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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TRAVIS THOMSON et al., Plaintiffs and Appellants, v. JOAN BEUCHEL, Individually and as Trustee, etc., Defendant and Respondent.	B211516 (Los Angeles County Super. Ct. No. PC036551)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret L. Oldendorf, Judge. Affirmed.

George W. Coleman, a Law Corporation and George W. Coleman for Plaintiffs and Appellants Travis Thomson, Kelly Thomson and Amanda Marie Wells.

Morris Polich & Purdy LLP, Richard H. Nakamura, Michael P. West and Maureen M. Home for Defendant and Respondent Joan Beuchel, individually and as Trustee of the Joan Beuchel Revocable Living Trust.

Travis and Kelly Thomson sued Joan Beuchel (individually and as Trustee of the Joan Beuchel Revocable Living Trust), the owner of hillside property adjacent to the Thomsons' property, after a mudslide severely damaged the Thomsons' home.[1] In a previous appeal we reversed the trial court's entry of summary judgment in favor of Beuchel on the ground Beuchel owed a duty to adjacent landowners to reasonably maintain her property and whether she had breached that duty raised a triable question of fact incapable of resolution on a motion for summary judgment. (*Thomson v. Beuchel* (July 31, 2007, B194775) [nonpub. opn.] (*Thomson I*).)

The case proceeded to trial, and a jury entered a verdict in favor of Beuchel. The Thomsons appeal from the judgment on several grounds, including the trial court's refusal to give several special jury instructions requested by the Thomsons, certain evidentiary rulings made by the court and the award of expert witness fees to Beuchel pursuant to Code of Civil Procedure 998. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Thomson I*

In April 2005 the Thomsons sued the owners of adjacent hillside parcels, including Beuchel, for negligence, nuisance, trespass and injunctive relief. After the other defendants settled with the Thomsons, Beuchel moved for summary judgment on the theory Beuchel either owed no duty to the Thomsons or, if she did, she had acted reasonably in managing her property and could not be held liable for damages resulting from the natural, unaltered flow of surface waters from her property. In support of the motion, Beuchel attached the declaration of a geologist asserting without analysis, "[Beuchel's] Property appears to have [been] maintained in a reasonable manner with respect to Plaintiffs' property." (*Thomson v. Beuchel, supra,* B194775[, at p. 4].) The Thomsons countered with the report of a geotechnical engineer, who had concluded the

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[1] The original complaint also named as defendants the owners of another adjacent parcel, who subsequently settled with the Thomsons. The Thomsons later amended their complaint to add Kelly Thomson's daughter, Amanda Marie Wells, as a party. The existence of these other parties is not relevant to the resolution of this appeal.

surficial stability of the slope that had failed fell below the standard for "minimum stability for safety for such a slope." (*Ibid*.) The trial court sustained Beuchel's evidentiary objections to the report submitted by the Thomsons and granted the motion on the ground they had failed to show the existence of a disputed material fact as to the reasonableness of Beuchel's conduct.

We reversed. Because Beuchel's potential liability stemmed from the reasonableness of her conduct in managing her property (see *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358 (*Sprecher*)), we concluded that issue required examination of myriad factors, including, at a minimum, "[t]he likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition." (*Sprecher*, at p. 372.) Accordingly, the existence of a disputed issue of material fact precluded entry of summary judgment.

2. *The Evidence at Trial*

We summarize the facts established at trial as set forth by Beuchel.[2] Nearly 40 inches of rain fell in the City of Los Angeles during the winter of 2005. Within the few weeks preceding the mudslide that damaged the Thomsons' home on January 9, 2005, two separate storms deposited seven and five inches of rain; several days before the slide, another five inches of rain saturated the slopes north of Los Angeles. Many slopes

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[2] The Thomsons' opening brief fails to include "a summary of the significant facts limited to matters in the record," as required by California Rule of Court, rule 8.204(a)(2)(C). Instead, the Thomsons suggest the facts may be derived from our previous opinion, which recited the evidence submitted on the summary judgment motion. The Thomsons misapprehend their duty in this respect. Ordinarily, "[f]ailure to set forth the material evidence on an issue waives a claim of insufficiency of the evidence." (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97; see also *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "[A]ppellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it '"are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is deemed waived.'" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) In light of the Thomsons' breach of this duty, we adopt the factual statement supplied by Beuchel.

in the immediate area failed, including the slope behind the Thomsons' home, which destroyed the western portion of the Thomsons' retaining wall and sent mud and debris into the Thomsons' dining room.

The Thomsons own two adjacent parcels of land. The eastern lot is unimproved, and their home is located on the western lot. Both lots abut the hillside. A retaining wall, which was in place at the time the Thomsons purchased their home, extends across the back of the lot containing their home. Neither the home inspector nor Travis Thomson, who is a construction professional, noted any problems with the retaining wall before the slide; nor did Travis Thomson consider it necessary to construct a retaining wall on his unimproved lot. The Thomsons did not conduct any geological testing to determine whether the slope was stable and had no concerns about Beuchel's property. In fact, during the six years the Thomsons had lived in the home, they never experienced problems during the rainy season. Other than annual weed abatement, they performed no maintenance on the unimproved portions of their lots.

Beuchel's property, which she has owned since 1986, lies to the west of the Thomsons' home. Her lot also abuts the hillside and is unimproved except for initial grading at the front of the lot. There were no visual indications the slope would fail during a heavy rainstorm; and, during the 20 years she owned the property, she had seen no changes in the property and had never been told there was a problem with the slope. She maintained the property by removing weeds once or twice a year. There had never been a mudslide during the rainy season until January 9, 2005.

On January 9, 2005 the Thomsons' property was hit by three mudslides: one on the west side of the house, one on the east side of the house and a final one from the north that destroyed part of the retaining wall and the backyard and went through the dining room window. Although the Thomsons and their daughter were inside the house and heard three separate slides, none of them saw the slide that damaged the house.

According to the Thomsons' expert, Gary Masterman, a civil and geotechnical engineer who first inspected the slope on January 27, 2005, the mud and debris that entered the Thomsons' house came from a gully on the ascending slope that ran from the

top of the slope (above the Thomson and Beuchel lots) through Beuchel's lot and into the Thomsons' lot. Masterman opined the loose soil material came from the two upper lots and not Thomsons' lot. Masterman also testified on the subject of slope stability. Although he had previously testified at his deposition there were indications of a gross stability problem on the ascending slope, he corrected himself and acknowledged there was no gross stability issue with the hillside. Further, after his initial assertion of a problem with surficial stability, he withdrew this conclusion on cross-examination and admitted there was no stability problem on the property other than the gully.

Two experts testified on behalf of Beuchel. The first, Richard Hazen, a geotechnical engineer, testified a typical homeowner would be unable to predict whether a slope was potentially unstable and whether a slide might be hazardous to structures below. Hazen also testified without contradiction that, if the Thomsons' retaining wall had extended farther to the west, the mud and debris from the west would have been diverted to the unimproved lots instead of the Thomson house. Brian Kramer, a civil and geotechnical engineer, testified the majority of the material from the slide originated on the lot north of Beuchel's property and flowed directly onto the Thomsons' property without crossing Beuchel's property. Both experts also testified there was no slope stability problem on Beuchel's property. Kramer even duplicated Masterman's calculations—using Masterman's data—to show there was no issue of slope instability.

3. *Jury Instructions, the Jury Verdict and Award of Costs*

Over the Thomsons' objection, the court instructed the jury using standard civil jury instructions on negligence (CACI No. 401) and reasonable care in maintenance of property (CACI No. 1001). The jury deliberated for only 30 minutes before returning a verdict in favor of Beuchel. Judgment was entered on August 27, 2008 and corrected nunc pro tunc on September 15, 2008.

Beuchel submitted a bill of costs that included $19,127 in expert fees incurred after service by Beuchel of settlement offers pursuant to Code of Civil Procedure section 998 totaling $40,000. The Thomsons moved to tax those costs on the ground Beuchel's settlement offers were not made in good faith and the costs had been incurred after the

experts' depositions had been taken. On November 7, 2008 the trial court denied the motion to tax and awarded the fees as requested.

CONTENTIONS

The Thomsons contend the trial court erred in refusing to instruct the jury on Beuchel's duty to reasonably maintain her property and denying their proposed special instruction that heavy rainfall did not constitute an "act of God." The Thomsons also contend the court erred in denying several motions in limine and in allowing certain evidence to be admitted. Finally, the Thomsons argue Beuchel was not entitled to receive expert fees as costs.

DISCUSSION

1. *The Trial Court Did Not Err in Refusing the Special Jury Instructions Proposed by the Thomsons*

   a. *Standard of review*

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him or her which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*); *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684 (*Bullock*); *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1107-1108.) A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading or incomplete. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158; see *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 ["[i]rrelevant, confusing, incomplete or misleading instructions need not be given"].) In addition, a court may refuse an instruction requested by a party when the legal point is adequately covered by other instructions given. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.)

When the contention on appeal is that the trial court failed to give a requested jury instruction, we review the record in the light most favorable to the party proposing the instruction to determine whether there was substantial evidence warranting the instruction. (*Soule, supra,* 8 Cal.4th at p. 572; *Bullock, supra,* 159 Cal.App.4th at p. 685.) If so, reversal is required when "'it seems probable'" the refusal to give the

proposed instruction "'prejudicially affected the verdict.'" (*Soule*, at p. 580; accord *Bullock*, at p. 685; *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1225-1226.)

b. *The requested special instructions on duty*

The Judicial Council of California Civil Jury Instructions (CACI) are "the official instructions for use in the state of California." (Cal. Rules of Court, rule 2.1050(a).) "The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror." (*Ibid.*) "Use of the Judicial Council instructions is strongly encouraged." (*Id*., rule 2.1050(e).) Nonetheless, whenever the standard CACI instructions "do not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a [CACI] instruction cannot be modified to submit the issue properly, the instruction given should be accurate, brief, understandable, impartial, and free from argument." (*Ibid*.)

Contending they were entitled to an instruction that Beuchel had already been found to owe a duty of care to the Thomsons, the Thomsons proposed three separate special jury instructions addressed to that issue. The first proposed special instruction on duty, citing *Sprecher, supra*, 30 Cal.3d 358, stated, "An uphill landowner owes a legal duty of reasonable care to a downhill landowner to take steps necessary to protect the downhill landowner from harm from natural conditions of the uphill landowner's property with resulting liability for breach of that duty." The Thomsons' second proposed special instruction on duty stated, "Defendant Beuchel has a duty to exercise due care in the management of her property." The third proposed special instruction stated, "The issue of Defendant Beuchel's liability relates to her failure to ensure the stability of the slope on her property."

The trial court rejected the Thomsons' proposed instructions and instead used standard CACI instructions on negligence resulting in property damage: CACI No. 401,

the general instruction on negligence,[3] supplemented by CACI No. 1001, an instruction tailored to a claim that a property owner's negligence caused damage to another's property.[4]

The Thomsons special instructions were neither appropriate nor necessary. The existence of a duty of reasonable care under the circumstances of this case was not disputed and thus was not an issue to be sent to the jury.[5] (See, e.g., *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, fn. 4.) The instructions given by the court described the

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[3] CACI No. 401, as given in this case, provided, "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if he does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. [¶] You must decide how a reasonably careful person would have acted in Plaintiffs[']. . . situation, as well as Defendant [Joan] Beuchel's situation."

[4] CACI No. 1001, as given the jury, provided, "A person who owns property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who owns property must use reasonable care to discover any unsafe conditions and to repair, replace or give adequate warning of anything that could be reasonably expected to harm others. [¶] In deciding whether Defendant [Joan] Beuchel used reasonable care, you may consider, among other factors, the following: [¶] (a) The location of the property; [¶] (b) The likelihood of harm; [¶] (c) The probable seriousness of such harm; [¶] (d) Whether Defendant [Joan] Beuchel knew or should have known of the condition that created the risk of harm; [¶] (e) The difficulty of protecting against the risk of such harm; [and] [¶] (f) The extent of Defendant [Joan] Beuchel's control over the condition that created the risk of harm."

[5] The determination that a legal duty is owed in a particular set of circumstances is ""only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6, citing *Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) "[A] 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 on the negligent party." (*Ballard*, at p. 573, fn. 6.) Under the facts presented in the summary judgment motion, we concluded Beuchel owed a duty of reasonable care to maintain the slope in a safe condition, but that determination did not relieve the Thomsons of the obligation of demonstrating Beuchel had breached that duty by failing to use reasonable care to maintain her property in a safe condition.

factors jurors should consider in determining whether Beuchel had breached her duty to maintain her property in a reasonable manner. In particular, with respect to CACI No. 1001, which was proposed by both parties, the factors identified for consideration by the jury were derived from *Sprecher*, *supra*, 30 Cal.3d 358, the basis for our previous decision, as well as other cases standing for the same proposition. (See, e.g., *Arato v. Avedon*, *supra*, 5 Cal.4th at p. 1189, fn. 11 [court may refuse instruction requested by a party when legal point is adequately covered by other instructions given]; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1217 [rejecting claim of instructional error when requested special instructions were duplicative of instructions given].) In addition, the trial court was properly concerned the inclusion of the Thomsons' additional instructions might confuse the jury rather than clarify the scope of that duty. (See, e.g., *Harris v. Oaks Shopping Center*, *supra*, 70 Cal.App.4th at p. 209 ["[i]rrelevant, confusing, incomplete or misleading instructions need not be given"].) Consequently, the jury was adequately advised by the form instructions of the scope of Beuchel's duty to the Thomsons.

The special instructions proffered by the Thomsons were also legally inaccurate. Only the first proposed instruction refers to the crucial underpinning of "reasonable" care essential to the imposition of liability on a landowner for damages resulting from an unsafe condition on his or her land. Moreover, the one instruction that uses the term "reasonable care" was inadequately tethered to conditions that delineate the scope of the duty—conditions that are more than adequately spelled out in CACI No. 1001.

In any event, as Beuchel points out, the Thomsons have failed to identify any prejudice flowing from the failure to give the requested special instructions. (See *Soule, supra,* 8 Cal.4th at pp. 580-581.) The Thomsons' attempt to identify such prejudice in the reply brief is, in effect, merely a criticism of the jury's findings on those facts. We are not empowered to second-guess the findings of the jury, which emphatically (in a mere half hour) rejected the Thomsons' claims.

c. *The requested special instruction on acts of God*

The Thomsons next challenge the trial court's rejection of their proposed special instruction informing the jury that a heavy rainstorm is not an "act of God," even though Beuchel did not raise "act of God" as a defense to their claims. Instead, the Thomsons contend members of the jury who sustained damage to their homes during the 1994 Northridge earthquake may have erroneously concluded the rainstorm was a non-compensable "act of God." The Thomsons have provided no support for this argument, either factually or legally. Their concern, as articulated here and in the trial court, was entirely speculative and unwarranted by the evidence in the case. Accordingly, the trial court properly rejected the proposed instruction. "An instruction correct in the abstract, may not be given where it is not supported by the evidence or is likely to mislead the jury." (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 302.)

2. *The Trial Court's Evidentiary Rulings Were Proper*

a. *Standard of review*

Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197 ["In determining the admissibility of evidence, the trial court has broad discretion. . . . On appeal, a trial court's decision to admit or not admit evidence, whether made in limine or following a hearing pursuant to Evidence Code section 402, is reviewed for abuse of discretion."]; accord, *People v. Alvarez* (1996) 14 Cal.4th 155, 203 ["appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion"]; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.) "The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou*, at p. 1480; see Evid. Code, § 354; Code Civ. Proc., § 475.)

b. *The Thomsons have forfeited the right to challenge three of the evidentiary rulings of the court*

Although the Thomsons ascribe the trial court's errors to its rulings on motions in limine, the trial court deferred ruling in limine and instead indicated its intent to rule on evidence as it was proffered at trial. With respect to at least three of the Thomsons' claims of error, Beuchel correctly asserts those arguments have been forfeited.

The trial court denied the Thomsons' motion in limine to exclude expert testimony on the natural flow of surface water without prejudice, meaning the Thomsons were free to raise the issue again if necessary. No further objections on that topic were made.[6] The Thomsons' claim the court's initial ruling left them in an "uncertain position" with respect to the testimony of their expert is simply not a legally cognizable claim of error.

The trial court also denied, again without prejudice, the Thomsons' motion in limine to exclude evidence related to any preexisting condition of the retaining wall at the rear of their property. At trial the Thomsons' counsel failed to object when Beuchel's expert was asked about defects in the retaining wall. Accordingly, this contention has been forfeited.[7] (See, e.g., *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 [failure to raise issue or argument in trial court results in forfeiture of the point on appeal]; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 988-989 [party may not raise issue on appeal not presented in trial court].)

The trial court admitted as an exhibit a single page from Masterman's report that Beuchel's expert used to demonstrate an erroneous calculation by Masterman. On appeal, the Thomsons assert use of the exhibit in this manner violated Evidence Code

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[6] The Thomsons claim this issue was raised with respect to the admissibility of exhibit 18. We have reviewed the relevant portion of the trial transcript and see no discussion of their motion in limine or its subject matter.

[7] The Thomsons also argue Beuchel's expert should not have been allowed to discuss a drawing of a proposed retaining wall that extended across the back of their unimproved lot. The court excluded the drawing but allowed the expert to testify about the proposed wall because the Thomsons' expert had already mentioned it, thus opening the door to further testimony on the subject. There was no error.

section 770 (use of witness's prior inconsistent statements). That argument was never raised in the trial court, however, and is similarly forfeited on appeal.

c. *The Thomsons have failed to show a prejudicial abuse of discretion in the trial court's remaining evidentiary rulings*

i. *The backyard improvements*

The trial court denied, without prejudice, the Thomsons' motion in limine to exclude evidence of unpermitted backyard improvements, including a koi pond. At trial Beuchel elicited testimony from Travis Thomson relating to the koi pond, which had been damaged in the slide. The Thomsons' counsel reminded the court of the motion in limine, and the court agreed the question of permitting of structures was irrelevant. In other words, the court sustained the Thomsons' objection on this point. The Thomsons now argue they had asked the court to exclude all evidence related to backyard improvements. There is no evidence to support this argument, and no showing of prejudice from its admission.

ii. *Evidence related to the 2007 post-slide brush fire*

Beuchel brought two motions in limine to exclude evidence related to a brush fire that occurred in 2007 on her property, including documents prepared by the Los Angeles County Department of Public Works and expert testimony by a civil engineer employed by the County. The trial court denied both motions without prejudice.

During trial, in response to specific objections by Beuchel, the court refused to permit the civil engineer to testify and excluded one of the documents drafted by him that contained a warning to the Thomsons about possible mudslides from the canyons above them and advice on precautionary measures they might consider. Citing Evidence Code section 352,[8] the court explained the fires had occurred two years after the slide and there was a risk the jury would draw prejudicial inferences from the remedial measures recommended by the engineer. The Thomsons argue this ruling was error because the

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[8] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

evidence was also relevant to show the County's conclusion a debris flow might originate on "the canyons above" and damage the Thomsons' home. But the concern voiced by the County was both imprecise as to the source of the slides and directed to the risk of a slide following a brush fire, a factor that did not exist in 2005. It was therefore insufficiently probative to counter the risk of prejudice. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [trial court's ruling excluding evidence under Evid. Code, § 352 may be reversed only when ruling is "'arbitrary, capricious or patently absurd'" resulting in a "'manifest miscarriage of justice'"].) Accordingly, the Thomsons have failed to show the trial court abused its discretion in excluding this evidence.

3. *The Trial Court Did Not Err in Its Award of Expert Fees to Beuchel*

Ordinarily expert witness fees are not recoverable as costs in a civil action unless the expert was ordered by the court. (See Code of Civ. Proc., § 1033.5, subd. (b)(1).) Nonetheless, because the Thomsons failed to receive a judgment more favorable than Beuchel's collective $40,000 statutory offer to compromise pursuant to Code of Civil Procedure section 998,[9] the court, "in its discretion," was authorized to require the Thomsons to pay Beuchel's reasonable costs of trial, including expert witness fees. (Code Civ. Proc., § 998, subd. (d).)

The Thomsons contend the award was unauthorized because (1) the settlement offers were not made in good faith; and (2) the expert witness fees were incurred after the expiration of the 50-day period set forth in Code of Civil Procedure section 2034.230, subdivision (b), which provides a discovery cut-off date for expert preparation before trial. According to the Thomsons, the experts should not have incurred any fees after completion of their depositions, and the Thomsons should be permitted to tax them.

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[9] Code of Civil Procedure section 998, subdivision (c)(1), states, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award . . . the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

The Thomsons' contentions are meritless. The Thomsons' argument the offer was not made in good faith is premised on the assertion the proffered $40,000 would not have covered their repair costs of $47,000, let alone the $210,000 they sought for implementation of a remedial design. According to the Thomsons, an offer "must be realistically reasonable under the circumstances of the particular case" and carry some reasonable prospect of being accepted. (See *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 531 (*Regency Outdoor*).) That standard was eminently satisfied in this case. Beuchel ultimately prevailed, after lengthy litigation, in demonstrating that she exercised reasonable care in maintaining her property under the circumstances. The sum of $40,000 equalled nearly 20 percent of the Thomsons' claimed damages and, as Beuchel points out, would have paid for the bulk of the necessary cleanup even though she had no obligation to pay for those damages. The trial court was evidently satisfied the offers were made in good faith.

Likewise, section 998 does not restrict the recoverability of expert witness fees based on when they were incurred.[10] In *Regency Outdoor, supra*, 39 Cal.4th 507 the Supreme Court confirmed that section 998, subdivision (c)(1), authorizes an award of expert witness fees incurred both before and after a compromise offer is made, or at any time during the litigation. (*Id.* at p. 532.) As the Court explained, "awards of expert witness fees under Code of Civil Procedure section 998, subdivision (c) have *never* been tied to when these fees were incurred relative to a compromise offer." (*Regency OutdoorAdvertising, Inc.*, at p. 532.) "The first sentence [of section 998, subdivision (c)(1)] limits recoverable 'costs' to those incurred from the time of the offer. The second sentence, which relates to the 'costs of the services of expert witnesses,' contains no such limitation." (*Ibid.*) Thus, the trial court was authorized to award any and all reasonable expert witness fees incurred by Beuchel. The court's award was well within this broad

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[10] Similarly, the offer to compromise does not affect Beuchel's right to recover reasonably necessary costs as the prevailing party in the litigation, including the $200 filing fee she paid for the motion for summary judgment that was ultimately reversed on appeal. (See Code Civ. Proc., § 1032, subd. (b).)

discretion. The fact the award included fees incurred after the discovery cut-off is simply irrelevant.

DISPOSITION

The judgment is affirmed. Beuchel is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.