IN THE

Supreme Court of Virginia

RECORD NO. 161339

EMERALD POINT, LLC
and
THE BREEDEN COMPANY, INC.,

Appellants,

v.

LINDSEY HAWKINS, PAUL HARMON,
THOMAS ZAMARIA, and WILLIAM GUIRE,

Appellees.

REPLY BRIEF OF APPELLANTS

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III. REPLY TO PLAINTIFFS' STATEMENT OF THE CASE, MATERIAL PROCEEDINGS BELOW, AND STATEMENT OF FACTS.

The following addresses some, but not all, of the factual statements made in plaintiffs' brief that are not supported by the record. Given the page limitations, defendants are not able to identify all of the misstatements and mischaracterizations.

Plaintiffs' brief starts with a discussion of the expert witness disclosure for plaintiffs Zamaria, Harmon, and Guire. However, on page 2 of plaintiffs' brief, plaintiffs misleadingly combine the witness disclosure for several treating healthcare providers with the disclosure of Dr. Lieberman in a quote separated by an ellipsis. (App. 746-48, 764-66, 784-85). In doing so, plaintiffs suggest a more fulsome disclosure for Dr. Lieberman than was actually made. But even this sleight of hand is insufficient. The joined disclosures still do not contain the opinions and facts testified to by Dr. Lieberman which are the subject of this appeal.

Plaintiffs' brief then quotes a portion of Hawkins' expert witness interrogatory answer and notes that the answer incorporates Hawkins' medical records. However, neither Hawkins' expert witness interrogatory answer, nor her medical records which she claims are incorporated in her answer, disclose Dr. Lieberman's testimony at issue here.

At page 5 of plaintiffs' brief, plaintiffs reference Dr. Lieberman's video deposition which was played at trial, noting that Judge Padrick granted one objection to an answer as being outside the scope of the expert designations. Significantly, plaintiffs omit mention of the 60 enumerated objections to Dr. Lieberman's testimony which were ruled on at a pre-trial hearing. (App. 118-127, 793). Many of those objections, as specifically identified in defendants' opening brief, were made on the basis that Dr. Lieberman's testimony was not contained in his expert designation, and are the basis of defendants' first assignment of error. (App. 118-127, 793).

Plaintiffs' brief inaccurately states that city inspector Allen Moore "flunked the installation of a new furnace ***and the repair of the old flue pipes***" on January 18, 2013. *Appellees' br. 5 (emphasis added)*; *see also Appellees' br*. 18 (erroneously stating Moore, "flunked Morris' work because of 'improper venting'"). Moore testified that he gave a stop work order on January 18, 2013, solely because a permit had not been obtained for installation of the new furnace. (App. 902). Later, on January 23, 2013, after Green Run Heating and Cooling had taken over the work, he saw that the B-vent was not locked and therefore did not pass the inspection of the new furnace that day. (App. 908). He passed

Green Run's work to install the new furnace on January 28, 2013. Moore never testified concerning "the repair of the old flue pipes" as stated in plaintiffs' brief. In fact, Moore had no information about the condition of the vents or firestopping at the time of the CO leaks and made no inspection of the existing vents in the attic that Calvin Morris repaired. (App. 916). He only looked at the newly installed furnace and vents. (App. 915-16). Contrary to plaintiffs' statement, Moore did not flunk Morris' repair of the old flue pipes in the attic. Moore's testimony about work on the new furnace installation was irrelevant and prejudicial.

Plaintiffs' brief inaccurately implies that plaintiffs objected *in toto* to the trial court's order ruling on objections to Dr. Lieberman's testimony. *Appellees' br. 6-7.* Plaintiffs did not, however, object to entry of the order but only "to those objections the court sustained." (App.127).

Plaintiffs' brief inaccurately states that the defendants discarded the furnace "before the Plaintiffs could inspect" it. *Appellees' br. 9.* On the contrary, the furnace sat in storage for approximately 18 months after removal and was available for inspection. (App. 1040, 1077, 1128). During that time, plaintiffs' expert, Lester White, inspected plaintiffs' apartment, but did not ask to see the furnace. (App. 1256). Plaintiffs' counsel sent a letter of representation, but the letter did not identify the

furnace as a potential cause of the carbon monoxide leak and did not request inspection or preservation of the furnace. (App. 75, 808).

Plaintiffs' brief also incorrectly states that the defendants got rid of photographs of the furnace. *Appellee's br. 9.* None of the appendix pages cited in support of that statement mentions photographs of the furnace. No evidence was presented that the defendants ever possessed photographs of the furnace or disposed of photographs. Also, the trial court expressly stated that furnace photos were not the basis of the spoliation sanction adverse inference instruction. (App. 1375).

The brief inaccurately states that Virginia Natural Gas' Charles Basnight, who turned the furnace off and affixed a red tag on November 27, 2012, "noted a 'cracked heat exchanger' in his records. . .". *Appellees' br. 11.* The supporting appendix citations for the statement do not mention Basnight's records or refer to a cracked heat exchanger. Basnight did not open the furnace or look inside where the heat exchanger is located; and he did not make any determination as to the source of the carbon monoxide in the apartment. (App. 844).

Plaintiffs' recitation of Calvin Morris' repair of the attic flue pipe and subsequent testing for carbon monoxide inaccurately suggests that the leak was not fixed and that carbon monoxide continued to leak.

Appellees' br. 12. After Morris repaired the flue pipe, he checked carbon monoxide levels and obtained a reading of 3 ppm, which is not considered to be hazardous. (App. 1125-26, 887). The City of Virginia Beach's code enforcement department's Danny Carlson then inspected the apartment with Morris and they detected no carbon monoxide. (App. 854, 857-58). Carlson authorized the removal of the red tag as the apartment was safe and there was no more evidence of a carbon monoxide leak. (App. 858). Plaintiffs' statement that "the problem was not fixed" is incorrect.

Plaintiffs' statement that defendants' records refer to a cracked heat exchanger improperly suggests that there was evidence that the heat exchanger was in fact cracked. *Appellees' br. 12.* There was no such evidence. Defendants' November 27, 2012 work order stated, "Work Request: VNG red tagged - heat exchanger cracked?" (App. 1390). The reference to a cracked heat exchanger on the work order indicated that it was potentially a problem; however, no one had yet inspected the heat exchanger so it had not been determined to be cracked. (App. 1053-54, 1072, 1123). VNG's Basnight did not open the furnace or look inside where the heat exchanger was located and did not make any determination as to the source of the carbon monoxide detected in the apartment. (App. 844).

The second reference to a cracked heat exchanger is in the defendants' incident report prepared by Mary Hummell, the property manager who obtained the information for the incident report from plaintiffs. (App. 1034). The report states that Virginia Natural Gas reported a cracked heat exchanger. The VNG inspector, Charles Basnight, however, did not open the furnace or look inside, and he did not make any determination as to the source of the carbon monoxide in the apartment. (App. 844). Virginia Natural Gas therefore did not determine that the heat exchanger was cracked. Furthermore, after Morris repaired the flue pipe in the attic, the carbon monoxide levels dropped to zero, thus indicating that the heat exchanger was not the source of the elevated readings. (App. 1100, 1125-26, 1391, 854, 857-58, 861-62).

There is also a mention that VNG found a cracked heat exchanger in the manger's incident report dated January 4, 2013, prepared by Mary Hummell. (App. 1395-96). Basnight was the VNG employee who responded to the apartment on the morning of January 4, 2013 after the carbon monoxide alarm sounded. (App. 834-39, 1381). He found high carbon monoxide readings when the furnace was on. He affixed a red tag to the furnace and opened the windows. (App. 838, 1381, 1200). He did not testify that he examined the heat exchanger or found a cracked heat

exchanger. Furthermore, when the furnace was removed and replaced on the same day, carbon monoxide readings continued at elevated levels (even with the windows open) indicating that the furnace, and therefore the heat exchanger, was not the source of the leak. (App. 1036, 1393-94.) Only after a disconnected flue pipe in the attic from the adjoining apartment was repaired did the CO readings drop to a normal range. (App. 1036, 1393-94). Thus, while references to a cracked heat exchanger appear in a work order and in incident reports, no one inspected the furnace's heat exchanger until it was removed on January 4, 2013, at which time no defects were found. (App. 1055-56, 1058, 1118-121, 1126).

Plaintiffs' statement regarding Virginia Beach Fire Department's Captain Shelly checking the carbon monoxide levels after the furnace was replaced on January 4, 2013 is misleading. *Appellees' br. 16.* While plaintiffs' statement that Captain Shelly "got a reading of 4 ppm" is correct, Captain Shelly testified that there were no safety concerns and that the fire department does not consider a reading of less than 9 ppm to present any safety issue. (App. 879, 882, 884-85, 887, 1385). There is no evidence in the record to support the assertion in plaintiffs' brief that "chronic exposures at lower levels (such as 3-9 ppm)" are hazardous.

Appellees' br. 10.

IV. REPLY TO PLAINTIFFS' ARGUMENT

A. Defendants Timely Objected To Dr. Lieberman's Testimony.

Plaintiffs' argument that defendants waived their objections to Dr. Lieberman's testimony as outside the scope of his designation is wholly belied by the trial court's orders on the subject. On June 17, 2016, the trial court entered an order memorializing rulings from a pre-trial hearing in which defendants objected to Dr. Lieberman's testimony on various grounds, including the objections which are the subject of defendants' first assignment of error. (App. 118-178). Plaintiffs did not object to the entry of the order as being inaccurate in any way or on the grounds that the objections were waived. (App. 127). Plaintiffs noted only an objection to "those objections the court sustained." (App. 127). On February 23, 2017, the trial court corrected the first three words of the order, changing them from "Came this day" to "Came on May 13, 2016," the date of the pre-trial hearing in which the objections were heard and ruled upon. (App. 793).

"It is the firmly established law of this Commonwealth that a trial court speaks only through its written orders." *Environment Specialists, Inc. v. Wells Fargo Bank Northwest,* 291 Va. 111, 118, 782 S.E. 2d 147, 150 (2016); *Davis v. Mullins,* 251 Va. 141, 148, 466 S.E. 2d 90, 94 (1996).

Here, the orders of the trial court demonstrate that defendants objected to the testimony of Dr. Lieberman at a pre-trial hearing on May 13, 2016, and the trial court ruled on the objections at that time. The defendants' objections were largely overruled, and Dr. Lieberman's testimony was played for the jury during trial. Those objections are the subject matter of the first assignment of error.

Plaintiff's reliance on *Galumbeck v. Lopez,* 283 Va. 500, 722 S.E. 2d 551 (2012), is misplaced. In that case, discussions in the trial court regarding the disputed evidence were held off the record at a sidebar conference, and the proffer was recorded after the court adjourned for the day and outside of the presence of opposing counsel. *Id.* at 508, 722 S.E. 2d at 555. By contrast, the trial court in the present action entered a detailed order setting forth the specific testimony of Dr. Lieberman to which defendants objected by transcript page and line number, the basis for each objection, and the court's ruling on each objection. The record is thus sufficient to enable this Court to evaluate and resolve the assignment of error.

Plaintiffs seem to argue that defendants were required to make their objections during Dr. Lieberman's deposition testimony. That is incorrect. Rule 4:7(d)(3)(B) requires a party to raise objections during a deposition if

the objection concerns "errors . . . which might be obviated, removed, or cured if promptly presented . . . at the taking of the deposition." Dr. Lieberman's testimony to facts and opinions which were not disclosed as required by Rule 4:1(b)(4)(A)(i) and the trial court's scheduling order fall outside the scope of this rule. Dr. Lieberman's testimony was either disclosed or not disclosed in accordance with the rule, and objection during the deposition could not cure the error. Thus, defendants' objections on that ground were not waived. Instead, they were presented to the court at a pretrial hearing where the court ruled on them without any objection by the plaintiffs that they were waived. (App. 127).

B. Dr. Lieberman's Undisclosed Testimony.

The plaintiffs' designations for Dr. Lieberman, at best, identify certain topics on which he may offer testimony. The designations, however, fail to disclose the opinions that are the subject of this appeal. The designations do not state that dementia is a long-term effect of exposure to carbon monoxide and that a much higher percentage of people who have been exposed developed dementia later in life. (App. 946-47, 119 at ¶4). They do not disclose a study that 59% of Japanese coal miners still had almost a daily headache 33 years later after the initial exposure. (App. 955, 120 at ¶12). They do not identify testimony comparing the danger of low level

chronic exposure to acute high dose transient exposure. (App. 957, 120 at ¶13). They do not state that plaintiffs had chronic exposure to carbon monoxide that began probably before November. (App. 957-58, 120 at ¶14). They do not disclose comparisons between carbon monoxide and other toxins, such as pesticides, nor do they disclose a morbidity and mortality rate for carbon monoxide exposure. (App. 945-46, 119 at ¶4). They do not disclose the normal level of carbon monoxide in the blood or the level of carbon monoxide that will trigger a UL-rated alarm. (App. 949, 950-51, 119-20 at ¶¶8, 9, 22). They do not identify the mechanism of injury from carbon monoxide. (App. 982, 122 at ¶28). They do not state that plaintiffs inhaled nitrous oxide, sulfur dioxide, or formaldehyde. (App. 959-60, 120-21 at ¶16). There is no mention of personality disturbances, Parkinsonism and Parkinson's disease. (App. 961, 122 at ¶20). They do not state that Hawkins brain was injured. (App. 983, 122 at ¶29). They do not state that Hawkins could no longer work. (App. 981). Indeed, at the time of the disclosure, Hawkins was employed. (App. 235, 241). Nevertheless, all of these opinions were erroneously presented to the jury at trial.

Plaintiffs contend that Hawkins' expert designation incorporated all of Hawkins' medical records contained at pages 420 – 710 of the

appendix. Those records, however, do not reveal Dr. Lieberman's testimony to which defendants' assign error. Plaintiffs do not point to a single record which discloses the facts and opinions testified to by Dr. Lieberman to which defendants assign error.

C. The Trial Court Erred In Granting The Adverse Inference Instruction

1. There was not "substantial evidence" that the furnace was defective.

Plaintiffs' brief incorrectly states that there was substantial evidence that the old furnace was the source of the leak from October 2012 through January 23, 2013. *Appellees' br. 35.* On the contrary, the undisputed evidence was that the carbon monoxide detector in the apartment first alarmed on November 27, 2012, that the source of the leak found in the attic was repaired on that day, that carbon monoxide readings taken after the repair detected no carbon monoxide, and the city inspector authorized the defendants to remove the red tag because the apartment was safe on November 29, 2012. (App. 854, 857-58, 861-62, 858). The alarm did not sound again until January 4, 2013. (App. 1160, 1184-85). The furnace was removed on January 4 and a new one installed on that same day but elevated CO levels continued until another flue pipe leak in the attic was repaired. When the furnace was inspected after removal, no defects were

found. Contrary to plaintiffs' statement, the substantial evidence, indeed all the evidence, was that the old furnace was not the cause of the leaks. And incredibly, plaintiffs go on to argue that the old furnace was a source of CO until January 23, 2013, even though it had been removed and taken out of service on January 4, 2013. *Appellees' br. 35.* Plaintiffs also inaccurately state that when the old furnace was removed on January 4, 2013, CO levels decreased. *Appellees' br. 36.* The evidence was undisputed that after the removal of the old furnace and installation of the new one, carbon monoxide levels were still detected at about 30 to 40 ppm – even with the windows opened. (App. 1036, 1393-94). Thus, plaintiffs' statement that CO levels decreased upon removal of the old furnace, "pointing to the heat exchanger as a problem," is inaccurate.

2. The furnace was not material, defendants acted reasonably, and the spoliation instruction permitted the jury to infer a falsehood.

The plaintiffs failed to satisfy their initial burden of demonstrating that the defendants had a duty to preserve the furnace. The undisputed evidence was that defendants determined that the attic flue pipes, and not the furnace, were the cause of the carbon monoxide leaks on November 27, 2012 and January 4, 2013; after removal, the furnace was inspected and found to have no defects; and defendants stored the furnace for 18

months without a request from anyone to inspect it or preserve it. Thus, defendants should not have foreseen that the furnace would be material evidence, and they had no duty preserve it.

Even if the furnace was material, and defendants had a duty to preserve it, the trial court erred in granting the adverse inference instruction because the defendants did not act with intent to deprive the plaintiffs of material evidence or otherwise act in bad faith. The amicus argues against a *per se* rule that bad faith is required for an adverse inference instruction. However, even under the standard proposed by the amicus, the adverse inference instruction was erroneous in this case.

The amicus brief argues that the determination of whether a sanction should be imposed for spoliation necessarily depends upon the unique circumstances of each case. *Amicus br. 11.* The facts of this case clearly demonstrate that granting an adverse inference instruction was error. Defendants did not intentionally dispose of the furnace to prevent its use in litigation. Neither did defendants negligently dispose of the furnace because the facts were clear that the furnace was not the cause of the leaks.

Under the balancing test proposed by the amicus, it is clear the trial court erred in granting the adverse inference instruction. *Amicus br. 13.*

Defendants (1) had no duty to preserve the furnace because it was not material to threatened litigation; (2) they did not negligently, intentionally or deliberately deprive the plaintiffs of access to relevant evidence; (3) the furnace was not material to issues in the case because it was found not to be the cause of the CO leaks; (4) the absence of the furnace had no prejudicial effect on the plaintiffs because it was not the culprit which caused the carbon monoxide leaks; and (5) the defendants, at the time the furnace was disposed of 18 months after the incident, should not have known that it was relevant to foreseeable litigation.

The effect of the instruction was to permit the jury to infer that had the furnace been available at the time of trial, it would have constituted unfavorable evidence against the defendants, when the furnace was found not defective and not the cause of the carbon monoxide leaks. The jury was thus permitted to infer something that the evidence demonstrated was simply not true. The trial court erred in granting the adverse inference instruction, and the decision below should be reversed.

V. CONCLUSION

For the foregoing reasons, and those stated in defendants' opening brief, the Court should reverse the decision of the trial court and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE

Rule 5:26 has been complied with and a copy of the reply brief of appellants has been e-mailed this 25th day of August, 2017 to

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On behalf of *The Virginia Trial Lawyers Association*

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