

STATE OF MICHIGAN
COURT OF APPEALS

ACORN WINDOW SYSTEMS, INC., and
FIREMAN'S FUND INSURANCE COMPANY
OF WISCONSIN,

UNPUBLISHED
August 12, 2003

Plaintiffs-Appellees,

v

DETROIT EDISON COMPANY,

No. 229496
Wayne Circuit Court
LC No. 97-712809-NZ

Defendant-Appellant.

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant Detroit Edison Company appeals as of right a judgment entered in plaintiffs' favor following a jury trial. This action arose out of an incident on April 29, 1996, when one of defendant's electrical poles failed and caused a catastrophic fire at plaintiff Acorn Window Systems' distributing warehouse. Plaintiff Fireman's Fund Insurance Company of Wisconsin was Acorn's insurer and paid a substantial sum to Acorn to settle the insurance claim. Defendant admitted negligence and proximate cause, but defended plaintiffs' claims by arguing that the claimed damages were excessive and that Acorn was comparatively negligent for most of the damages because it failed to install various fire prevention or fire safety devices, such as an automatic sprinkling system, a smoke or fire detection system, and various other fire safety devices. The jury attributed five percent comparative negligence to Acorn. Defendant now appeals as of right. We affirm.

I

Defendant first argues that the trial court committed instructional error when it refused to give the standard jury instructions on proximate cause, SJI2d 15.01 and SJI2d 15.03.¹ Claims of instructional error are subject to de novo review. *Keywell & Rosenfeld v Bithell*, 254 Mich App

¹ Defendant also argues that the trial court improperly failed to give SJI2d 15.05. This issue is waived because, at trial, defendant specifically agreed that SJI2d 15.05 did not apply to the case. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); see also *Roberts v Mecosta General Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002).

300, 339; 657 NW2d 759 (2002); *In re Flury Estate*, 249 Mich App 222, 225; 641 NW2d 863 (2002). “When a party so requests, a court must give a standard jury instruction if it is applicable and accurately states the law.” *Chastain v GMC (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). There is no error requiring reversal, however, if the trial court fairly and accurately conveys the applicable law and the parties’ theories. *Id.*; *In re Flury, supra* at 225-226.

We find no merit to defendant’s claim that reversal is required because the trial court refused to give SJI2d 15.01 and SJI2d 15.03. Prior to trial, defendant admitted negligence and proximate cause. In this regard, the lower court record contains numerous admissions by defendant regarding these issues. For example, defendant’s June 1, 1999, trial brief states in pertinent part:

Defendant, Detroit Edison Company (“Edison”) admits that the fire was caused by its ordinary negligence; however, EDISON will offer evidence that: (1) Plaintiffs are grossly overstating their damages; (2) Plaintiffs’ were comparatively negligent and/or failed to mitigate their damages, thereby severely exacerbating their losses, by failing to take reasonable measures to protect their property under the circumstances.

* * *

In short, the “comparative negligence” in the instant case does not pertain to causing the accident. By its admission of liability, Defendant will concede that it was 100% responsible for starting the fire. The only remaining issue is the amount of Plaintiff’s damages, and the portion thereof which would not have been sustained for the plaintiff’s failure to exercise ordinary care to take precautions to protect its property in the event of fire. That “mitigation of damages” issue is logically unrelated to Defendant’s negligence in causing the fire. Therefore, evidence as to the latter is hardly necessary to evaluate the former.

This Court should rule that if defendant admits 100% responsibility for causing the fire, then evidence of its negligence will not be admitted. Evidence at trial would therefore be limited to establishing the amount of Plaintiff’s damages and the portion thereof that would have been avoided had Plaintiff exercised ordinary care for the protection of its property against the possibility of fire.

Furthermore, defendant also specifically agreed to the inclusion of SJI2d 17.01, which informed the jury that it had admitted liability and was responsible for the damages it caused. Thus, under the circumstances, it was undisputed that defendant was *a* proximate cause of damages. A determination of proximate causation with respect to defendant’s negligence was therefore unnecessary. “While causation is generally a matter for the trier of fact, if there is no issue of material fact, then the issue is one of law for the court.” *Holton v A Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). The question to be decided by the jury was not whether defendant’s conduct was *a* proximate cause of damages, but whether some of the claimed damages were caused by the comparative negligence of Acorn in failing to take reasonable steps to protect its property in the event of a fire. Defendant attempted to mitigate its responsibility through a comparative fault defense. The issue of comparative negligence was

fairly and accurately presented to the jury, and the concept of proximate cause was fairly and accurately described to the jury in the context of the comparative negligence claim. The theories of the parties were clearly presented to the jury for determination. Thus, the trial court properly refused to instruct on the issue of proximate cause as it related to defendant's conduct. *Chastain, supra* at 591.

Defendant additionally argues that the trial court erred by refusing to instruct the jury in accordance with its requested special jury instruction. Defendant's requested instruction placed the burden of proof on plaintiffs to establish that defendant's conduct was a proximate cause of all of the claimed damages. However, a defendant attempting to mitigate liability through a comparative fault defense has the burden of alleging and proving that another person's conduct was a proximate cause of damages. *Holton, supra* at 326. Because defendant had the burden of proving that Acorn's conduct was a proximate cause of the claimed damages, defendant's requested special instruction was improper as a matter of law. See also *Lamp v Reynolds*, 249 Mich App 591, 598-599; 645 NW2d 311 (2002). Therefore, the trial court properly refused to give it.

II

Defendant next argues that the trial court erred when it refused to instruct the jury in accordance with SJI2d 6.01. Defendant additionally argues that an even stricter instruction was warranted, specifically, that the jury could presume that missing documents were unfavorable to plaintiffs.

SJI2d 6.01 states that where a party fails to produce evidence under its control, and gives no reasonable excuse for the failure to produce the evidence, a jury may infer that the evidence would have been adverse to that party. SJI2d 6.01 should be given only where (1) the evidence was under the control of the party who failed to produce it and could have been produced by that party, (2) no reasonable excuse for the failure to produce the evidence has been given, and (3) the evidence would have been material, not merely cumulative, and not equally available to the opposite party. [*Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999).]

We conclude that the trial court did not err by refusing to give SJI2d 6.01. Defendant failed to establish that evidence under Acorn's control was not produced, that there were no reasonable excuses for failing to produce certain evidence, and that the evidence in question was material and not equally available to defendant.

Defendant requested the jury instruction on the ground that its expert believed that certain documents should have existed and been produced. There was no showing, however, that the documents identified by defendant actually existed, much less that they were in Acorn's exclusive control and could have been produced. Further, the requisite showing was not made with respect to the missing "Grabscheid Report." The report was not prepared for Acorn Window Systems and was not prepared by an employee of Acorn Window Systems. It was prepared by Acorn's president, Keith Reiter, when he engaged in freelance work for the Grabscheid group several years before the fire. There was no evidence that Reiter should have had a copy of the report in his possession, given that he no longer worked for the Grabscheid

group. And, while the document was at one time in the possession of the foreign investor, whose holding company owns Acorn, there was no evidence that it was still in the investor's possession. It was prepared solely for the purpose of enabling the investor to evaluate whether the assets of Acorn's predecessor company should be purchased out of bankruptcy four years before the fire. Further, the record does not support a conclusion that defendant attempted to pursue the production of the document through a subpoena to the Grabscheid group. In addition, with respect to several other documents that defendant now claims would have supported the giving of SJI2d 6.01, we likewise conclude that there was no showing that the documents were in Acorn's possession or control, that Acorn could have produced them, or that they were not equally accessible to defendant. Thus, the trial court's decision to refrain from giving the adverse inference instruction, SJI2d 6.01, was proper.

Defendant's additional argument that it was entitled to an even stronger, adverse presumption instruction, is waived. Defendant never requested such an instruction at trial. " 'In order to preserve for appellate review the adequacy of jury instructions in a civil case, a party must make a request for a jury instruction before the instructions are given and must object to the alleged error after the jury has been instructed.' " *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000), quoting *Zinchook v Turkewycz*, 128 Mich App 513, 520; 340 NW2d 844 (1983). A defendant's failure to request an instruction waives the issue on appeal. *Id.* More importantly, however, defendant was not entitled to an adverse inference instruction, much less the stronger, adverse presumption instruction.

Finally, we note that defendant also argues that, in the event of a new trial, Reiter should be precluded from testifying as a sanction for impeding discovery and destroying documents. The issue is not raised in the statement of questions presented and, therefore, is not properly before this Court. *In the Matter of BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). In any event, because we are not remanding for a new trial, this issue need not be decided.

III

Defendant also argues that the trial court erred when it awarded prejudgment interest for the entire verdict amount dating back to the filing of Acorn's complaint on April 28, 1997. We review de novo an award of prejudgment interest pursuant to MCL 600.6013. *Farmers Ins Exchange v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002).

In *Phinney v Perlmutter*, 222 Mich App 513, 562; 564 NW2d 532 (1997), this Court clarified that "the complaint" for purposes of the prejudgment interest statute is the "formal complaint filed against the defendant upon whom prejudgment interest is being taxed." (Emphasis added). Thus, where an amended complaint adds a defendant, upon whom prejudgment interest is to be taxed, the date of the amended complaint adding the defendant is used to calculate the interest. *Id.* In *Rittenhouse v Erhart*, 424 Mich 166, 217; 380 NW2d 440 (1985) (Riley, J.), four justices agreed that the term "the complaint" as used in MCL 600.6012 refers to the "formal complaint filed against the defendant upon whom the prejudgment interest is being taxed."

We hold that prejudgment interest commences to accrue, and therefore should be calculated, from the date of the filing of the complaint upon the defendant against whom the judgment has been entered. [*Id.* at 218.]

The cited cases do not support defendant's claim that the time frame for calculating prejudgment interest against a particular defendant is determined by an event other than the filing of the formal complaint against it. On April 28, 1997, Acorn filed its formal complaint against defendant, the entity against which the prejudgment interest was taxed. At the time of the filing of the complaint, the entire amount of damages that was subsequently awarded was at issue. The amended complaint did nothing to change the nature of the case or the amount of damages sought against defendant. Prejudgment interest was therefore properly awarded against defendant for the entire jury award from the date of the filing of the complaint on April 28, 1997.

In considering this issue, we note that defendant's reliance on the "relation back" doctrine and MCR 2.118, is misplaced. In *Phinney, supra*, citing *Rittenhouse, supra*, this Court specifically acknowledged that "the relation back of amendments for other purposes is not analogous to the purposes of prejudgment interest."

IV

Defendant also challenges the trial court's refusal to instruct the jury that any damage award needed to be reduced by the salvage value of items that were removed from the building after the fire. This argument is abandoned on appeal. A party may not give cursory treatment to an issue with no citation to authority. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Moreover, we note that the issue has no merit even if considered. A court must give a standard jury instruction if it is applicable and accurately states the law. *Chastain, supra*. In this case, the jury instruction at issue was not applicable. There was no evidence to support a finding that items removed from the building after the fire actually had any salvage value. While employees were observed removing items, no one testified with regard to what merchandise was removed, whether it was damaged or operational, and whether it had salvage value. The record also does not support defendant's claim that items removed from the building were included in the claimed damages. Defendant could have offered testimony with respect to salvage value, assuming that such evidence existed. It had ample opportunity to depose employees and determine what was removed and whether it had any value. A trial court is entitled to a degree of deference with respect to whether the evidence supported a particular jury instruction. *Keywell & Rosenfeld, supra*. In this case, the trial court found, and the record supports, that any issue with respect to salvage values was totally speculative. See, generally, *Karbel v Comerica Bank*, 247 Mich App 90; 635 NW2d 69 (2001).

V

Defendant next argues that the trial court made serious errors when it precluded Timothy Sinclair, a real estate expert, from testifying regarding the amount it would have cost Acorn to install a sprinkling system in its building. The qualification of an expert and the admissibility of his testimony are reviewed for an abuse of discretion. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 454; 633 NW2d 418 (2001). MRE 602 provides, in pertinent part, that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 702 provides:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The facts and data on which an expert bases an opinion must be reliable. *Anton v State Farm Mut Automobile Ins Co*, 238 Mich App 673, 677-678; 607 NW2d 123 (1999).

The trial court correctly ruled that Sinclair was not qualified to offer testimony with regard to the cost of installing a sprinkling system in Acorn's building. While he was permitted to testify as a real estate expert regarding the value that a sprinkler system would add to a building, he had no personal knowledge of the cost of installing a sprinkler system. Indeed, he admitted that his testimony in this regard was based on hearsay, not personal knowledge. He had never paid for such a system, never had one installed in a building, and speculated with respect to how and when such a system would be added. Because there was no reliable foundation for Sinclair's testimony that it would have cost Acorn two dollars per square foot to add sprinklers, the testimony was properly stricken. MRE 701; MRE 702; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 412; 516 NW2d 502 (1994).

VI

Finally, defendant argues that the jury's comparative fault finding of five percent is against the great weight of the evidence. In ruling on a new trial motion, the trial court's function is to review whether the overwhelming weight of the evidence favors the losing party. *Phinney, supra* at 525. This Court reviews the trial court's decision for an abuse of discretion. *Id.*; *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). This Court is required to engage in an in-depth analysis of the record on appeal. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). We find no abuse of discretion in this case.

It was undisputed that defendant's negligence caused the accident and resulting fire. It was also undisputed that, when the electrical pole fell, it sent electricity to several parts of the roof and fire ignited in several areas. Defendant did not deenergize the downed power lines until three hours after the fire was reported. The fire department could not fight the fire offensively because the building was energized. Plaintiffs presented expert testimony that, while a sprinkler system could have slowed the spread of fire, it may not have been effective in this case. In addition, it was unknown whether firewalls, sprinklers, or other precautions would have prevented the loss because the fire was a catastrophic event. It was unknown if the massive destruction could have been prevented.

Defendant attempted to convince the jury otherwise and presented expert testimony that buildings with sprinkler systems and other safety devices sustain less damage. Defendant's experts, however, conceded important facts. Detroit's fire investigator testified that if the building was energized, the fire department would have been prevented from aggressive firefighting. He testified that where fires are fought defensively, like in this case, the burning building is usually a total loss. Defendant's expert, Robert Trenkle, was adamant in his opinion that Acorn was not prudent and that it should have had fire-safe files, fire-safe cabinets, firewalls and a monitored fire system. He also testified that a sprinkling system would have made a difference in this case because it would have held the fire in check until the fire department

arrived. He specifically agreed, however, that such a system would probably not have extinguished the fire. In addition, Trenkle was equivocal with respect to the portion of the applicable building code that allegedly required the building to have a sprinkling system. He could not explain why the building passed yearly fire safety inspections if it did not meet building code requirements. He also admitted that a fire on the outside of a roof would not immediately activate a smoke detection system or a sprinkling system.

Our review of the evidence does not lead to a conclusion that the trial court abused its discretion by denying defendant's new trial motion on the ground that the comparative fault verdict of five percent was against the great weight of the evidence. The evidence did not overwhelmingly favor defendant. It was undisputed that defendant's negligence caused the fire, that the fire ignited in several spots on the roof, that defendant did not deenergize its power lines for several hours, that the firefighters were prevented from aggressively fighting the fire, and that defense firefighting usually "writes off" the burning building. The evidence with respect to a sprinkling system and other precautions was disputed. The jury was entitled to weigh that evidence. Because the verdict was not manifestly against the clear weight of the evidence, reversal is not required. *Ellsworth, supra* at 185.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage