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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL – SECOND DIST.

FILED

Aug 15, 2012

JOSEPH A. LANE, Clerk

bfisher Deputy Clerk

HAILEY STONE, a Minor, etc., et al.,

Plaintiffs and Appellants,

v.

HOT DOGGER TOURS, INC.,

Defendant and Respondent.

B228603

(Los Angeles County
Super. Ct. No. EC048419)

APPEAL from the judgment of the Superior Court of Los Angeles County. Laura A. Matz, Judge. Affirmed.

Law Offices of Eric Bryan Seuthe & Associates and Eric Bryan Seuthe for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffrey A. Miller, Brittany H. Bartold; Cahill & Associates, Sean T. Cahill and Todd C. Samuels for Defendant and Respondent.

* * * * *

Plaintiff and appellant Hailey Stone, heir of decedent Nicholas Stone, appeals the judgment, following trial by jury, in favor of defendant and respondent Hot Dogger Tours, Inc., the entity against whom plaintiff brought a wrongful death action. Plaintiff contends the trial court made multiple evidentiary errors which deprived her of a fair trial. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We briefly summarize the facts germane to the issues raised on appeal.

On the morning of September 16, 2007, Nicholas Stone went for a motorcycle ride with some friends on Angeles Crest Highway, a mountain road with numerous curves that winds through the Angeles National Forest. The weather was sunny, warm and dry. Sometime around 9:00 a.m., just after starting out on their ride up the mountain, Mr. Stone and one of his friends, Christopher Rabino, passed a slow-moving vehicle and drove ahead of the rest of their group.

Near the highway's intersection with Mount Wilson Road, the road is fairly straight for a distance of about two to three blocks. Mr. Rabino saw Mr. Stone, who was ahead of him by a few bike lengths, lose control of his motorcycle on this straightaway, just before entering into the next turn. Mr. Stone was not yet leaning into the turn when his motorcycle just "went down." With Mr. Stone still "wedged" into the motorcycle, the motorcycle slid along its left side, hit the side of the mountain, and careened back partly onto the roadway. The force of the crash separated Mr. Stone from his motorcycle, and the motorcycle ricocheted off the hillside and collided with Mr. Rabino. Mr. Rabino had been trying to stop, but fell when he was hit by Mr. Stone's motorcycle.

Shortly thereafter, another motorcycle rider, Larry Michael Beaufait, who was riding alone and did not know Mr. Stone and his friends, came upon the scene of the accident. Mr. Beaufait saw two riders down at the end of the straightaway and began preparing to stop to see if he could help. As he drove closer to the downed riders, he lost control of his motorcycle because his tires unexpectedly "lost traction." His motorcycle went into a slide and he came to rest about 25 to 30 feet from Mr. Stone.

Mr. Beaufait owned an automotive repair shop and was familiar with the properties and odor of antifreeze. After the crash, he smelled the distinctive odor of antifreeze. He also noticed that a portion of the road appeared lightly coated with a “slippery” or “oily” substance. He even slipped as he attempted to walk across it. Mr. Beaufait walked back down the road a ways to flag down other drivers and warn them to stop.

Mr. Rabino was knocked unconscious from the crash. Mr. Rabino awoke to his friends, who had caught up and come upon the accident scene, trying to talk to him to see if he was alright. While getting up from the ground, Mr. Rabino smelled antifreeze, and he and several of his friends slipped on the road trying to walk over to assist Mr. Stone. There was no puddling of any liquid on the road, but there was a definite smell of antifreeze and the surface was slippery.

A tour bus owned and operated by defendant and respondent Hot Dogger Tours, Inc., dba Gold Coast Tours, was travelling up Angeles Crest Highway that same morning. Defendant’s employee, Efrem Geary, with 25 years of experience, was driving the bus. Before leaving the yard that morning, Mr. Geary had performed a routine inspection of the bus (designated number 575) which took approximately 30 to 35 minutes. The bus was approximately 45 feet long and carried 57 passengers, although it was empty at the time, as Mr. Geary was on his way up the mountain to pick up a load of passengers.

In the vicinity of Mount Wilson Road, Mr. Geary noticed, in his rear view mirror, what appeared to be white steam or smoke coming from the rear of the bus. Within about a mile, Mr. Geary was able to pull into a turnout large enough to accommodate the bus. While checking the engine, Mr. Geary discovered the radiator fluid was down approximately a gallon and a half, so he replaced that amount with water. He also discovered a small crack (perhaps an eighth of an inch) in the bottom radiator hose spraying fluid onto the hot engine, which he believed had caused the smoke or steam. A company mechanic eventually arrived to repair the bus.

A bicyclist riding up the highway that morning saw bus number 575 in the vicinity of Mount Wilson Road. The bus was emitting a “large cloud” of smoke from the back

end. He did not notice any slippery substance on the highway or any fluids dripping or spraying onto the highway from the bus, and he was able to continue his bike ride up the highway without incident.

Officers from the California Highway Patrol, including Michael Morrin and Curtis Stout, received radio dispatches to report to the scene of an accident where three motorcyclists had crashed. Officer Morrin arrived at the scene around 9:20 a.m. and observed emergency medical technicians from the United States Forest Service tending to the downed riders. After ensuring that traffic was under control, Officer Morrin began to document the accident scene, including taking photographs and measurements. He received another radio broadcast of a disabled tour bus farther up the highway. Because witnesses had reported some sort of fluid spill on the road, Officer Morrin went to the location of the bus and spoke to Mr. Geary. He also looked at the engine and observed no fluid spills or fluid trails between the accident scene and the bus location. Officer Morrin returned to the scene and continued to document the accident site. He observed no fluids or substances on the road, located no slippery areas on the road, no slippery substances on the motorcycles, and found only one area of staining on the road, which was not wet or slippery to the touch.

Mr. Stone was pronounced dead at the scene and his body transported to the County of Los Angeles Department of Coroner (Coroner). An autopsy was performed on September 18, 2007, with “multiple blunt force trauma” found to be the cause of Mr. Stone’s death. Blood samples were taken to be tested for various substances. The toxicology report included in the autopsy report indicated that Mr. Stone’s blood had tested positive for the presence of marijuana.

Plaintiff and appellant Hailey Stone is the minor daughter and sole heir of Nicholas Stone. Plaintiff, through her mother acting as guardian ad litem, filed this action for wrongful death against defendant, primarily alleging that defendant negligently failed to maintain and inspect bus number 575, resulting in the broken radiator hose and the spilling or spraying of radiator fluid or antifreeze onto the highway, which caused Mr. Stone’s fatal accident.

The action proceeded to a jury trial in July 2010. Defendant's primary defenses were that it was not negligent in the maintenance of its buses and that the accident had not been caused by a slippery substance on the roadway, but rather was caused by Mr. Stone operating his motorcycle under the influence of marijuana. In support of the defense that Mr. Stone was reckless in operating his motorcycle that morning, defendant sought to introduce the toxicology report from the Coroner's office, expert testimony from its retained expert, Dr. Herbert Moskowitz, regarding the effects of marijuana on the human body, and the percipient testimony of Mr. Rabino that he and Mr. Stone had been smoking marijuana before the motorcycle ride.

Plaintiff brought several motions in limine to exclude the toxicology report and other evidence of marijuana use by Mr. Stone. As to the toxicology report, the trial court denied plaintiff's motion, ruling that defendant could attempt to establish a proper foundation for the admission of the report under the official record exception to the hearsay rule. As to Mr. Stone's use of marijuana, the court granted plaintiff's motion to exclude testimony of his previous use to show habit or custom, but permitted defendant to offer evidence to show Mr. Stone drove recklessly or negligently on the day of the accident.

During trial, defendant called Brian Waters, a criminalist with the Coroner's office, to lay a foundation for the toxicology report as an official record. The trial court denied plaintiff's request to hold a hearing on the foundational elements for admission of the report outside the presence of the jury. Under questioning by both defense counsel and counsel for plaintiff, Mr. Waters explained that he was a senior criminalist with the Coroner's office, primarily engaged in performing tests and analyses on postmortem blood and tissue samples taken from autopsies, and that he is the criminalist responsible for performing marijuana testing. Mr. Waters also testified to the certification of the Coroner's lab, the protocol of the Coroner's office for the collection of samples and transmission to the toxicology department for testing, the protocol for preparation of reports, his standard procedure of calibrating instruments before running tests or "runs" and his procedure for multiple "runs" for accuracy. He also confirmed that he prepared

his report of the tests performed on Mr. Stone on October 4, 2007, the results of which were accurately incorporated into the final toxicology report prepared, according to protocol, by a supervising criminalist in the Coroner's office.

Later, during the cross-examination of Mr. Rabino, defense counsel asked when Mr. Stone left Mr. Rabino's home the night before their motorcycle ride, and Mr. Rabino said probably around 5:30 or 6:00 p.m. Defense counsel then inquired whether Mr. Rabino saw Mr. Stone smoke marijuana that day. Over defense objection, Mr. Rabino was allowed to answer "yes," that they had all smoked marijuana that day, and that he believed Mr. Stone had smoked it from a glass pipe. In a follow-up question, Mr. Rabino denied seeing Mr. Stone smoke any marijuana the following morning before the start of their ride.

Numerous additional witnesses testified during the course of trial, including Willy Wondowski, a bus mechanic employed by defendant, who attested to defendant's maintenance procedures for its fleet of tour buses.

The jury returned a verdict in favor of defendant, answering the first question of the special verdict form in the negative. Question 1 read: "Were defendants HOT DOGGER TOURS, INC. dba GOLD COAST TOURS and/or EFREM JAMAL GEARY negligent?" The jury answered no, never reaching any other questions, including whether or not Mr. Stone had been negligent. Judgment was entered in defendant's favor accordingly. Plaintiff then moved for a new trial, which was denied. This appeal followed.

DISCUSSION

1. Admission of the Toxicology Report

Plaintiff raises several contentions regarding the admission of the toxicology report. Plaintiff argues the court erred (1) in finding that the foundational requirements for admitting the report as an official record under Evidence Code section 1280 (section 1280) were satisfied; (2) in conducting the Evidence Code section 402 hearing regarding the foundational requirements in the presence of the jury; and (3) in allowing Brian Waters to give expert testimony to establish the foundational requirements when Mr.

Waters had not been designated by defendant as either a retained or non-retained expert. We conclude the court did not abuse its discretion in admitting the toxicology report.

a. Foundational requirements

The toxicology report (exhibit 218-11) was admitted as an official record under section 1280. The trial court is vested with “broad discretion” to determine whether a party has established the foundational requirements of section 1280. (*People v. Martinez* (2000) 22 Cal.4th 106, 120 (*Martinez*).) “A reviewing court may overturn the trial court’s exercise of discretion ‘ “only upon a clear showing of abuse.” ’ [Citations.]” (*Ibid.*)

Section 1280 provides: “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.”

Plaintiff concedes the first element of section 1280 was satisfied. However, plaintiff contends the timeliness and trustworthiness elements were not established, that the toxicology report should not have been received as an exhibit, and defendant’s expert, Dr. Moskowitz, should not have been allowed to discuss it, or rely upon it, in expressing his opinions before the jury.

On the timeliness element, plaintiff argues not only that the report admitted as exhibit 218-11 was not the report generated by Mr. Waters on October 4, 2007, but also that Mr. Waters’s report was prepared more than two weeks after the September 18 autopsy, and that such a lapse of time does not satisfy the requirement that an official record be made “at or near the time of the act, condition, or event” in order to be admissible.

The Supreme Court has explained that “the timeliness requirement ‘is not to be judged . . . by arbitrary or artificial time limits, measured by hours or days or even

weeks.’ [Citation.] Rather, ‘account must be taken of practical considerations,’ including ‘the nature of the information recorded’ and ‘the immutable reliability of the sources from which [the information was] drawn.’ [Citation.] ‘Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the [hearsay] exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory.’ [Citation.]” (*Martinez, supra*, 22 Cal.4th at p. 128.)

In *Lee v. Valverde* (2009) 178 Cal.App.4th 1069 (*Lee*), the appellate court reversed the trial court, finding it had abused its discretion in refusing to admit a forensic report as an official record on the grounds the report did not meet the timeliness requirement of section 1280. The court explained that while the certified copy of the report presented as evidence bore a later date (reflecting the time it was printed from the lab’s database), the report nonetheless duly indicated that the analysis of the blood sample was *performed and reported* on the same day, defeating any claim that the analyst’s reported test results were not made at or near the time he or she performed the analysis. (*Lee*, at pp. 1078-1079.)

Lee relied in part on *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210 (*Miyamoto*), another case where the trial court was reversed for rejecting a lab report proffered as an official record for lack of evidence showing its timeliness under section 1280. “That the results were later retrieved and incorporated into a formal written report, that the report was later reviewed by a second employee of the Lab, that the report was later certified by the analyst who ran the test, and that the report of all these events was printed at some later date for use at the DMV hearing does not alter the fact that the test results were recorded at the time the test was performed.” (*Miyamoto*, at p. 1221.)

The same rationale applies here. Mr. Waters testified that he completed his testing of Mr. Stone’s blood sample for the presence of marijuana and generated his report on the same day: October 4, 2007. He further attested to the protocol at the Coroner’s office for the follow-up review of his report, as well as the preparation of the final toxicology report

by the supervising criminalist incorporating all of the toxicology testing to be attached to the autopsy report. And, he confirmed that the test results included in that final report, bearing the date October 17, 2007, and submitted as exhibit 218-11, matched his test results of October 4, 2007.

In this case, just as in *Lee* and *Miyamoto*, there was no danger from “lapse of memory” because the results of the analysis were duly reported by Mr. Waters on the same date he performed the analysis. The later incorporation of his results into a final, formal toxicology report does not reflect negatively on the timeliness of Mr. Waters’s report or render exhibit 218-11 untimely for purposes of section 1280. (*Lee, supra*, 178 Cal.App.4th at pp. 1078-1079.) Plaintiff’s argument Mr. Waters’s analysis is suspect because it was performed over a week after the autopsy was performed and the specimen was collected is not persuasive. Mr. Waters attested to the secured, cold storage of the samples in the toxicology department. Plaintiff has failed to show the trial court abused its discretion in finding the timeliness element was satisfied.

As to the trustworthiness element, plaintiff contends there was inadequate evidence from which the court could deem exhibit 218-11 trustworthy, as there was evidence casting doubt as to the accuracy of the report. Plaintiff argues the autopsy report, of which exhibit 218-11 was a part, documented an inaccurate height and weight for the decedent and also included two different personal inventory lists. Plaintiff further argues that Mr. Waters did not provide detailed testimony explaining, for instance, the manner in which marijuana testing is performed at the Coroner’s office, whether there are generally accepted protocols in the industry, whether there are generally accepted calibration requirements for the testing of equipment, and whether Mr. Waters’s calibration of his equipment met those requirements.

Section 1280 gives the trial court discretion to deem an official record trustworthy if there is sufficient evidence as to the “sources of information and method and time of preparation” reflecting positively on the trustworthiness of the document. (§ 1280, subd. (c); see also *People v. Parker* (1992) 8 Cal.App.4th 110, 116.) During initial discussions with the parties as to the potential admissibility of the report, the trial court correctly

explained to defense counsel that the official certification of the report as a true and correct copy was insufficient to establish the trustworthiness element.

Thereafter, defendant proffered the testimony of Mr. Waters to establish the foundation for the report and the manner in which it was prepared. Mr. Waters stated he was a senior criminalist with the Coroner's office and had worked there for seven years, with his main duties being forensic postmortem toxicological analysis and collection of evidence. Mr. Waters explained that the Coroner's office is an accredited toxicology lab with the American Society of Crime Laboratory Accreditation Board. He explained the office's general procedures of performing an autopsy within two to three days of a decedent being brought into the office, and of completing all toxicology testing within one month thereafter. Mr. Waters conceded there may be some variation in the amount of time autopsies and tests are completed due to the caseload of the office at the time.

Mr. Waters explained the protocol for collecting blood and other specimens during an autopsy. He stated that the medical examiners work on one body at a time to eliminate cross-contamination, and that samples are preserved in jars or test tubes, which are labeled with the coroner case number and decedent's name, if known, the type of specimen, the date of the autopsy, and the date and time of collection. The samples are then brought up to a secured area in the toxicology lab and placed in refrigerated storage, maintained at four degrees Celsius. The assigned criminalist then performs the requested tests and prepares his or her report of the analysis and results.

Mr. Waters explained that his specialty is the analysis of specimens for the presence of marijuana, that he calibrates his equipment before testing, and that he performs multiple "runs" to verify the results. For additional quality control purposes, his test results are reviewed by another analyst and then the result is input into the office database. Eventually, all of the toxicology test results are incorporated into a final, comprehensive toxicology report reviewed and approved by the supervising criminalist to become a part of the formal autopsy report.

Following Mr. Waters's testimony, the trial court allowed the parties to make a final argument and then ruled that the toxicology report would be received, finding Mr.

Waters's testimony adequate to establish its reliability. In part, the court explained: ". . . I find it reliable enough. This lab is accredited. And this gentleman testified that he calibrates the machines before he does the tests. So the document will be received. You're welcome to argue it's [*sic*] evidentiary value to the jury, but it is received as a public record."

Given the testimony of Mr. Waters, the court was well within its discretion in finding his testimony sufficient to establish the trustworthiness of exhibit 218-11. This was not a situation, for instance, where the sources of information reflected in the official record are third parties under no public duty to accurately report their observations. (See, e.g., *People v. Baeske* (1976) 58 Cal.App.3d 775, 780-781 [trial court properly excluded police report containing statement of third-party witness]; see also *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 705.) And, Mr. Waters provided reasonably detailed testimony regarding the procedures followed at the Coroner's office reflecting on the reliability of the report. To the extent there were some minor discrepancies, the court was correct in explaining that counsel could argue those defects to the jury as bearing on the weight to be afforded the exhibit. Plaintiff has failed to show any abuse of discretion by the trial court.

b. Evidence Code section 402 hearing

In a civil case, the court has discretion to conduct an Evidence Code section 402 hearing in the presence of the jury. (Evid. Code, § 402, subd. (b) ["court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury"]; see also *Mize v. Atchison, T. & S. F. Ry. Co.* (1975) 46 Cal.App.3d 436, 448 [discretionary language of Evid. Code, § 402 authorizes trial court to determine whether hearing on admissibility of evidence is properly held in presence of jury].)

Plaintiff argues the jury was unfairly prejudiced in hearing Mr. Waters's testimony regarding the request for and performance of toxicology tests as part of the autopsy performed on Mr. Stone, and that the court should not have allowed such allegedly inflammatory testimony to establish the foundation for a document, the admissibility of which was in question. Even assuming for the sake of argument that plaintiff could show

it was an abuse of discretion to allow the jury to hear the foundational testimony before the court ruled on the admissibility of the report, plaintiff has failed to show reversible error.

The potential for prejudice existed only if the court ultimately ruled the report inadmissible. Because the toxicology report was properly admitted, the jury would have heard that foundational testimony and no unfair prejudice can be established.

c. Testimony of Mr. Waters

Mr. Waters was identified on defendant's witness list as an employee of the Coroner's office. Defendant did not list Mr. Waters as a retained or nonretained expert on its pretrial expert designation pursuant to Code of Civil Procedure, section 2034.260. Plaintiff is correct that failure to properly designate an expert, including a nonretained expert, in accordance with the statutory requirements prevents calling that expert to offer opinions at trial. (Code Civ. Proc., § 2034.300; see also *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1423.) But plaintiff is not correct in contending that Mr. Waters testified as an expert.

Mr. Waters testified as a percipient witness, based upon his own personal knowledge and personal observations, to lay a foundation for the admissibility of the toxicology report, including how and when such reports are generated at the Coroner's office, when he performed his testing and generated his report, and the protocol regarding incorporation of his test results into the final toxicology report offered as exhibit 218-11. Plaintiff has failed to show error.

2. Admission of Testimony Regarding Marijuana Use

Plaintiff contends the court committed error in allowing defendant to elicit from Mr. Rabino that he and Mr. Stone smoked marijuana at his home on the afternoon and evening of September 15, less than 24 hours before the motorcycle ride and Mr. Stone's fatal accident. Defendant argues that plaintiff waived the issue by failing to cite supporting legal authority.

We agree plaintiff has failed to support this contention of error with argument and citation to relevant legal authority, and we therefore may treat it as waived. (*McComber*

v. Wells (1999) 72 Cal.App.4th 512, 522-523; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.) Nevertheless, we briefly discuss the contention on its merits.

The questions directed by defense counsel to Mr. Rabino were minimal, including how late Mr. Stone was at Mr. Rabino's home the evening before their ride, whether Mr. Stone smoked marijuana that day, and whether Mr. Rabino had seen Mr. Stone smoke marijuana the next morning before they started out on their ride. Defendant's proffered expert toxicologist, Dr. Moskowitz, was prepared to offer an opinion that the smoking of marijuana within less than 24 hours before the accident was relevant to the levels of marijuana found in Mr. Stone's blood sample, and the degree to which Mr. Stone's motor skills and judgment would have been impacted. Mr. Rabino's testimony was not elicited to show that Mr. Stone had a habit of smoking marijuana or as improper bad character evidence. The court did not err in allowing Mr. Rabino's testimony in this regard.

3. Cumulative Error

Because we find no error in the evidentiary rulings challenged by plaintiff, we need not discuss plaintiff's final argument regarding alleged cumulative error.

DISPOSITION

The judgment is affirmed. Defendant and respondent Hot Dogger Tours, Inc., shall recover its costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.