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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

5TH AND LA, Plaintiff and Appellant, v. WESTERN WATERPROOFING COMPANY, INC., Defendant and Respondent.	B266363 (Los Angeles County Super. Ct. No. BC535363)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Affirmed.

Law Offices of Tabone and Derek L. Tabone for Plaintiff and Appellant.

Diederich & Associates and Amy E. Volk for Defendant and Respondent.

* * * * * *

Appellant 5th & L.A., owner of a building in downtown Los Angeles, brought suit for breach of warranty against respondent Western Waterproofing Company, Inc. Appellant claimed the waterproofing respondent had installed on the roof of appellant's building was faulty, resulting in leaks during rainstorms. A jury returned a special verdict finding the waterproofing had not performed as promised, but the failure was not a substantial factor in causing appellant's harm. Appellant asserts on appeal that the special verdict was inconsistent and not supported by substantial evidence. Appellant further asserts errors by the trial court in admitting or excluding evidence. We affirm the judgment.

BACKGROUND

Appellant is a joint venture that owns and manages a building containing spaces for swap meet stalls. The roof is used for parking, with a small enclosed second story to use for office space and storage.

In 2011, water was leaking into the building in various places, so appellant contracted with respondent to waterproof the roof. The contract included a five-year warranty with an option to extend the warranty for another five years. Respondent began the job in May 2012, and completed it by July 2012.

It rained within a month after the job was complete. Appellant notified respondent of a leak, purportedly from the roof. Respondent removed and replaced the waterproofing material around the area of the suspected leak. The leaking resumed a few weeks later in the same area.

In October 2012, appellant noticed that areas of the roof were bubbling and peeling up. Respondent investigated along with the manufacturer of the waterproofing material and

determined that respondent had applied some of the material incorrectly. Specifically, on part of the roof, various materials had either been applied in the wrong order, or outside the window of time necessary to ensure proper adhesion.

Respondent proposed a repair plan to appellant. Appellant rejected the proposal and insisted that the entire waterproofing system be removed and replaced. Respondent did not agree, and appellant brought suit for breach of express warranty and implied warranty under various theories.

At trial, respondent's foreman on the job, Jason Travers, was called as a witness for appellant. He testified that respondent had installed some of the waterproofing material incorrectly. Appellant's expert Mark Vanderslice testified as to the poor condition of the roof and opined that total replacement was justified. Another expert, Ron Kazemi, estimated the cost of total replacement at $546,800.

Respondent designated one of its employees, Kristopher Houger, as an expert. He opined that the repairs proposed by respondent were adequate under the warranty, and that replacement was unnecessary. He estimated the cost of the proposed repairs at $67,000. On cross-examination, Houger acknowledged that some of the waterproofing material had been installed incorrectly, and that this constituted poor workmanship.

Respondent also called Leroy Anderson as an expert on the standard of care. Anderson testified that the roof could be repaired, and total replacement was unnecessary.

During closing statements, appellant's counsel argued that the repairs offered by respondent were inadequate and the entire roof should be replaced. Respondent's counsel admitted there

had been an error in installation, but argued that appellant had not shown that error caused the leaks. Moreover, respondent's counsel argued, appellant had waived its rights under the warranty by refusing the offered repair and instead insisting on total replacement.

The jury returned a special verdict. The jury found (1) respondent "provide[d] a warranty for the work performed"; (2) "the waterproofing system" did not "perform as promised within the warranty period"; (3) appellant "t[ook] reasonable steps to notify [respondent] within a reasonable time that the waterproofing system did not perform as promised"; and (4) appellant was "harmed." But on the fifth question—"Was the failure of the waterproofing system to perform as promised a substantial factor in causing [appellant's] harm?"—the jury answered "no."[1] Per the special verdict form, this ended the inquiry and the jury did not answer any additional questions.[2] The court entered judgment for respondent.

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[1] The written verdict stated that seven jurors had voted "no" on the fifth question, and five had voted "yes." The court polled the jury at the request of appellant's counsel and at least two jurors apparently changed their vote, resulting in nine "no" votes and three "yes" votes.

[2] The additional questions on the special verdict form were:

6. "Was the plaintiff offered a warranty repair?"

7. "Was the repair offered adequate to comply with the warranty?"

8. "Did plaintiff refuse the repair offered?"

9. "What are [plaintiff's] damages?"

The court denied appellant's motion for a new trial. Appellant timely appealed.

DISCUSSION

1. Inconsistent Verdict

Appellant argues that the special verdict was inconsistent and appellant is entitled to a new trial. We find there was no inconsistency.

"Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from them conclusions of law.' " (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855, quoting Code Civ. Proc., § 624.) "A special verdict is inconsistent if there is no possibility of reconciling its findings with each other." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) " ' " 'Where the findings [in a special verdict] are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.' " ' " (*Id.* at p. 358.) We review de novo a claim of inconsistency in a special verdict.[3] (*Ibid.*)

Appellant argues that it was inconsistent for the jury to find the waterproofing did not perform as promised, but this failure did not cause appellant's harm. Appellant claims that a finding that the waterproofing did not perform as promised

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[3] Although appellant did not object to the verdict before the jury was discharged, a claim that a verdict is fatally inconsistent does not require an objection to preserve the issue for appeal. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530.)

necessarily meant "that the waterproofing system was not watertight [and] that it allowed water intrusion into the building." Appellant further argues that harm "in the context of this case can only mean that water was entering the building through the roof. There is no other logical conclusion . . . ."

We disagree with appellant's interpretation of the special verdict. *David v. Hernandez* (2014) 226 Cal.App.4th 578 (*David*) is instructive. In *David*, appellants brought a negligence action against a truck driver after their car collided with his tractor-trailer. (*Id.* at p. 581.) The jury returned a special verdict finding that the truck driver was negligent, "but that his negligence was not a substantial factor in causing harm to appellants." (*Id.* at p. 585.) Appellants asserted on appeal that the verdict was "fatally inconsistent because 'a finding of causation flows automatically from the negligence finding.' " (*Ibid.*)

On appeal, the court stated that because the special verdict did not specify the manner in which the truck driver was negligent, " 'the jury's finding is tantamount to a general verdict. As long as a single theory of negligence is lawfully rebutted on a lack of causation theory, it matters not that another theory of negligence is not so rebutted.' " (*David*, *supra*, 226 Cal.App.4th at pp. 585-586, quoting *Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 26.) The court listed "several theories of negligence that the jury could have reasonably concluded had been rebutted for lack of causation." (*David*, at p. 586.) For example, the jury might have found the truck driver negligent for failing to maintain certain lights and reflector strips on his vehicle, but then also found that appellants would not had seen those lights or reflectors even had they been properly maintained,

and thus the negligence played no part in the collision. (*Ibid.*) Therefore, the special verdict was "neither inconsistent nor unsupported by substantial evidence."[4] (*Id*. at p. 588.)

Here, the jury returned a verdict that the waterproofing system did not "perform as promised within the warranty period." As in *David,* the special verdict did not specify under what theory this element was satisfied. Thus, our inquiry is whether there is a "single theory" of failure of performance that is " 'lawfully rebutted on a lack of causation theory.' " (*David, supra*, 226 Cal.App.4th at p. 586.)

We hold that there is. The jury could have concluded that the waterproofing did not "perform as promised" in that portions of it were bubbling because they were not installed correctly. The jury appears also to have reached the conclusion that the "harm" suffered by appellant was water leaking into the building (indeed, appellant states "[t]here is no other harm Plaintiff could or did allege"). But the jury then could have concluded that the incorrect installation was not a substantial cause of the water intrusion; that is, the installation was not so faulty as to allow water to penetrate, and any leaks came from some other source.[5] Under this theory, the jury could reasonably conclude that the failure of the waterproofing to perform as promised was not a substantial cause of appellant's harm.

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[4] The court nonetheless reversed the judgment based on later findings made by the trial court in denying appellant's motion for a new trial. (*David, supra*, 226 Cal.App.4th at pp. 590-592.)

[5] Appellant argues the evidence does not support this finding. We discuss this contention in part 2 of the Discussion, *post*.

Appellant argues that *David* is inapplicable because the jury here did not make a general finding of negligence, but a specific finding that the waterproofing did not perform as promised. That specific finding, appellant claims, necessarily refers to the failure of the waterproofing system to prevent leaks, as this was the expected "performance." We disagree. Nothing in the record, including the jury instructions, defines what it means for the waterproofing to "perform as promised." The jury could reasonably conclude that the bubbling constituted a failure of performance, albeit one that did not lead to appellant's harm. Appellant essentially concedes this in its opening brief, arguing that the roof falling short of its promised life expectancy could constitute a "possible performance breach" unrelated to the leaking. Thus, the jury's unspecific finding is as much a de facto "general verdict" as the finding of negligence in *David*.

Because there is at least one theory lawfully rebutted on a lack of causation theory, the special verdict is not fatally inconsistent.

2. Substantial Evidence

Appellant claims the jury's conclusion that the failure of the waterproofing to perform as promised was not "a legal cause of the harm suffered" is not supported by substantial evidence. Appellant argues "[t]here was no evidence that anything other than Defendant's substandard work caused the roof to leak." We disagree.

As an initial matter, appellant cites the wrong standard of review. It was appellant, as the plaintiff, that bore the burden of proof on each element of its cause of action. (Evid. Code, § 500; *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 464.) The jury found that appellant

had failed to prove the causation element. " 'In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . .' " (*Sonic, supra*, at p. 465.) "[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*Ibid.*)

Here, we cannot say appellant put forth evidence of such character and weight that as a matter of law the jury should have decided in its favor. Indeed, although appellant's expert Vanderslice spoke extensively about bubbling and other issues with the roof, our review of the record reveals no point at which he explicitly opined that these issues caused the alleged leaking. He acknowledged he had never seen any active leaks while at the building. He also admitted that he had done no water testing to actually trace the leak to the roof, and had not investigated other possible sources of leaks, such as the air conditioning, sprinkler, or plumbing systems.

Moreover, contrary to appellant's assertion, respondent offered evidence to contradict appellant's evidence. Respondent's expert Anderson testified that he observed other possible sources of the leaks outside of respondent's scope of work, such as gaps in door frames and cracks in the masonry and stucco. He testified

that he saw efflorescence on the masonry, which indicated water penetration.[6] He stated there was nothing that led him to believe the waterproofing system leaked.

Based on the above, we cannot conclude that causation was established as a matter of law in this case.

3. Errors in the Admission or Exclusion of Evidence

Appellant raises multiple claims of error on the part of the trial court in admitting or excluding evidence. None merits reversal.

a. Expert Witnesses

Appellant claims the trial court was inconsistent in constraining the scope of various experts' testimony, and appellant was prejudiced as a result. We disagree.

i. Houger

Appellant claims that the court failed to properly limit respondent's employee Houger's testimony to the scope described in a declaration submitted by respondent's counsel. The declaration stated: "The scope of Mr. Houger's potential expert type [*sic*] testimony will be very limited as to the repairs proposed which are already in the possession of the plaintiff in this case and the in-house costs of those repairs."[7]

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[6] Anderson described "efflorescence" as a white, powdery substance that results when water intrudes into masonry and the grout or cement leaches out.

[7] The declaration was submitted in support of an ex parte request for an order shortening time to file a motion to designate Houger as a nonretained expert. The trial court apparently construed the ex parte request as the actual motion to designate the new expert and issued a minute order adding Houger to respondent's list of experts (we take judicial notice of the minute order, entered April 8, 2015).

We reject appellant's claim of error. "When an expert witness declaration indicates the expert will testify on Topic A, that expert may not testify on Topic B." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2016) ¶ 11:21c, p. 11-9.) "It is up to the court, however, to determine whether the testimony offered is within the 'general ambit' of the topic disclosed." (*Ibid.,* quoting *Jones v. Moore* (2000) 80 Cal.App.4th 557, 566.) The court's determination is reviewed for abuse of discretion. (*Jones, supra*, at p. 566.)

Appellant claims it was error for the court to allow Houger to testify, over objection, that the warranty did not require complete removal and replacement of the roof or application of a new top coat. We disagree. It was not an abuse of discretion to find this testimony was within the "general ambit" of the topics disclosed in respondent's counsel's declaration. In explaining the "repairs proposed," Houger was entitled to explain why that proposal satisfied the warranty, and why it did not contain other possible repairs. Even were the evidence admitted in error, there would be no prejudice because the testimony pertained to whether respondent's proposed repair was adequate, an issue the jury never reached. (See Evid. Code, § 353, subd. (b) ["A verdict . . . shall not be set aside . . . by reason of the erroneous admission of evidence unless" "the error or errors complained of resulted in a miscarriage of justice."].)

Appellant also claims the trial court erred by allowing Houger to criticize the repair cost estimate reached by appellant's cost expert. Appellant did not object to this testimony at trial

and therefore has forfeited the issue on appeal.[8] (See Evid. Code, § 353, subd. (a).) But on the merits we find no error in admitting this testimony: respondent's counsel's declaration stated that Houger would testify regarding respondent's "in-house costs of . . . repairs," and such testimony reasonably could include comparisons to other estimates and explanations of the differences. And, again, admission of this evidence did not prejudice appellant, as it pertained to costs, an issue not reached by the jury.

Appellant also argues that the court erroneously prohibited a question of Houger that should have been permitted. On cross-examination, appellant's counsel asked Houger: "Would you agree that when water intrusion appears only when it's raining, it's most likely a leak from the roof rather [than] the plumbing or some other source?" Respondent's counsel objected that this called for expert opinion, and the court sustained the objection. We find no error here. Houger was designated to testify regarding the necessary repairs to a specific roof and the cost of those repairs, but appellant's question went beyond this "general ambit" to ask about causes of leaks in general. While it would not necessarily have been error for the court to permit this question, it was not an abuse of discretion to prohibit it.

ii. Kazemi

Kazemi was designated as appellant's expert on "the cost to repair or replace the roof." Appellant claims that the trial court "held Mr. Kazemi on a very short leash," presumably in comparison to Houger, and claims the "lack of fairness and even

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[8] Appellant claims, without explanation, that an objection would have been futile. We reject this unsubstantiated argument.

handedness is an abuse of discretion." Appellant points to examples where the court either sustained respondent's objections to Kazemi's testimony or required answers to questions to which appellant objected, but does not explain why the trial court's rulings were erroneous. Nor does appellant explain how these rulings affected the outcome of the trial.

Absent any suggestion from appellant as to a legal basis to find error in the court's rulings, or any indication of prejudice other than a generalized claim of "lack of fairness," we decline to reverse. Moreover, we find no prejudice: as a cost expert, Kazemi's testimony was irrelevant to causation, the determinative issue in this case, and therefore unlikely to affect the outcome.

b. Photographs

Appellant claims the trial court should have admitted photographs of the rooftop taken by appellant's manager shortly before trial. The court declined to do so, instead admitting photographs taken several months earlier, as these were the last photographs that had been reviewed by opposing counsel. Appellant argues the more recent photographs showed the condition of the roof was worsening and the defects were extensive. Appellant contends that this evidence was relevant to prove (1) damages, and (2) that appellant reasonably rejected a partial repair and did not waive its rights under the warranty.

" 'A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse . . . and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v.*

Brown (2003) 31 Cal.4th 518, 534, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10, citation omitted.)

Regardless of whether the trial court correctly excluded the photographs, appellant has not shown that the decision resulted in a manifest miscarriage of justice. Accepting for the sake of argument that the photographs were relevant to the issues of damages and waiver, the jury never reached those issues, having ruled against appellant on the causation element. Thus, even had the photographs been admitted, they would have had no impact on the outcome of the case.

c. Interrogatory Responses

Appellant claims the trial court erred in barring its counsel from presenting respondent's interrogatory responses to the jury. We agree the trial court erred, but hold that the error was harmless.

Before trial, respondent served responses to special interrogatories propounded by appellant. The first interrogatory asked, "Did you use any subcontractor for the job described in the complaint," to which respondent replied, "No." Interrogatories 2 and 3 asked for details about any subcontractors identified in the first response, and respondent answered "NA" (not applicable) to both. The remaining interrogatories were contention interrogatories pertaining to the labor and materials involved in the waterproofing installation; respondent answered all with objections and a statement that "investigation and discovery continue and the information is not yet known." The responses included a verification signed by Jennifer Ballengee.

At trial, appellant's counsel sought to cross-examine Houger regarding the interrogatory responses. The court prohibited the line of questioning on the basis that Houger had

not been involved in responding to the interrogatories. Later, appellant's counsel requested that he be permitted to read the interrogatories and responses into the record. The court denied the request, noting that the interrogatories had not been answered by any of the witnesses who had testified in the case.

Under Code of Civil Procedure section 2030.410, a party may use the answer to an interrogatory against the responding party, regardless of whether "the responding party is available to testify, has testified, or will testify at the trial or other hearing," so long as the interrogatory response is admissible under the rules of evidence. Interrogatory responses may be presented during the course of questioning, or be read into evidence when no question is pending. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, ¶ 8:826, p. 8C-162.) Thus, appellant is correct that counsel should not have been prohibited from reading the interrogatories and their responses into evidence on the basis that none of the witnesses at trial had been involved in preparing the responses.[9]

But any error was not prejudicial to appellant. All but one of the interrogatory responses simply stated "not applicable" or "the information is not yet known," so they contained no information that would have affected the outcome of the trial. Appellant argues the answer to the first interrogatory would have impeached Houger's testimony that respondent did in fact use subcontractors for the job, but appellant does not explain, nor does the record reveal, why this minor point would have been important or even relevant to the jury's final determination on causation. Respondent never argued that any of its

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[9] We do not decide whether the responses could have been excluded on some other basis.

subcontractors were to blame for appellant's harm. To the extent appellant wished to paint Houger or respondent as untruthful generally, we are unconvinced this discrepancy would have accomplished that goal.[10]

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

FLIER, J.

I CONCUR:

BIGELOW, P. J.

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[10] Respondent argues there was no inconsistency between Houger's testimony and the interrogatory response. Respondent explains that subcontractors were used for work other than the application of the waterproofing system, and it was to these subcontractors that Houger referred. The interrogatory response, in contrast, only addressed the actual application of the waterproofing, which respondent asserts did not involve subcontractors.

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RUBIN, J. – Dissenting.

I agree with much of the analysis in the majority opinion, specifically its treatment of plaintiff's arguments that the verdict was inconsistent and that the trial court erred in some of its evidentiary rulings. I part company only with the majority's conclusion that substantial evidence supported the verdict.

The jury's verdict included the following findings (Answers to Verdict Questions 1 through 4): Defendant provided a warranty; the water proofing system did not perform as promised within the warranty period; plaintiff gave defendant reasonable notice of the failure of the water proofing system to perform as promised; and plaintiff was harmed. In contrast, the answer to the fifth question was that the failure of the waterproofing system to perform was not a substantial factor in causing plaintiff harm. The trial court entered judgment for defendant based on that verdict. Plaintiff moved for a new trial on several grounds including that the damages awarded were legally inadequate. The trial court denied the motion.

Implicit in the majority opinion is that the jury reasonably found that any failure of the waterproofing system did not justify requiring defendant to replace the roof in its entirety. With that, I also agree. Substantial evidence supported the verdict that plaintiff had not proved its claim for damages measured by the cost of a new roof.

My limited disagreement with the majority stems from the verdict that defendant's conduct was not a substantial factor in

causing *any* damages. My review of the record convinces me that defendant essentially conceded its poor workmanship throughout trial; on the other hand, defendant forcefully (and successfully) argued that the claim for roof replacement was wholly unwarranted. Defendant elicited evidence from its *own expert*, Kristofer Houger, that the reasonable cost to make the repairs caused by the poor workmanship (the poor workmanship which the jury subsequently found) was $67,000. Indeed, defense counsel argued as much to the jury:

"Mr. Houger prepared a cost estimate as to what the cost would be for the repairs he proposed. He said it was roughly $67,000."

Later in argument, defense counsel made it clear that the system had not performed as promised: "Western Waterproof [defendant] acknowledged an error."

Under these circumstances, based on the uncontradicted evidence of Mr. Houger and the concessions defendant made throughout the proceedings that the failure to perform caused $67,000 in damages, I conclude that the verdict that defendant was not a substantial factor in causing plaintiff harm is not supported by substantial evidence. In my view, the trial court should have granted a new trial based on inadequate damages (Code Civ. Proc. § 657, subd. (5)). Alternatively, the trial court could have ordered an additur by which the trial court would grant the new trial unless defendant "consents to an addition" to the judgment. (Code Civ. Proc, § 662.5. See *Spillman v. City and County of San Francisco* (1967) 252 Cal.App.2d 782, 788, fn. 2.)[1]

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[1] Code of Civil Procedure section 662.5 provides for both an additur or, in cases of excessive damages, a remittitur in deciding a motion for new trial. As relevant here, subdivision (1) states:

One final point: I recognize defendant argued to the jury that plaintiff had waived its right to $67,000 by refusing defendant's offer to make repairs in that amount. Although Verdict Question 8 asked whether plaintiff had refused an offer to repair, the jury did not answer that question as it was instructed not to answer any additional questions if it found defendant's failure to perform was not a substantial factor in causing harm to plaintiff. In light of this record, I do not address the issue of waiver; nor does the majority appear to do so.

RUBIN, J.

"If the ground for granting a new trial is inadequate damages, [the court may] issue a conditional order, granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable."