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NO. 51201-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Muhammad Ahsan and Faiza Ahsan,

Appellants,

v.

Sloans Enterprise of Amboy, LLC, Respondent,

**RESPONDENT SLOANS ENTERPRISE OF AMBOY, LLC'S
RESPONSE BRIEF**

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I. INTRODUCTION

This appeal arises from property damage that appellants Mr. and Mrs. Ahsan sustained after respondent Sloans Enterprise of Amboy LLC performed landslide mitigation/excavation work around the Ahsans' home. After a three-day trial in which the jury heard competing expert testimony, the jury returned a defense verdict. The Ahsans now contend that the trial court erred in admitting defense expert testimony falling within the ambit of Evidence Rule 704 (stating that "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact").

Sloans Enterprise respectfully requests that the Court of Appeals affirm the jury's defense verdict. Clearly controlling and settled law supports the trial court's admission of the defense expert's testimony under ER 704—which is the only issue the Ahsans raise on appeal. The Ahsans lodged no objections to the expert testimony, but even if they did, the trial court properly allowed defense expert Mr. Zipper to testify about his opinions.

Likewise, the Ahsans proposed and the trial court properly submitted Washington Pattern Instruction 2.10. Finally, the trial

court's admission of the expert's testimony was clearly within its discretion.

II. NO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion in admitting defense expert opinion testimony under ER 704, in response to plaintiffs' expert opinion testimony. Also, appellants Ahsan proposed, and the trial court properly submitted to the jury Washington Pattern Instruction 2.10.

III. RESTATEMENT OF THE CASE

Appellants/plaintiffs Mr. and Mrs. Ahsan sued Respondent/defendant Sloans Enterprise in July 2016 for negligence allegedly arising from landslide mitigation/excavation work that Respondent Sloans Enterprise performed on December 12, 2015. Clerk's Papers (CP) 1. Sloans Enterprise denied the allegations and asserted affirmative defenses. CP 4-8.

A. EACH PARTY PRESENTED COMPETING EXPERT TESTIMONY.

At the three-day trial, each party presented expert opinion testimony concerning whether Sloans Enterprise breached a duty of reasonable care when it performed landslide mitigation/excavation work around the Ahsans' home. The Ahsans' expert, Mark Swank (an engineering geologist), testified that it was not appropriate for

Sloans Enterprise to perform the excavation work under the existing conditions on December 12, 2015. Verbatim Report of Proceedings (VRP) at 475:16-20 (07/21/17).

Q: In your opinion would the property have suffered the damage that it did suffer if this excavation had not taken place?

A: In my opinion, yes.

Q: It would have or wouldn't?

A: It would not have had the extensive amount of damage.

VRP at 481:14-19. Mr. Swank opined that Sloans Enterprise's excavation work was a "trigger" that caused subsequent soil instability, leading to more damage to the Ahsans' home. VRP at 482:13-484:5. Sloans Enterprise vigorously cross-examined Mr. Swank, VRP at 483-540, then moved for a directed verdict after the Ahsans rested their case.

The trial court denied the motion for a directed defense verdict, stating that the expert opinion evidence presented in Mr. Swank's testimony was sufficient to establish that Sloans Enterprise "should have known that removing the dirt would increase the landslide danger, that there were multiple causes to the landslide

specifically on December 12; however, there was one trigger and that was the excavation. If the jury finds that testimony credible, then that'll be sufficient I think for, for the Plaintiff to succeed, but that's within their, their purview, so I deny your motion." VRP at 552:22-553:7.

Sloans Enterprise called its first witness, defense expert John Zipper (licensed civil and geotechnical engineer). Mr. Zipper testified that he had reviewed Mr. Swank's report, VRP at 565:5-21, and disagreed with his assessments, calculations, and opinions about what caused further landsliding and damage to the Ahsans' home on December 12, 2015. VRP at 565:12-571:7. Referring to the Ahsans' expert, defense counsel asked defense expert, Mr. Zipper:

Q: Ultimately, Mr. Swank said that the excavation that was done, whether it was the rock wall or it was the extent of the excavation into the backyard, the slide debris removal [performed by Sloans Enterprise], that triggered further sliding on the 12th. What's your opinion about that?

A: My opinion is no, it did not.

VRP at 571:8-14. Mr. Zipper then explained the bases of his opinion, VRP at 571:14-576:7, including his opinion that the landslide was

continuing to move before, during, and after Sloans Enterprise's excavation work; a record-setting rainfall triggered the landslide; drainage issues on top of the hill above the Ahsans' home were a factor; poor quality soil was a factor; and the fact that the "whole area slid previously" in 2006 was a factor. VRP at 574:1-2. Mr. Zipper explained all of the efforts that the Ahsans could have made (but did not) after the 2006 landslide to avoid another landslide. VRP at 574:5-575:5.

Finally, Mr. Zipper opined that the December 2015 landslide would have continued to occur, regardless of whether Sloans Enterprise performed excavation work, VRP at 576:17-22, and that it was reasonable for the Ahsans to "at least make some attempt to clear soil from the side of the house that day." VRP at 576:23-577:1. Mr. Zipper testified that a "homeowner's got to do what they can to try to protect their property, and it's a very reasonable thing to do is to try to get the amount of work done that, that can reasonably be done within a short period of time, you know, basically an emergency basis to remove the mud that has already damages these deck posts." VRP at 577:4-11. Defense counsel then asked:

Q: And was there anything unreasonable then about Mr. Sloan going ahead and performing the work that Mr. Ahsan asked him to do?

A: No.

VRP at 577:13-16. The Ahsans lodged no objections to these questions or answers, and proceeded to cross-examine Mr. Zipper at length. VRP at 577:21-603:16. Sloans Enterprise rested, VRP at 603:20, then the parties discussed jury instructions.

B. BOTH PARTIES PRESENTED WPI 2.10 REGARDING EXPERT TESTIMONY.

The trial court noted that both parties submitted identical jury instruction with respect to experts, namely Washington Pattern Instruction 2.10. VRP at 607:13-14; see *also* CP 21 (the Ahsans' expert instruction) and CP 54 (Sloans Enterprises' expert instruction). The Ahsans lodged no objections and took no exceptions to the trial court's final set of jury instructions, which included WPI 2.10. VRP at 642:7-12.

The trial court's instruction to the jury inclusive of WPI 2.10, states as follows:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

CP 116. After this three-day trial, the jury returned a defense verdict on July 13, 2017, first answering “no” to whether Sloans Enterprise was negligent. CP 138-39. That verdict was reduced to a Judgment on August 24, 2017. CP 131.

C. THE AHSANS APPEALED THE DEFENSE VERDICT.

The Ahsans were represented by counsel in the trial court. On September 12, 2017, the Ahsans, now proceeding *pro se*, filed a notice of appeal of the verdict. On May 29, 2018, the Ahsans filed their opening brief, stating that “there was extensive testimony by experts for both sides.” App. Opening Br. at 1. The Ahsans also state that the trial court admitted “a large number of documents, including photos, charts, drawings, invoices, estimates, satellite photos, and the like” without objection by both sides. *Id.* at 3. Further, the Ahsans admit that “[n]either side challenged the expert credentials of the other side, and therefore, they were ‘expert witnesses’ for the purposes of trial.” *Id.*

The Ahsans contend that the trial court abused its discretion under ER 704 by allowing defense expert, John Zipper, to provide an opinion on an ultimate issue. *Id.* at 3-4. They argue that Mr. Zipper's opinion on the "ultimate" issue was inadmissible and invaded the province of the jury. *Id.* at 4, 6.

IV. ARGUMENT

A. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

"[T]rial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014), citing *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889 (2013). "If the basis for admission of the evidence is "fairly debatable," we will not disturb the trial court's ruling." *Id.* citing *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986) (internal quotation marks omitted) (quoting *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)).

"The determination of the admissibility of expert testimony is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *Weyerhaeuser Co. v. Commercial Union Ins.*

Co., 142 Wn.2d 654, 15 P.3d 115 (2000); *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997) (“The trial court has discretion on whether to admit expert testimony; its discretion will be overturned only for an abuse of that discretion.”) *Id.* citing *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991).

In the case at bar, the trial court did not abuse its discretion in allowing each side to present competing expert opinions, and ER 704 expressly allows an opinion on an ultimate issue. It states as follows: “Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” The defense verdict should be affirmed.

B. *PRO SE* LITIGANTS ARE HELD TO THE SAME STANDARD AS ATTORNEYS.

Pro se litigants are held to the same standard as all others; they are bound by the same procedural and substantive law as everyone else. *Bly v. Henry*, 28 Wn. App. 469, 471, 624 P.2d 717, 718 (1980).

C. THE AHSANS' DID NOT PRESERVE THE TRIAL COURT'S ALLEGED ERROR AND THUS WAIVED THEIR RIGHT TO OBJECT TO EXPERT TESTIMONY ON APPEAL.

As a preliminary matter, the Ahsans did not object to defense expert John Zipper's opinion testimony of at trial, including his opinions on ultimate factual issues regarding causation. Now, on appeal, they contend that his testimony was inadmissible. "It is the general rule that in order to preserve error, counsel must call the alleged error to the court's attention with the error can be corrected." *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975); see also *State v. Brush*, 32 Wn. App. 445, 456, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983) ("Generally, the failure to object at trial will operate as a waiver of the right to assert that error on appeal.")

Furthermore, the admission "[t]he admission of expert testimony is within the discretion of the trial court." *State v. Gilcrist*, 15 Wn. App. 892, 893, 552 P.2d 690 (1976), *review denied*, 89 Wn.2d 1004 (1977), and once the basic qualifications of an expert are shown, any claimed deficiencies go to the weight of the testimony rather than its admissibility. *State v. Parker*, 9 Wn. App. 970, 972, 515 P.2d 1307 (1973).

Here, the Ahsans' failure to object at trial operated as a waiver of the right to assert on appeal that the trial court erred.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING COMPETING EXPERT TESTIMONY.

Even if the Ahsans did not waive their right to assert that the trial court erred in admitting Mr. Zipper's expert testimony, it was still wholly within the trial court's discretion to admit his testimony. Evidence Rule 704 plainly states that "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. "ER 704 allows an expert to testify on an ultimate issue the trier of fact must resolve." *Johnston-Forbes*, 181 Wn.2d at 352-53.

This Court's decision in *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 168, 231 P.3d 1241 (2010) states that "[n]o witness may express an opinion that is a conclusion of law or that tells the jury what result to reach." *Id.* citing *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003); 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE §§ 704.5, 704.6 (5th ed. 2007).

Here, Mr. Zipper neither expressed a conclusion of law nor told the jury what result to reach. He simply opined about what did or did not cause the landslide, and whether Sloans Enterprise's landslide mitigation/excavation caused in whole or part further landsliding and damage to the Ahsans' home.

The *Carlton* Court held that “[o]n any other issue, however, ER 704 explicitly provides that ‘[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.’” *Carlton*, 155 Wn. App. at 168 (quoting ER 704).

In *Carlton*, the Court stated that “the prohibition on ‘ultimate facts’ testimony does not prevent [expert] Dr. Burgess from testifying as to the ultimate *factual* issue of causation.” *Id.* citing *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007) (expert opinions that help establish the elements of negligence are admissible); 5B *TEGLAND, supra*, § 704.2, at 260 (“a witness may testify that ... the defendant in a civil case was or was not responsible for the plaintiff's injuries”).

Here, defense expert John Zipper's opinions, including there being nothing “unreasonable” about “Mr. Sloan going ahead and performing the work that Mr. Ahsan asked him to do” was clearly

admissible, regardless of whether it “embraces an ultimate issue to be decided by the trier of fact.” ER 704. As in *Carlton*, Mr. Zipper’s expert testimony addressed factual causation.

The Ahsans’ were concerned about protecting their property and removing damaging soil and mud around their house. However, Mr. Zipper opined that the December 2015 landslide would have continued to occur, regardless of whether Sloans Enterprise performed excavation work, VRP at 576:17-22, and that it was reasonable for the Ahsans to “at least make some attempt to clear soil from the side of the house that day.” VRP at 576:23-577:1.

The trial court submitted WPI 2.10, which instructed the jury that it was not “required to accept” Mr. Zipper’s opinion (or Mr. Swank’s opinion), and conversely was allowed to determine their credibility and to give the proper weight to their testimony, including “the reasons given for the opinion and sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.” CP 116.

In sum, testimony by an expert which embraces the ultimate issue is allowed. *Batten v. South Seattle Water Co.*, 65 Wn.2d 547, 551, 398 P.2d 719 (1965); *Gerberg v. Crosby*, 52 Wn.2d 792, 796, 329 P.2d 184 (1958). Similarly, the trial court may reject expert

testimony in whole or in part. *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975). In *Group Health Coop. v. Dep't of Revenue*, 106 Wn.2d 391, 399 722 P.2d 787 (1986), the Supreme Court quoted an Iowa decision as follows:

Jurors and witnesses have separate and distinct functions. It is the duty of the jury to decide issues of fact. A witness could not usurp that function or invade the province of the jury, by his opinion, if he wished. It may accept it wholly, or in part, or reject it in toto. If the opinion meets with its approval it should accept it. The purpose of court trials is to ascertain the truth and rightness of the matters in issue, and the purpose of expert-opinion testimony is to instruct and aid the jury in ascertaining that truth, whether it be the ultimate fact or some minor evidential fact.

Id. at 399 (quoting *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942)). Here, the jury could accept or reject Mr. Zipper's opinions, which opinions either did or did not aid the jury in ascertaining the truth, "whether it be the ultimate fact or some minor evidential fact."

V. CONCLUSION

Sloans Enterprise respectfully requests that the Court of Appeals affirm the jury's defense verdict. Clearly controlling and settled law supports the trial court's admission of the defense expert's testimony under ER 704—which is the only issue the Ahsans raise on appeal. The Ahsans lodged no objections to the

testimony, but even if they did, the trial court properly allowed Mr. Zipper to testify about his opinions, whether those opinions addressed “an ultimate” factual issue or not. The jury was not required to accept his opinions. Further, the trial court’s admission of the expert’s testimony was clearly within its discretion.

Respectfully submitted this 9th day of July, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the dated noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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DATED this 9th day of July, 2018.



Susan L. Klotz
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