.

III

THE MOTION TO EXCLUDE ALL EVIDENCE

The Ayalas contend that, even assuming the trial court properly precluded them from presenting expert testimony, it erred by granting the motion to exclude all of their evidence.

"[A] motion to exclude all evidence on a particular claim is subject to independent review as the functional equivalent of a common law motion for judgment on the pleadings [citations] or, if decided in light of evidence produced during discovery, a motion for nonsuit [citation]. . . . Understood as a motion for nonsuit, the question is whether, disregarding conflicting evidence, indulging in every legitimate inference that may be drawn from the evidence, and viewing the record in the light most favorable to plaintiffs, [the] evidence . . . will support a judgment in plaintiffs' favor. [Citations.] Accordingly, . . . the sole question before us is one of law." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 634-635.)

"In negligence cases arising from the rendering of professional services, as a general rule the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common knowledge includes the conduct required by the particular circumstances. [Citation.]" (*Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1239.)

In *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, the California Supreme Court held that these rules apply to construction defect claims. (*Id.*

at pp. 701-703.) The Ayalas contend that *Miller* applies only to construction defect claims based on negligence, not strict liability. But *Miller* itself involved both negligence and strict liability claims. (*Id*. at p. 699.) The court reasoned that, as to the negligence claims, expert testimony was required to establish the standard of care (*id.* at pp. 701-703); as to the strict liability claims, expert testimony was required to establish the presence of a defective condition. (*Id*. at pp. 703-704.)[2]

The Ayalas also suggest that *Aas v. Superior Court*, *supra*, 24 Cal.4th 627 somehow conflicts with *Miller*. *Aas* was decided after the entry of judgment in this case. It held that, in a construction defect case based on negligence, the plaintiff can recover "out of pocket" damages for bodily injury or property damage, but not "benefit of the bargain" damages, such as repair costs or diminished value. (*Aas, supra*, at pp. 635-649.) We do not see how *Aas* is relevant. Under *Miller*, expert testimony is still necessary to prove negligence; *Aas* merely controls the measure of damages once negligence is proved.

The Ayalas argue that they did not need expert testimony -- they could have proven a prima facie case based solely on their own testimony and that of other percipient witnesses. They waived this argument by failing to raise it below. Separately and alternatively, they also waived it by failing to make an offer of proof. Pardee's motion was to exclude all of the Ayalas' evidence. Although such a motion is analogous to a

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[2] The Ayalas alleged claims based on negligence, strict liability, and breach of warranty. They have never argued that *Miller* does not apply to their breach of warranty claims. Thus, they have waived any such contention.

motion for nonsuit, it is not identical. For example, Pardee made its motion before opening statements, earlier than it could have moved for nonsuit. (Code Civ. Proc., § 581c.) As a result, the substance of the excluded evidence was not yet in the record. To challenge the erroneous exclusion of evidence on appeal, the Ayalas had to make an offer of proof. (Evid. Code, § 354, subd. (a).) Because they did not, we have no way of knowing whether the "common knowledge" exception would have applied.

The Ayalas also argue that they could have proven their case with the testimony of the Rochelles' experts. They did argue this below (although only in opposition to the preclusion order, not in opposition to the motion to exclude all of their evidence). They rely on subdivision (m), which provides: "A party may call as a witness at trial an expert not previously designated by that party if: (1) that expert has been designated by another party and has thereafter been deposed . . . , or (2) that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion."

Once again, the Ayalas waived this contention by failing to make an offer of proof regarding the Rochelle experts' testimony. All the Ayalas had to do was summarize *any* homeowner's testimony about *any* alleged defect, then summarize the testimony of *any* of the Rochelles' experts supporting recovery for that defect. Thus, this is not a case in which an offer of proof would have been futile. (See Evid. Code, § 354, subd. (b).) Nor is this a case in which the evidence would have been sought on cross-examination. (See

Evid. Code, § 354, subd. (c).) If counsel for the Rochelles did not bring it out on direct, counsel for the Ayalas would have had to call the experts as their own witnesses.

In any event, the record indicates that the Rochelle experts could not have given sufficient testimony under subdivision (m), item (1) to support the Ayalas' case. Carroll testified at his deposition that the Ayalas had not retained him, he had not inspected their homes, and he had no opinions about their homes. Thereafter, the trial court precluded all experts from testifying to work done, or opinions formed, after their depositions. The Ayalas do not challenge this ruling; it was plainly within the trial court's discretion. (See § 2034, subds. (f)(2)(D), (j)(4).) It effectively precluded Carroll from testifying to any opinions regarding the Ayalas' homes. Hastie similarly testified at his deposition that he had no opinions about the Ayalas' homes. Admittedly, his deposition had not yet ended. The court order banning further site inspections, however, would have prevented him from testifying to any later-formed opinions.[3]

In their reply brief, the Ayalas argue vehemently that *any* expert testimony supporting the Rochelles' case would also have supported their case. They made no offer of proof, however, to demonstrate that this was true. We cannot just assume it. It is inconsistent with the deposition testimony of both Carroll and Hastie to the effect that, even though they did have opinions regarding the Rochelles' homes, they had no opinions regarding the Ayalas' homes. It is also inconsistent with the fact that the Ayalas

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[3] In this appeal, the Ayalas rely solely on the testimony of Carroll and/or Hastie; they have waived any contention that, if expert testimony was required, one of the Rochelles' other experts could have supplied it.

had Carroll and Hastie inspect their homes, even at the risk of violating a court order. Evidently they felt the expert testimony supporting the Rochelles' case, standing alone, was insufficient to support their case. Certainly the trial court could reasonably so conclude.

The Ayalas further argue that, in a construction defect case involving mass-produced housing, expert testimony based on "a sufficient sampling of houses" may be applied to all the other houses by "extrapolation." (Emphasis omitted.) But when is a sampling "sufficient"? On this record, we have no way of knowing whether the alleged defects in the Rochelles' houses and the Ayalas' houses were so similar as to make expert testimony regarding the latter unnecessary. And, as we have previously noted, the trial court could reasonably conclude that separate expert testimony *was* necessary.

Subdivision (m), item (2), which allows a party to call an undesignated expert for the purpose of impeachment, is a red herring. It does not allow the expert to give an opinion; it only allows the expert to testify to facts which undermine the opinion of another expert. (*Mizel v. City of Santa Monica* (2001) 93 Cal.App.4th 1059, 1067-1068; *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 52-53; *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 145-146.) Impeaching Pardee's experts, by itself, would not prove the Ayalas' case. "The rejection of a witness's testimony by the trier of fact has only the effect of removing that testimony from the evidentiary mix. Without more, the disregard or disbelief of the testimony of a witness is not affirmative evidence of a contrary conclusion. [Citations.]" (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160,

1205.) Thus, this subdivision would not have let the Ayalas elicit any opinions supporting their case. The Ayalas have never argued that they could have proven their case through *Pardee's* experts; this contention (implausible to begin with) has been waived.

Separately and alternatively, the trial court had the inherent power, independent of statute, to exclude evidence as necessary to enforce its case management order. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1376-1381.) This is true even if the evidence would otherwise have been admissible under subdivision (m). We derive this principle from *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132.

In *FMC*, the plaintiff sued its liability insurers over their obligation to defend and indemnify it with respect to 57 hazardous waste sites. The trial court divided the 57 sites into eight groups and ordered that the issues as to each group be tried separately, before separate juries. (*FMC Corp. v. Plaisted & Companies*, *supra*, 61 Cal.App.4th at p. 1143.) It also issued case management orders setting deadlines for designating expert witnesses. Some of the defendants designated an expert witness named Preslo to testify in the sixth trial. The plaintiff then belatedly sought to designate Preslo for the eighth trial, under subdivision (m), item (1), on the ground that she had been designated by other parties and deposed. (*Id.* at p. 1214.) The defendants moved to preclude Preslo's testimony. The main dispute was over whether the sixth and eighth "trials" were really separate trials, or just separate phases of a single trial. The trial court granted the motion to preclude Preslo's testimony, based both on section 2034 and on its finding that the

belated designation was "a clear manipulation" of the case management order. (*Id.* at p. 1215.)

On appeal, the plaintiff argued, once again, that it was entitled to call the expert under subdivision (m), item (1) because all of the discovery related to but a single trial; it also argued that, by basing its order on "manipulation," the trial court "had effectively imposed an unauthorized evidence preclusion sanction." (*FMC Corp. v. Plaisted & Companies*, *supra*, 61 Cal.App.4th at p. 1215.) The appellate court held: "We conclude that the trial court's case management orders were proper and enforceable apart from technical distinctions between 'trials' and 'phases' of trials, that no adequate reason appears for [the plaintiff]'s failure to designate Preslo for the eighth trial in accordance with the case management orders, and that the trial court's ruling was within the scope of its inherent power to control the proceedings before it." (*Ibid*.)

Here, the case management order called for the orderly disclosure of all of the expert witnesses and documents on which each party intended to rely. Obviously, the Ayalas intended to rely on Carroll, Hastie, and the other experts designated by the Rochelles. Initially, they were willing to be bound by the Rochelles' designation; later, they repudiated the Rochelles' designation, but attempted to designate the same experts themselves. They failed, however, to designate their expert witnesses and to disclose their expert documents in conformance with the case management order -- even after the trial court modified the case management order by extending their deadlines. Allowing the Ayalas to call the same experts under subdivision (m) would have been an end run around the case management order.

We conclude that the trial court correctly ruled that, once the Ayalas were precluded from presenting expert testimony, they could not present sufficient evidence to support a judgment in their favor.

IV

DUE PROCESS VIOLATIONS

The Ayalas contend the trial court violated their right to due process, in three respects.

First, they argue that the trial court did not give them enough time to designate expert witnesses and to deposit expert documents. We have already addressed this contention in part II.B, *ante*.

Second, they argue that on August 25, 2000, when the trial court precluded them from presenting expert testimony, they "were not represented by counsel." (Italics omitted.) A party is "represented" in an action from the time its attorney makes his or her first authorized appearance. (See Code Civ. Proc., § 1014.) This representation does not end until (1) the client substitutes a different attorney (Code Civ. Proc., § 284, subd. 1), (2) the trial court allows the attorney to withdraw (Code Civ. Proc., § 284, subd. 2), or (3) the attorney dies or ceases to practice (Code Civ. Proc., § 286). The attorney's absence from a hearing does not end the representation and does not deprive the court of jurisdiction. This is true even if the attorney has purported, on the record, to resign. (*De Recat Corp. v. Dunn* (1926) 197 Cal. 787, 790-794.) A fortiori, it is true where the attorney continues to represent the party. Here, the Ayala parties were *represented* by counsel, regardless of whether their counsel attended the hearing.

Third, they argue that the trial court ruled on Pardee's motion for nonsuit on the day it was made, without allowing them to file written points and authorities in response. Counsel for the Ayalas noted that he had not had time to read the motion; all he asked for, however, was "an opportunity to be heard." The trial court immediately took a 20-minute recess, which gave him enough time to read the motion. It then heard argument. Counsel for the Ayalas did not object any further. We conclude that this argument was waived by failure to raise it below. (*Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286-1287.)

It lacks merit in any event. "A motion is made orally in court and written notice thereof need not be given unless required by statute." (*Harabedian v. Superior Court* (1961) 195 Cal.App.2d 26, 32, italics omitted.) There is no statutory requirement that a motion for nonsuit be made in writing. (See Code Civ. Proc., §§ 581c, 1005, subd. (a), 1010.) "Most motions for nonsuit are made orally and without prior notice to plaintiff." (3 Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2001) ¶ 12:225, p. 12-43, italics omitted.) Similarly, a motion in limine is merely an objection to evidence and need not be made in writing. (See generally *People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Determining whether this violates due process requires "a balancing of the private interest affected by the official action, the government's interest, and the risk of an erroneous deprivation of the private interest, including the probable value, if any, of additional or substitute procedural safeguards and the burdens such safeguards would

entail. [Citations.]" (*In re Rose* (2000) 22 Cal.4th 430, 456.) We acknowledge that erroneously granting a motion to exclude all evidence does deprive the plaintiff of a substantial private interest. Moreover, requiring the plaintiff to respond to the motion immediately and orally does pose a certain risk of an erroneous ruling. Nevertheless, an oral motion to exclude all evidence does not necessarily violate due process, in light of: (1) the time the plaintiff's counsel has already had to prepare for trial, (2) the government's interest in not postponing a trial already underway, (3) the plaintiff's opportunity to request a continuance and an opportunity to respond in writing, based on the circumstances of the particular case, and (4) the plaintiff's opportunity to file written motions for reconsideration, for new trial and to vacate the judgment.

We conclude that the trial court in no way violated the Ayalas' right to due process.

V

IMPROPER CONSIDERATION OF

THE AYALAS' FAILURE TO SETTLE

The Ayalas contend the trial court improperly penalized them for their failure to settle the case.

Preliminarily, we question their assertion that a trial court can *never* penalize a party for failing to settle. They cite *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415. There, however, the trial court had sanctioned an insurer under Code of Civil Procedure section 128.5, based expressly on its decision to defend rather than to settle. (*Triplett v. Farmers Ins. Exchange*, *supra*, at pp. 1419-1420.) The appellate court

therefore held that: "[A] trial court may not sanction *(under § 128.5)* a *defendant's* decision to insist on its constitutional right to a jury trial rather than settle a case . . . ." (*Id.* at p. 1422, italics added.)

The Ayalas rely on this same quote. However, they: (1) omit the words "under § 128.5," without using an ellipsis or other device to indicate the omission, and (2) omit the word "defendant," substituting, in brackets, the word, "party." It is hard to believe these omissions are innocent. Here, of course, the trial court did not purport to act under Code of Civil Procedure section 128.5. Moreover, under Code of Civil Procedure section 128.5, as well as under the tort theory of malicious prosecution, a trial court *can* penalize a *plaintiff* for pursuing a frivolous action. By contrast, as the court in *Triplett* noted, there is no tort of "malicious defense." (*Triplett v. Farmers Ins. Exchange*, *supra*, 24 Cal.App.4th at pp. 1422-1423.)

However, we need not rest our opinion on this ground. Rather, we reject the Ayalas' present contention because there is simply no indication in the record that the trial court was, in fact, motivated by their failure to settle. They argue that the trial court's rulings against them were erroneous; they conclude that, because it supposedly had no appropriate basis for these rulings, it must have had an inappropriate basis. Having already held that the trial court did not err, we disagree.

The Ayalas also argue that "the [trial c]ourt went out of its way to try to create the impression that it was *not* reacting to [their] unwillingness to settle its case." During the hearing, their counsel complained that the preclusion order had been "a squeeze play" to coerce settlement. In response, counsel for Pardee started to dispute some of his factual

statements. The trial court said: "Let me interrupt you so that the record is clear. The record needs to reflect that the parties had stipulated that the [c]ourt could participate in settlement negotiations . . . without precluding the [c]ourt from presiding over the trial. And the [c]ourt has engaged in extensive settlement negotiations. . . . However, I will state that the ruling that I make today is not in any way connected with the [c]ourt's views or attitude, impressions or otherwise that it's garnered from the settlement negotiations." We will take the trial court at its word. Certainly we are not about to disbelieve it without some affirmative reason to do so.

Next, the Ayalas point out that, both before and after ruling on the motion to exclude their evidence, the trial court referred to the settlement negotiations. In particular, at the beginning of the hearing, it said: "I have just received a document entitled 'Defendant/Cross-Complainant Pardee Construction Company's Objection to All Evidence of the [A]yala Plaintiffs' . . . . Can I correctly assume from this motion that the case has not been settled?" After granting the motion, it said: "I need to talk to [counsel for the Rochelles] and to [counsel for Pardee]. [¶] What is the effect now of the [c]ourt's granting the nonsuit as to the Ayala -- what effect is it going to have, if any, on the settlement?"

We perceive no impropriety. The previous two court days had been consumed by settlement negotiations. It was only natural that, before ruling on a motion, the trial court would want to know if the case had settled. When it did rule, it explained, clearly and at some length, its reasons for granting the motion to exclude all evidence. Then, having adjudicated the Ayalas' claims, it quite appropriately inquired about the effect on the

other parties' settlement. There is nothing in this record to suggest that it granted the motion to exclude all of the Ayalas' evidence because they had failed to settle.

Interestingly, the Ayalas do *not* mention the trial court's finding that they were hoping to get a free ride to settlement on the Rochelles' coattails, and therefore they never intended to provide any discovery. This finding proves that the trial court did not act in a blind fit of pique. Quite the contrary, it had a keen perception of what was really going on in its courtroom. It was focused on the Ayalas' failure to provide discovery, not on their failure to settle. Indeed, it believed that, ultimately, they *did* intend to settle.

We conclude that the Ayalas' claim that the trial court was improperly motivated by their failure to settle is unfounded.

VI

THE COST AWARD

The Ayalas contend the trial court erred in awarding approximately $50,000 in costs against them.

A. *Additional Factual and Procedural Background*.

Pardee filed a memorandum of costs, in which it claimed costs totaling $122,052.85. The memorandum of costs is not in the record.

The Ayalas then filed a motion to tax costs. The motion is not in the record. Pardee filed an opposition to the motion. The opposition is not in the record. The Ayalas filed a reply to the opposition. The reply is not in the record.

After a hearing, the trial court granted the motion to tax costs in part and denied it in part. It awarded Pardee costs against the Ayalas in the amount of $51,754.98. A reporter's transcript of the hearing is not in the record.

B. *Analysis*.

The Ayalas argue: "[A]n award of costs in excess of $50,000, when [they] never even got the privilege of presenting their case at all[,] is reversible abuse of . . . discretion." (Italics omitted.) However, "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs . . . ." (Code Civ. Proc., § 1032, subd. (b).) The Ayalas do not argue that the costs awarded were not actually incurred, or that they were not properly allowably under Code of Civil Procedure section 1033.5. Accordingly, Pardee was entitled to them.

Second, they argue that the trial court ruled without stating reasons, "with no discussion on the record, and with no consideration of input or rebuttal from [the Ayalas]." They cite no authority for the proposition that the trial court was required to state reasons. Moreover, the record, lacking the reporter's transcript, is wholly inadequate to support this contention. Although the Ayalas do not appear to argue that the cost award is not supported by substantial evidence, out of an excess of caution, we note that the record is also wholly inadequate to support this contention.

We conclude that the Ayalas have failed to demonstrate any error involving the cost award. Indeed, on this record, their challenge to the cost award appears frivolous.

VII

DISPOSITION

The judgment and the order awarding costs are affirmed. Pardee shall recover costs on appeal against the Ayalas.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

WARD
J.