2006 WL 330216

Court of Appeal, First District, Division 5, California.

TRAVELERS INDEMNITY COMPANY, Plaintiff and Appellant,
v.
ALL PHASE FIRE PROTECTION, INC., Defendant and Respondent.

No. A108422.
|
(Marin County Super. Ct. No. CV-015759).
|
Feb. 10, 2006.

Attorneys and Law Firms

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Opinion

GEMELLO, J.

Following a restaurant fire, the restaurant's insurer sued a company that had been hired to clean the hood and exhaust system above the restaurant's grills, alleging that poor cleaning led to a buildup of grease and residue that later caused the fire. The trial court granted nonsuit during trial, based in part on the insurer's failure to present expert testimony to establish the standard of care. Earlier, the court had denied the insurer's motion to augment its expert witness list with such an expert. The insurer appeals from the denial of the motion to augment and the grant of the nonsuit. We affirm.

Factual & Procedural Background

In reviewing a trial court order granting nonsuit, we present the evidence in the light most favorable to Travelers, drawing all legitimate inferences in its favor and disregarding conflicting evidence. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 118; *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) Mindful of that focus, we summarize the facts as follows:

Strawberry Joe's, a Mill Valley restaurant, had a front and a back kitchen, each with its own hood and exhaust systems. The hood and exhaust system for the mesquite grill in the front kitchen rose vertically above the grill and passed through the ceiling, then made a 90-degree turn to a horizontal section that was partially in the attic and partly on the roof, then made another 90-degree turn to a final vertical section that was topped with a fan. The restaurant periodically hired service providers to remove the buildup of grease and residue inside the ducts, which was a fire hazard. The ductwork was cleaned by various companies from 1995 to 1999.

In March 2000, All Phase Fire Protection, Inc. (All Phase) cleaned Strawberry Joe's ductwork. On June 10, 2000, a fire started in the roof area of the restaurant. Travelers Indemnity Company, the restaurant's insurer, sued All Phase in subrogation, alleging that All Phase's negligent cleaning of the ductwork caused the fire.

Brian Simmons and Charles McGruder, All Phase employees, cleaned the ductwork at Strawberry Joe's. They used the dry scraping method, which involved putting a degreasing agent on the interior walls of the ducts and scraping the walls with a sharp tool attached to the end of an extendable pole. Simmons testified that steam cleaning is more effective. McGruder stood on the roof and scraped from the top of the ductwork and Simmons stood on the mesquite grill cooking surface and scraped from the bottom.

If certain areas were inaccessible, it was All Phase's practice to make a notation on the invoice that it was not able to clean all areas due to the configuration of the ductwork. The purpose of the notation was to alert the owner about the possibility of a fire. There were no notations on the Strawberry Joe's invoice.

It is more difficult to clean ducts with angles in them. To clean around a 90-degree angle with the dry scraping method, a worker needs a bendable pole. Ronald Coats,

All Phase's president a the time of the March 2000 cleaning, did not recall whether the company had bendable poles. Mario Paz, an All Phase employee, had bendable poles, but he took them with him when he left the company before the March 2000 cleaning.

Simmons testified that McGruder "would have the flexible pole" at the Strawberry Joe's cleaning and that McGruder was able to scrape the entire horizontal section of the ductwork. McGruder himself did not testify. Simmons testified that he was able to reach through the lower part of the ductwork and up over the 90-degree bend to pull down the residue McGruder had scraped loose from the horizontal section. Simmons was five feet nine inches tall. At his deposition, Simmons had testified that the distance from the hood to the roof was 15 feet.

Generally, All Phase did not use any hot water when they did a dry scrape. They used hot water only when the customer tended to complain, and Simmons had no reason to believe that the owner of Strawberry Joe's was a complainer. At trial, both Simmons and Coats testified that they "believed" All Phase used hot water in a pressure washer at Strawberry Joe's, although at his deposition, Simmons never mentioned that All Phase used a pressure washer to clean the ducts at Strawberry Joe's and nothing on the invoice indicated that a pressure washer was used.

Simmons testified that he was able to stick his head in the ductwork and confirm that McGruder cleaned the horizontal section of the ductwork. At trial, Travelers' expert looked into the horizontal section of the ductwork with a flashlight and said he could only see 15 inches into the duct.

Travelers' theory at trial was that the fire started in the ductwork because an ember landed in grease and residue lining the inner walls of the ducts, and that the grease buildup was caused by All Phase's inadequate cleaning in March 2000 and its failure to notify Strawberry Joe's that the ducts needed to be cleaned again. All Phase's theory was that the fire started outside of the ductwork in the attic, and even if it did start in the ductwork, improper cleaning was not the cause of the grease buildup. Travelers did not present a standard of care expert at trial. After Travelers rested its case, the court granted All Phase's motion for nonsuit because Travelers had not presented sufficient evidence that All Phase was negligent and that such negligence caused the fire.[1]

[1] Travelers subsequently moved for a new trial. The court denied the motion on the same grounds it relied on to grant nonsuit. Travelers states in the introduction to its opening brief that it is appealing from the order denying its new trial motion, but it makes no substantive legal argument about that order independent of its challenge to the court's order granting nonsuit. Therefore, we do not review the court's order denying a new trial. (See *Guthrey v. California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellate court may deny claim on appeal that is unsupported by legal argument applying legal principles to the particular facts of the case on appeal].)

Discussion

I. *Motion to Augment*

The trial court denied Travelers' motion to augment its expert witness list with a standard of care expert. Travelers argues the court abused its discretion in doing so.

A. *Procedural Background*

When the parties originally exchanged expert witness lists in November and December 2003, Travelers identified two experts on the cause and origin of the fire. AAA Fire Protection identified Kevin O'Neill as an expert on service standards regarding fire protection exhaust systems like the one at issue in this case. Travelers called AAA Fire Protection's counsel and asked if O'Neill would express any opinions against the interests of All Phase and was advised that he would. Travelers did not designate its own expert on the standard of care because it understood that O'Neill would testify favorably for Travelers.

Travelers deposed O'Neill on January 15, 2004. On March 3, 2004, Travelers asked opposing counsel to stipulate that it could augment its expert witness list. Travelers explained that it wished to name an additional expert because, "Frankly, I expected AAA Fire Protection Service's expert, Kevin O'Neill, to testify regarding the standard of care and whether All Phase satisfied the standard of care for the industry.... Mr. O'Neill's testimony was different than what I expected." Travelers' proposed a new expert who would testify on the standard of care and whether All Phase satisfied the standard of care. All Phase refused to agree to the proposed stipulation.

On March 16, 2004, Travelers filed a motion to augment its expert witness list. In its moving papers, Travelers argued that no party would be prejudiced by the augmentation because there were still two months before

trial and the time to disclose experts based on the new trial date had not passed. "There is plenty of time for defendants to depose the new expert and prepare for trial." A hearing on the motion was set for April 13, 2004, a few weeks before trial; Travelers did not move for an expedited hearing on its motion.

AAA Fire Protection, Strawberry Joe's and All Phase all opposed the motion. They argued there was nothing surprising in O'Neill's testimony, that it was consistent with the AAA Fire Protection's representations to Travelers regarding his testimony, and that Travelers' failure to designate a standard of care expert was a deliberate tactical decision. They also argued that Travelers had unreasonably waited two months after the deposition to move to augment its expert witness list. Finally, they argued they would suffer prejudice because they had already formulated a pretrial and trial strategy based on the initial expert disclosures.

The court denied the motion, explaining that the declaration of Travelers' counsel did not establish mistake, inadvertence, surprise or excusable neglect, and Travelers had not acted diligently in bringing the motion.

B. *Analysis*

When Travelers made its motion, the Code of Civil Procedure provided that a trial court could grant leave to augment an expert witness list only after determining, *inter alia*, (1) that any party opposing the motion would not be prejudiced; (2) that the moving party either could not have earlier called the expert in the exercise of reasonable diligence or failed to call him due to mistake, inadvertence, surprise or excusable neglect; and (3) that the moving party sought leave to augment promptly after deciding to call the expert witness. (Code Civ. Proc., former § 2034, subd. (k); cf. current Code Civ. Proc. § 2034.620.)[2] "The decision to grant relief from the failure to designate an expert witness is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of manifest abuse of that discretion." (*Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476.)

[2] The pertinent text of the former Code of Civil Procedure section 2034, subdivision (k) was:

> The court shall grant leave to augment or amend 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 concerning the expert or the testimony described in subdivision (f) on all other parties who have appeared in the action.

The trial court did not abuse its discretion in denying the motion. First, the court properly found that Travelers failed to demonstrate reasonable diligence, mistake, inadvertence, surprise or excusable neglect. Travelers relies on *Dickison, supra,* 220 Cal .App.3d 1471, to argue that it established surprise as a ground for augmentation, but it failed to satisfy the standard established in *Dickison,* which holds that a surprise justifying augmentation of an expert witness list is one that could not have been prevented by the exercise of due diligence. (*Id.* at p. 1478.) In *Dickison,* counsel met twice with the expert and discussed specific testimony. (*Id.* at pp. 1476-1477.) At deposition, the expert unexpectedly gave testimony in direct conflict with his earlier representation to counsel. (*Id.* at pp. 1474-1475, 1478.) The appellate court found "no abuse of discretion in the trial court's determination that the change in [the expert's] testimony was a surprise which [the party] could not have prevented." (*Id.* at p. 1478.) In contrast, Travelers never directly interviewed O'Neill, but rather relied on AAA Fire Protection's representations about O'Neill's testimony. Travelers does not specify what those representations were or what specific deposition testimony by O'Neill contradicted those prior representations. Its vague allegations of surprise are insufficient to support its motion to augment.

The trial court acted well within its discretion when it found that Travelers failed to act promptly in seeking to augment its expert list. Travelers took O'Neill's deposition on January 15 but did not file its motion to augment its expert witness list until two months later, on March 16. A hearing on the motion was set for April 13, only a few weeks before trial. Travelers did not seek to shorten time on the motion. Travelers argues that the motion was timely because it was filed more than 50 days before the continued trial date, and expert lists ordinarily are due only 50 days before trial. As Travelers

acknowledges, the pertinent statute requires experts to be designated 50 days before the "initial trial date." (Code Civ. Proc., former § 2034, subd. (c); cf. current Code Civ. Proc. § 2034.230, subd. (b).) Travelers' reliance on *Guzman v. Superior Court* (1993) 19 Cal.App.4th 705 is not well-founded. In *Guzman,* the court held that a trial court abused its discretion in denying a motion to designate a new expert witness that was filed well before a new trial date. (*Id.* at pp. 707-708.) The trial court had not merely continued the trial date, however, but had granted a motion for a new trial. (*Id.* at p. 707.) When a new trial has been granted, the plaintiff may introduce any additional or new evidence on the issues in the case. (*Id.* at pp. 707-708.) Thus, it was an abuse of discretion to deny the plaintiff an opportunity to designate a new expert. (*Id.* at p. 708.) Here, the trial date had simply been continued. Travelers cites no authority allowing parties to designate new expert witnesses based on a continuance. The trial court did not abuse its discretion in denying Travelers' motion to augment.

II. *Nonsuit*

Travelers argues the trial court erred in granting All Phase's motion for nonsuit on the bases of insufficient evidence that All Phase was negligent and that such negligence was the cause of the fire. Travelers contends that expert testimony on the standard of care was not necessary.

"A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff's evidence before presenting his or her case. Because a successful nonsuit motion precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances. [Citation.] A trial court must not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor." (*Carson, supra,* 36 Cal.3d at p. 838.)

"A motion for nonsuit is tantamount to a demurrer to the evidence and presents a question of law: whether the evidence offered in support of the plaintiffs' case could justify a judgment in the plaintiffs' favor. (*Lussier v. San Lorenzo Valley Water District* (1988) 206 Cal.App.3d 92, 98.) "In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the [plaintiff's] evidence all the value to which it is legally entitled, ... indulging every legitimate inference which may be drawn from the evidence in [plaintiff's] favor....' " (*Campbell, supra,* 32 Cal.3d at p. 118, quoting *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583.) "When ... the evidence at the close of the plaintiff's case is so palpably insufficient that the trial court determines that no verdict for plaintiff could be sustained, it is the duty of the court to forestall the cost and delay of further proceedings by granting defendant's motion for nonsuit." (*O'Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729, 746.)

A. *Standard of Care*

Central to the parties' arguments on appeal is a dispute about the *scope* of the standard of care. Travelers' narrow definition of the standard of care encompasses only the specific conduct required of a duct cleaning company during a single service call. The standard of care, it argues, is that a duct cleaning company must completely clean the ducts it is hired to clean or notify the customer that it was not able to do so. By "completely clean," it means simply that the company must clean all parts of the ductwork it was hired to clean. If part of the ductwork is inaccessible, the company must notify the customer because grease or residue left in that section of the ductwork could ignite a fire.

All Phase defines the standard of care more broadly to include the frequency of servicing required by the type and volume of cooking at a particular restaurant. "The need for servicing exhaust ducts above solid-fuel restaurant grills, the frequency of such servicing and the appropriate manner for servicing such systems is an 'esoteric' field, beyond the common knowledge of lay persons."[3]

[3] In the trial court, Travelers raised the issue of the required frequency of cleanings. It argued that a duct system above a solid-fuel cooking system should be inspected on a monthly basis and cleaned as needed, and that All Phase took on the responsibility of alerting Strawberry Joe's regarding the necessary frequency of cleanings. Travelers planned to establish the industry standard regarding the frequency of cleanings through the testimony of All Phase's expert; it failed to elicit that testimony in its case-in-chief. On appeal, Travelers restricts the standard of care to the single issue of whether all sections of the ductwork were cleaned.

In considering the need for expert testimony, the trial court discussed the required frequency and the rate of grease buildup inside the ductwork in connection with both the standard of care and causation. "[I]t's not as though All Phase undertook to keep this thing free of grease. It wasn't like they had a service agreement they would come out as frequently as was necessary for them

to come to keep it free of grease." Discussing causation, the court said, "[W]hat we have here is a cleaning that was done and a fire that occurred ... 85 days later ... [¶] ... [¶] And hundreds of meals being prepared. And there is no evidence to suggest that but for the conduct of the defendants that fire wouldn't have occurred.... [¶] ... [¶][T]his would have been a different case if All Phase had undertaken to service the system on an ongoing basis. If All Phase had said that they were going to keep this ventilation and hood system clean, then there might have been some basis for liability without having to bring in an expert witness, but that did not occur here." Again, at the hearing on Travelers' motion for a new trial, the court described the issues needing expert testimony as, "[H]ow often do they need to come out, and what tools they need to use, and what the thing should look like when they're done, and how long that job lasts before they need to come out again, and who has to call them. [¶] Those are all questions that the average juror wouldn't know."

B. *Need for Expert Testimony*

If an issue is not within the common knowledge of persons of ordinary education, it must be established with expert opinion testimony. (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702.)

The required frequency of restaurant ductwork cleanings and the rate of grease buildup in ductwork are not subjects within the common knowledge of laypersons. Jurors do not commonly have experience with restaurant operations producing 200 meals a day; with the accumulation of grease and residue in commercial-scale ductwork; with the differences in the exhausts of solid fuel and gas or electric grills; or with the probabilities of fire based on the factors of grease buildup within ductwork, the adequacy of filters, and the release of embers while stoking a solid fuel fire.

Travelers' reliance on *Easton v. Strassburger* (1984) 152 Cal.App.3d 90 to support its argument that expert testimony was unnecessary is misplaced. In *Easton*, a homeowner sued a real estate broker when massive earth slides on her property destroyed part of her driveway and caused the foundation of the house to settle, causing cracks in the home's walls and warped doorways. (*Id.* at p. 96.) The homeowner accused the broker of negligence for failing to alert her to soil problems on the property, even though the broker knew the property was partially fill, that floors in the house were uneven, and that netting had been used to repair an earlier land slide. (*Id.* at pp. 97, 106.) The court held that expert testimony was not required to establish the standard of care because "[i]t does not require an expert to explain to the jury the relationship between uneven floors and the possibility of unstable soil, or the relationship between past slide activity and the likelihood or possibility of future slide activity." (*Id.* at p. 106.)

The court in *Easton* also noted that even if expert testimony were required to establish the standard of care, the testimony was supplied by the broker's agents. (*Easton, supra*, 152 Cal.App.3d at pp. 106-107.) In contrast, the testimony of All Phase's representatives was not sufficient to establish the standard of care. Coats testified that the purpose of cleaning the ductwork was to remove grease and residue so as to prevent a fire. He also testified that when he advertised his services to customers, he would tell them they should have their ductwork cleaned to prevent a fire. Both Coats and Simmons testified that if a section of the ductwork could not be cleaned because it was inaccessible, it was the company's practice to inform the restaurant owner by making a notation on the invoice because a fire potentially could start in the section that was not cleaned. Simmons also testified that he and McGruder cleaned the ductwork "satisfactory to cleaning standards, as far as I was trained." None of the testimony addresses the issues of the required frequency of cleanings in light of the type and volume of cooking at Strawberry Joe's or the rate of grease buildup between cleanings. Absent such evidence, the jury could not determine whether All Phase performed an adequate cleaning or whether any deficiency in its performance caused the fire. Further, Simmons' testimony about "cleaning standards" was insufficient to establish a standard of care because he never defined his training standards nor an industry wide acceptance of his standards.

Other cases cited by Travelers are also distinguishable. In *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, the defects in the plaintiffs' homes were so obvious that no expert testimony was necessary to establish the developer's standard of care. (*Id.* at pp. 796-797.) The landscaping included yellow lawns, dead trees and unhealthy plants and the siding on the homes was decomposing, rusting and mildewing. (*Id.* at pp. 788-789.) In *Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, pages 1508-1509, the legal malpractice defendant's conduct demonstrated "a total failure to perform even the most perfunctory research.... [¶] ... [O]ne does not need the testimony of a bankruptcy specialist to establish that it is below the standard of care to advise a client to violate the Penal Code." In *West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal .App.4th 351, pages 353, 358, expert testimony was unnecessary where a minor sued a little league organization because the coach threw

him a pop fly while the sun was blinding the minor's vision. "[T]he motion of the sun and its effects on a baseball field and baseball players are matters of common knowledge, not the proper subject of expert testimony." (*Id.* at p. 358.) Similarly, medical malpractice cases requiring no expert testimony have involved gross or obvious negligence readily apparent to a layperson. (See *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal .App.4th 1289, 1302-1303 [citing cases where an injury occurred to a body part not slated for medical treatment and where the wrong limb was amputated].) The question presented by this case, on the other hand, required a more nuanced analysis of the thoroughness and frequency of cleaning required by a servicing company in circumstances not commonly known to jurors.

C. *Traveler's Evidence*

Travelers argues that, even absent expert testimony, there was sufficient evidence to establish that All Phase was negligent and that its negligence caused the fire.

Travelers contends that it made its case by presenting evidence of a compelling coincidence between the area of the ductwork All Phase arguably was unable to reach and the location of the fire. Specifically, it cites evidence that it was physically impossible for Simmons to reach around the first 90-degree angle in the ductwork,[4] and testimony of its expert pinpointing the origin of the fire in a buildup of grease and residue at exactly that 90-degree turn. The record discloses that Travelers' expert testified that the area of the origin of the fire was "inside of the ductwork, *vertical ductwork*, that extended from the back of the hood behind the fire suppression system to the point of the fire, 90-degree turn inside of the wall." (Emphasis added.) Even assuming the plaintiffs proved that Simmons could not reach up and over the 90-degree angle or that McGruder had no bendable pole to scrape the grease out of the horizontal section, Travelers adduced no evidence that Simmons failed to completely clean the *vertical* section of the ductwork. Nor did plaintiffs provide evidence that a failure to clean the grease and residue from the *horizontal* duct caused a buildup of grease and residue in the *vertical* duct at the 90-degree angle. The testimony of Travelers' expert did not pinpoint the origin of the fire at an area All Phase necessarily needed a bendable pole to reach. Moreover, the trial record includes evidence of other possible causes of the fire, including damaged and dirty filters that Strawberry Joe's failed to change contrary to All Phase's advice, and the natural buildup of grease in the ductwork of a busy restaurant over a solid fuel cooking source. Travelers presented no evidence that a deficiency in All Phase's cleaning of the ductwork was the *probable* cause of the June 2000 fire. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482-483 [to defeat a motion for nonsuit, a plaintiff must present evidence that its theory of liability is more probable than other inferences supported by the evidence].)

[4] Attached to Travelers' opening brief is a diagram of the Strawberry Joe's ductwork above the mesquite grill, which Travelers acknowledges was not an exhibit at trial. We disregard evidence that was not before the trial court.

D. *Conclusion*

The trial court granted nonsuit because Travelers failed to present expert testimony on how well and how frequently a duct cleaning company needed to clean the ductwork in a restaurant like Strawberry Joe's in order to fulfill its duty to the restaurant owner and in order to prevent a fire due to a buildup of grease inside the ductwork. Whether these issues of the frequency of cleanings and the rate of grease buildup are characterized as issues related to the standard of care or to causation, they were issues critical to plaintiffs' case that needed to be proven by expert testimony. Because Travelers failed to present the testimony at trial, the trial court properly granted nonsuit to All Phase.

Disposition

***9** The judgment is affirmed.

We concur: JONES, P.J., and STEVENS, J.

All Citations

Not Reported in Cal.Rptr.3d, 2006 WL 330216