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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARCO HERNANDEZ et al., Plaintiffs, Cross-defendants and Respondents, v. SUSAN DOROTHY KOCSIS, Defendant, Cross-complainant and Appellant.	G063508 (Super. Ct. No. 30-2020-01156762) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Recio, Judge. Affirmed.

Cazzell Law and Maryann Cazzell for Defendant, Cross-complainant and Appellant.

Avant Law Corporation and Michael Kim; Gregory M. Garrison; Papaefthimiou and Alexander E. Papaefthimiou for Plaintiffs, Cross-defendants and Respondents.

* * *

A fire originating in the furnace closet of a fourplex unit forced tenants Marco Hernandez and Rosie Hernandez Moreno (together, Plaintiffs) to jump from their second-story window to escape. They sustained serious injuries and sued their landlord, Susan Dorothy Kocsis, for negligence and premises liability. After a five-day bench trial, the court found Kocsis was negligent in the maintenance of the property, that her negligence was a substantial factor in causing the fire, and that she had both actual and constructive notice of the dangerous condition—specifically, improperly "jumped" wiring in the furnace closet. The court awarded $105,000 to each Plaintiff.

Kocsis appeals, asserting the judgment must be reversed for several reasons, which we group into five main contentions: (1) the court erred by admitting the expert testimony of Plaintiffs' expert, Gidon R. Vardi, Ph.D.; (2) the judgment is not supported by substantial evidence; (3) the court prejudicially abused its discretion by excluding or limiting the testimony of her key witnesses; (4) the court imposed unfair and arbitrary time limitations that prevented her from presenting her case; and (5) the court erred by denying her motion to bifurcate and later dismissing her cross-complaint against a defaulted cross-defendant, Andrew "Junior" Calderon.

We find these contentions lack merit. The trial court acted within its discretion in finding Dr. Vardi qualified as an expert. The judgment is supported by substantial evidence, namely Dr. Vardi's expert opinion on causation and Kocsis's own admission that she had been notified of a "loose wire" in the furnace area but failed to address it. The court also acted within its discretion in its exclusion of certain evidence and in its management of the trial time and proceedings. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I.

THE FIRE AND THE RESULTING LAWSUIT

Kocsis owned a fourplex in which Plaintiffs were long-time tenants, residing in Unit A. In the early morning hours of January 3, 2019, a fire broke out. Plaintiffs were asleep in their second-story bedroom when Moreno awoke to the smell of smoke. When they opened the bedroom door, they were repelled by "a lot more smoke" from the hallway, making the stairs impassable. Their only escape route was out the second-story bedroom window.

Hernandez first helped Moreno out the window, lowering her as far as he could before she dropped to the ground. He then hung from the windowsill and dropped, striking his ankle, leg, and tailbone, and hitting his head on a tree trunk, which knocked him temporarily unconscious.

Plaintiffs filed suit against Kocsis for general negligence and premises liability, alleging Kocsis's failure to maintain the property caused the fire. Kocsis filed a cross-complaint against Plaintiffs and Moreno's adult son, Junior, who sometimes stayed at the apartment. Kocsis alleged Junior was responsible for the fire by smoking in the patio area. Junior failed to respond, and Kocsis entered his default.

II.

PLAINTIFFS' CASE AT TRIAL: THE "JUMPED WIRE" THEORY

At trial, Plaintiffs' case centered on the expert testimony of Dr. Vardi, an expert in OSHA safety, building inspection, and electrical contracting. Dr. Vardi testified he had assisted with fire investigations for insurance companies since 1978 and had specifically identified electrical

issues as the cause of fires at least 60 to 80 times. The trial court had earlier denied Kocsis's motion in limine (MIL #3) to exclude his testimony.

Dr. Vardi testified that, based on his inspection of the property, the fire's point of ignition was the furnace closet. He opined to a reasonable degree of certainty that the fire was caused by the improper and illegal jumping of fuses inside the fuse box contained in the furnace closet, which bypassed overload protections and caused the wire to overheat and ignite nearby flammable materials. He also testified that the furnace enclosure itself was noncompliant with building codes, as it used a wood louvered door which allowed the fire to spread rapidly, rather than a one-hour rated fireproof assembly.

To establish Kocsis's notice of the defect, Moreno testified that about a year or two before the fire, the furnace and air conditioner were working intermittently. She called the gas company, and a representative inspected the unit. The gas company representative told her he couldn't fix anything because there was a wire that needed fixing and the owner should get an electrician. Moreno testified she told Kocsis that the gas company representative said there's a wire that shouldn't be there and an electrician is needed to fix it.

Kocsis, in her own testimony, confirmed this. She testified she recalled Moreno telling her about the gas company visit and "something about a loose wire" at least a year before the fire. Kocsis admitted she kept no maintenance log, did not recall ever having the wiring inspected by an electrician, and was not aware of any obligation as a landlord to check the furnace.

III.

DEFENDANT'S CASE AT TRIAL: THE "JUNIOR" THEORY

Kocsis's defense centered on the theory that Junior started the fire while smoking on the patio. Notwithstanding that Junior was the central focus of her theory, however, Kocsis never attempted to depose Junior, did not serve any type of subpoena on Junior, did not list him on her witness list, did not call him as a witness and, as a result, he did not testify at trial. Instead, Kocsis relied on the testimony of three others.

First, Kocsis called Fire Captain Mark Weiss, who was the first to arrive on the scene on the night of the fire. The court limited Weiss's testimony to his percipient observations, as he had not been designated as an expert. Weiss testified that he encountered Junior at the scene, who was "aggressive" and interfering with the firefighters. Weiss also testified that he interviewed Plaintiffs at the scene and they told him that Junior likes to smoke downstairs in the outside patio.

Kocsis then called Sal Rios, another tenant. Rios testified that he sometimes saw Junior smoking on the patio. The court permitted Rios to testify that *during* the fire, Junior said to him, "I am sorry, man. It was my fault. I will go tell the fire department when you see them coming." The court admitted this testimony based on the hearsay exception for excited utterances. The court, however, excluded Rios's testimony about a second, similar statement Junior allegedly made four to five hours later, finding it no longer qualified as a spontaneous statement. The court also excluded Rios's testimony that when he later confronted Moreno about suing Kocsis, he told her it "wasn't [Kocsis's] fault," and Moreno was silent. Kocsis offered this as an "adoptive admission," but the court excluded it.

Finally, Kocsis called Kevin Bernotas, who purchased the property 19 months after the fire. The court permitted him to testify about the purchase price and the general state of the property. However, the court excluded his proffered testimony regarding which specific support beams the city required him to replace. According to Kocsis's offer of proof, Bernotas would have testified that the support beams near the furnace sustained less damage and did not require replacement, while beams further away in the patio did. The trial court excluded this line of testimony, finding it was improper expert testimony on fire damage assessment and that, given the 19-month time lapse, its probative value was minimal.

IV.

VERDICT AND JUDGMENT

After the five-day trial, the court issued a detailed statement of decision and judgment. The court found Dr. Vardi's testimony "highly credible for the most part." It found that "the origin of the fire was the furnace closet and that the cause of the fire was the improper and illegal jumping of fuses inside the furnace closet, which bypassed overload protections." The court explicitly found Kocsis "was negligent in the maintenance of the Property," that this negligence was a "substantial factor in causing harm" to Plaintiffs, and that Kocsis either knew or should have known of the dangerous conditions. The court awarded each Plaintiff $105,000.

Following the trial, the court held a hearing on the status of the defaulted cross-defendant, Junior, and subsequently dismissed the cross-complaint against him with prejudice, finding a judgment against him would be inconsistent with the trial's factual findings. Kocsis timely appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DR. VARDI'S EXPERT TESTIMONY

Kocsis first argues the trial court erred by permitting Dr. Vardi to offer an opinion on the fire's cause, asserting he was not qualified. "While an appellate court may review the trial court's decision [to admit expert testimony], it may reverse only for an abuse of discretion and must uphold the ruling unless ""the evidence shows that a witness *clearly lacks* qualification as an expert . . . ."""" (*People v. Dowl* (2013) 57 Cal.4th 1079, 1089.)

The court's decision to admit the testimony was well within its discretion. An expert is qualified if he has "special knowledge, skill, experience, training, or education" that will assist the trier of fact (Evid. Code,[1] § 720, subd. (a)).

The record provides a sufficient foundation for Dr. Vardi's qualifications. He testified he: (1) has been trained in and assisted insurance companies with fire investigations since 1978; (2) is a licensed electrical contractor; (3) is a certified building inspector; and (4) has specifically identified electrical issues as the cause of fires at least 60 to 80 times. Further, his resume reflected that he was an OSHA trainer on, among other things, fire protection and prevention.

Given that Dr. Vardi's ultimate opinion was that this fire was caused by an electrical defect (a "jumped wire") and exacerbated by a building code violation (a noncompliant "furnace closet" door), his specific, combined

[1] Statutory references are to the Evidence Code unless otherwise specified.

expertise in electrical systems, building codes, and fire investigations was certainly helpful for identifying the cause of the fire. Kocsis's arguments that he was not primarily trained as a fire investigator were certainly relevant to impeaching his testimony, but they ultimately go to the weight of his testimony, not its admissibility. We cannot say Dr. Vardi was clearly unqualified, and thus the trial court did not abuse its discretion in finding him qualified.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGMENT

Kocsis's next contention is that the judgment is not supported by substantial evidence. When reviewing a judgment for substantial evidence, we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) The testimony of a single credible witness, including an expert, may constitute substantial evidence. (*Ibid.*)

Plaintiffs prevailed on their claims for negligence and premises liability. To establish negligence, Plaintiffs were required to prove: (1) Kocsis owed them a duty of care; (2) she breached that duty; (3) the breach was a substantial factor in causing harm; and (4) they suffered damages. (*Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662.) For premises liability, Plaintiffs were required to prove Kocsis owned or controlled the property, was negligent in its maintenance, that Plaintiffs were harmed, and that Kocsis's negligence was a substantial factor in causing the harm. (See CACI No. 1000.) A landlord's duty includes maintaining the premises in a safe, habitable condition, which includes keeping electrical wiring and heating facilities in good working order. (Civ. Code, § 1941.1, subd. (a)(4)–(5); *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1204–1205.)

The trial court's judgment is supported by a solid, reasonable chain of evidence supporting every element of Plaintiffs' claims:

Duty and Control: It was undisputed that Kocsis was the owner and landlord of the property.

Breach and Causation: Dr. Vardi provided a credible expert opinion that the fire originated in the furnace closet and was caused by an "improper and illegal jumping of fuses," which constituted a dangerous condition and a code violation. The record contains evidence of Kocsis's actual notice of this defect. Moreno testified she specifically warned Kocsis that a gas company representative had identified a "wire that shouldn't be there" in the furnace area and that an "electrician is needed to fix it". Kocsis herself admitted under oath that Moreno had informed her about the gas company visit and the "loose wire" at least a year before the fire. Kocsis's failure to repair this known electrical hazard constitutes the breach of her duty and the evidence supports that this breach caused damages.

Damages: It is undisputed Plaintiffs were harmed, suffering physical injuries from their escape and loss of property.

This combination of expert testimony identifying the cause and lay testimony (including Kocsis's own admission) establishing actual notice of the defect constitutes substantial evidence supporting the court's judgment. We are not persuaded by Kocsis's argument that the court's finding it "did not know *who* had 'jumped the wire,' or *when* it had been 'jumped'" is fatal to causation. (Italics added.) The critical point is not who jumped the wires, but instead that Kocsis was aware of the condition but chose not to remedy it. The evidence established the dangerous defect existed for at least a year. The landlord's duty to repair was triggered by her notice of the defect, not by her knowledge of its precise origin.

III.

THE TRIAL COURT'S EVIDENTIARY RULINGS WERE PROPER

Kocsis contends the trial court committed several prejudicial errors by improperly excluding evidence. We review a trial court's rulings on the admissibility of evidence for an abuse of discretion. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) Moreover, any error in excluding evidence must be prejudicial to support reversal. (*Ibid.*) We find no prejudicial abuse here.

A. Captain Weiss and the Fire Report (Exhibit 37)

Kocsis contends the trial court erred by limiting the testimony of Fire Captain Mark Weiss. Kocsis never designated any witness as an expert, and thus Weiss was only allowed to testify as a percipient witness. Kocsis does not dispute that ruling, but instead contends Weiss was improperly limited from offering testimony that would impeach the factual foundation of Dr. Vardi's testimony. An undisclosed expert may be called 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." (Code Civ. Proc., § 2034.310, subd. (b).)

However, the only evidence Kocsis points to is the exclusion of Weiss's fire incident report, which found the cause of the fire to be undetermined, and his proposed testimony that a high percentage of apartment fires are caused by smoking. The report did not undermine any factual basis for Dr. Vardi's opinion, and the testimony about smoking clearly ventured into expert testimony rather than percipient testimony. In any

event, neither of those pieces of evidence were likely to affect the outcome, and thus Kocsis has failed to show prejudice.

B. The Court Did Not Err in Limiting the Testimony of Bernotas

Kocsis contends the court improperly limited the testimony of Bernotas, the subsequent purchaser of the property. She argues he should have been allowed to testify as to which support beams the city required him to replace to show a lack of damage around the furnace. The trial court permitted Bernotas to testify as a percipient witness to the property's condition and the price he paid. However, it excluded his testimony regarding *which* beams were replaced, sustaining objections based on Evidence Code section 352 and improper expert opinion.

"A lay witness may express opinion based on his or her perception, but only where helpful to a clear understanding of the witness's testimony (Evid. Code, § 800, subd. (b)),'i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed.'" (*People v. Hinton* (2006) 37 Cal.4th 839, 889.) We review the court's ruling on lay opinion testimony for abuse of discretion. (*Ibid.*)

The court acted within its discretion. An opinion on fire patterns and structural damage requires specialized knowledge. Kocsis's offer of proof—that since beams *away* from the furnace were replaced but beams *near* it were not, the fire did not start at the furnace—would only be relevant if an expert opined that such a pattern was probative of the ignition point of the fire. That is not something that is a matter of common understanding, and thus it was not admissible lay opinion. Since no expert testified to that theory, the evidence was properly excluded as irrelevant and improper expert opinion.

C. The Court Properly Limited the Testimony of Rios

Kocsis argues the court erred by excluding two key portions of Rios's testimony: (a) a second alleged admission of fault by Junior four to five hours after the fire, and (b) Moreno's silence when confronted by Rios. The court admitted Rios's testimony regarding Junior's first admission of fault under the excited utterance hearsay exception because it was allegedly stated while the fire was still raging. The court excluded the second, later statement, finding it no longer qualified as spontaneous. The court also excluded the testimony regarding Moreno's silence in the face of Rios's statement that Kocsis was not at fault, sustaining an objection under section 352.

To be admissible as a spontaneous statement (§ 1240, subd. (b)), a statement must be made "spontaneously while the declarant was under the stress of excitement" of the event. If the declarant has had time for deliberation and reflection, the exception does not apply. (*People v. Sanchez* (2019) 7 Cal.5th 14, 39–40.)

An adoptive admission requires that a party, with knowledge of a statement, "has by words or other conduct manifested his adoption or his belief in its truth" (§ 1221), and the statement must be one that, under the circumstances, would normally call for a response if the statement were untrue. (*People v. Jennings* (2010) 50 Cal.4th 616, 661.)

The court's rulings were not an abuse of discretion. Regarding the second statement by Junior, four to five hours had passed since the fire began. The court could reasonably conclude that Junior was no longer under the stress or excitement of the fire. Our high court has emphasized that a trial court's discretion "is at its broadest when it determines whether this requirement is met." (*People v. Poggi* (1988) 45 Cal.3d 306, 319.) In any

event, we fail to see how exclusion of the second admission could be prejudicial since the court had already admitted a substantially identical admission.

Regarding the purported adoptive admission, Rios's statement ("Why should we . . . sue [Kocsis] when it wasn't her fault?") was his own opinion, not a factual accusation against Moreno. Moreno's failure to debate Rios's opinion does not manifest an adoption of its truth. It was not an adoptive admission and was, therefore, irrelevant.

IV.

THE TRIAL COURT'S TIME MANAGEMENT WAS NOT AN ABUSE OF DISCRETION

Kocsis argues the trial court imposed "unreasonable, unfair, and indiscriminate time limitations." In particular, she takes issue with the trial court inflexibly enforcing a five-day trial time (notwithstanding her own trial estimate of five to six days), and she complains that the trial court's time tracking was unclear. She notes that she was not able to start her case-in-chief until the fourth day of trial. Plaintiffs respond that Kocsis made her own bed by inefficiently using her time during cross examination of witnesses and through contesting inconsequential procedural rulings.

Ultimately, we need not address the merits of her claims, because she has wholly failed to demonstrate any prejudice from the court's time limitations. She has not identified any evidence that she contends she was unable to introduce as a result of time limitations. We can only reverse errors that are prejudicial. This was not.

V.

THE TRIAL COURT'S MANAGEMENT OF THE DEFAULT PROVE-UP

Kocsis's final contention is that the trial court abused its discretion by denying her motion in limine (MIL #1) to bifurcate the trial and

conduct a default prove-up hearing against Junior *before* the main trial, and by later dismissing her cross-complaint against Junior with prejudice. She argues, "If it were being fair, at some point during the trial, following KOCSIS's submission of *MIL #1* to allow her to conduct the default prove-up, the Trial Court (having already determined that it would otherwise [*sic*] adopting VARDI's causation opinion no matter what)[2] should have given KOCSIS a choice. It should have *either* have [*sic*] granted the prove-up request, *or* offered KOCSIS a trial continuance so that KOCSIS had the option to voluntarily set aside JUNIOR's default, take his Deposition, and then proceed to trial. As it was, the Trial Court led KOCSIS on to believe that she would ultimately have her 'day in court' against JUNIOR."

We have a hard time following the argument. Once the trial court denied Kocsis's MIL #1 to conduct Junior's prove up prior to trial, the court was under no duty to offer Kocsis a choice to set aside Junior's default. The onus was on Kocsis to file a motion to set aside the default if that is what she wanted. Not only did Kocsis fail to file any such motion, but the irony is that *Junior* filed a motion to set aside his default and Kocsis *opposed it*.

Nor do we find any error in the dismissal of the cross-complaint against Junior. Junior's liability, if any, was predicated on the same facts as that of Plaintiffs': i.e., Kocsis's theory that Junior started the fire by smoking. Kocsis failed to establish at trial that Junior started the fire. Junior was entitled to the benefit of the court's factual determinations. (*Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co.* (1960) 184 Cal.App.2d 649, 655 ["The rule is definitely established that where there are two or more defendants and the liability of one is dependent upon that of the other[,] the

[2] Kocsis's implication that the trial court prejudged the case is not well taken.

default of one of them does not preclude his having the benefit of his codefendants establishing, after a contested hearing, the nonexistence of the controlling fact; in such case the defaulting defendant is entitled to have judgment in his favor along with the successful contesting defendant."].) Accordingly, the court did not err in dismissing the cross-complaint against Junior.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

SANCHEZ, J.

WE CONCUR:

MOTOIKE, ACTING P. J.

GOODING, J.