IN THE SUPREME COURT OF THE STATE OF NEVADA

L.A. PERKS PLUMBING AND HEATING, INC.,
Appellant,
vs.
BILL MANKE,
Respondent.

No. 49015

FILED

SEP 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order granting a new trial in a contract action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant L.A. Perks Plumbing and Heating, Inc. ("L.A. Perks") remodeled a gas station for respondent Bill Manke. Part of the job entailed burying underground gas and vapor recovery pipes. After the pipes were installed, Manke received a letter written by Washoe County District Health Department employee Michael Ezell indicating that the new piping was not installed in accordance with applicable federal regulations and the manufacturer's requirements, and thus could not be placed into service until the substandard installation was corrected. Without giving L.A. Perks an opportunity to correct the allegedly substandard work, which L.A. Perks offered to do, Manke hired another company to do the remedial work and did not pay L.A. Perks the balance due on the remodeling contract.

L.A. Perks subsequently filed a mechanic's lien and a district court complaint against Manke. Following a judgment on a jury verdict in favor of L.A. Perks, Manke moved for a new trial, which L.A. Perks opposed. The new trial motion was heard by a different district court judge who ultimately granted the motion, essentially concluding that the

08-22829

trial judge had abused his discretion in allowing L.A. Perks' rebuttal expert witness, Ken Stephens, to provide more than rebuttal testimony and actually testifying as a late-disclosed expert in L.A. Perks' case in chief, to Manke's prejudice. L.A. Perks has appealed the order granting a new trial.

The decision to grant or deny a motion for a new trial under NRCP 59(a) rests within the district court's sound discretion and will not be disturbed on appeal absent palpable abuse.[1] After reviewing the parties' briefs and appendices, we conclude that the district court palpably abused its discretion in ordering a new trial.

As an initial matter, our review of the trial transcript indicates that while Manke objected to allowing Stephens to testify as an expert rebuttal witness, he did not object to Stephens testifying out of order.

Having failed to object during trial, Manke waived that argument and thus the fact that Stephens testified out of order could not provide a basis for granting a new trial.[2]

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[1]Krause, Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001).

[2]See Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1235-36 (1978) (stating that to preserve a contention for appellate review, specific objections must be made and citing NRCP 59(a)(7), which allows a new trial due to an error at law occurring at trial and "objected to" by the party seeking a new trial).

Manke also fails to show that he objected to the admission of Stephens' November 2003 letter challenging the health department's authority to regulate vapor lines, so that argument likewise does not provide a basis for granting a new trial. In any event, Manke was not prejudiced by the admission of Stephens' letter as his own witness, Ezell, testified that he had received a copy of the letter and that the Health

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Additionally, we conclude that the trial judge properly allowed Stephens to testify as an expert rebuttal witness. Although Manke complains that Stephens was disclosed as an expert rebuttal witness only a week before trial, Manke himself never disclosed Ezell as an expert witness, instead insisting that Ezell was merely a lay witness testifying about his job. As the trial judge ultimately ruled, however, Ezell was an expert witness because he provided, both in his letter and his testimony, opinions based on his technical or specialized knowledge indicating that the vapor pipes had been improperly installed and that his department was empowered to regulate vapor pipes.[3] Because Ezell was allowed to testify as an expert witness over L.A. Perks' objection in spite of the fact that Ezell had not been disclosed as an expert witness, it was not an abuse of the trial judge's discretion to allow Stephens' late-disclosed expert testimony to rebut Ezell's anticipated testimony.[4]

. . . continued

Department had rescinded the notice of noncompliance as requested in that letter.

[3]See NRS 50.275 (setting forth requirements for expert testimony); Krause, 117 Nev. at 933-34, 34 P.3d at 569 (deferring to the trial court's decision to admit expert testimony if there is no clear abuse of discretion).

[4]See Otis Elevator Co. v. Reid, 101 Nev. 515, 523, 706 P.2d 1378, 1383 (1985) (allowing a plaintiff's expert witness to testify in rebuttal to testimony from a defense expert who had been disclosed only a week before trial); Morrison v. Air California, 101 Nev. 233, 235-36, 699 P.2d 600, 602 (1985) (defining rebuttal evidence as that which explains, repels, contradicts, or disproves evidence introduced by a defendant during his case in chief and stating that the exclusion of proper rebuttal evidence may be error).

Moreover, based on our review of the transcripts and record, we conclude that Stephens properly provided rebuttal testimony. Manke argues that L.A. Perks knew about the letter before trial and also knew that Ezell would be testifying, so Ezell's letter and testimony were not "new" matters that could be rebutted and should have instead been addressed in L.A. Perks' case in chief. Rebuttal evidence, however, can deny an affirmative fact that the opposing party has endeavored to prove and will not be excluded merely because it might have been part of the rebutting party's case in chief.[5] Here, Ezell testified, during Manke's case in chief, that the vapor lines had been buried inadequately and were not installed in accordance with the manufacturer's instructions. Ezell also testified that the county and state governments were authorized by 40 CFR § 280 to regulate vapor pipes connected to an underground storage system. In rebuttal, Stephens testified that (1) vapor pipes have been placed in cement at service stations in the past, (2) nothing in the Smith installation instructions refers to vapor lines, (3) he disagreed with the conclusion in Ezell's letter that 40 CFR § 280 applied to vapor lines, and (4) he had successfully challenged a notice of noncompliance from the health department on the basis that 40 CFR § 280 did not regulate vapor lines. Because Stephens' testimony "explained, repelled, contradicted, or disproved" Ezell's testimony and letter, it was proper rebuttal testimony, even if it could have been provided as part of L.A. Perks' case in chief.[6]

Finally, we conclude that Judge Elliott improperly held that Stephens' testimony "carried" L.A. Perks' case while severely undermining

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[5]Morrison, 101 Nev. at 236, 699 P.2d at 602.

[6]Id.

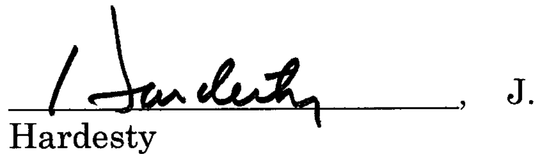
Manke's case. At trial, L.A. Perks provided extensive testimony from its owner, Leroy Perks, which established his credentials and experience and provided substantial evidence to contradict Ezell's opinion that the lines had been improperly buried and that the health department was empowered to regulate vapor lines. Leroy testified that he had long held various construction and engineering licenses, was certified by Smith pipes, had extensive experience in installing Smith pipes in numerous gas station projects for major companies and organizations, had previously encased vapor lines in concrete, knew the technical capacities and requirements for Smith and other pipes, and had been involved in developing Nevada's standards for implementing 40 CFR § 280. Leroy further testified that both the Smith manual and 40 CFR § 280 were silent as to vapor line requirements, so that the health department had acted without authority with respect to vapor lines and had incorrectly interpreted the burial standards.

In contrast, Ezell's own testimony demonstrated his relative inexperience with the Smith piping requirements, as he did not have a Smith manual until his investigation of the Manke job and he did not know the technical capacity of Smith versus steel pipes. And while his letter contended that the vapor lines were improperly installed because they were in direct contact with the concrete above it, Ezell testified that there had been no reported failures of product lines that previously had been allowed by the health department to be encased in cement, that a vapor line had been apparently encased in cement as shown in the Winner's Corner photo, and that a notice of noncompliance had been rescinded after Stephens had challenged the health department's authority to regulate vapor lines. Thus, there was substantial testimony,

besides Stephens' testimony, to support the jury's verdict in L.A. Perks' favor.

Consequently, it appears that district court palpably abused its discretion in granting Manke's new trial motion under NRCP 59(a)(1), (3), and (7), as Manke's substantial rights were not materially affected by any (1) irregularity in the court's proceedings or orders or abuse of discretion by the trial judge that prevented a fair trial, (2) accident or surprise which Manke's ordinary prudence could not have guarded against, or (3) objected-to error in law occurring at trial.[7] Accordingly, we

ORDER the judgment of the district court REVERSED.



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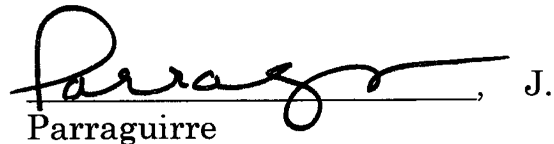

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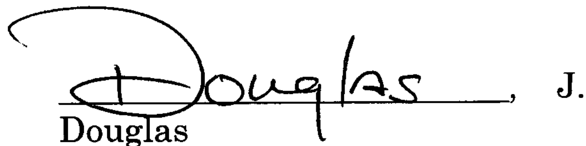

_______________, J.
Douglas

cc: Hon. Steven P. Elliott, District Judge
Hon. Norman C. Robison, District Judge
Cathy Valenta Weise, Settlement Judge
Hardy Law Group
Mark H. Gunderson, Ltd.
Washoe District Court Clerk

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[7]In light of this order, it is unnecessary to address the issue of whether the trial judge, rather than a substitute judge, should have ruled on Manke's new trial motion.