Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-350

APRIL TERM, 2018

Scott B. Naylor, et al.* v. Michael Wood	}	APPEALED FROM:
	}	
Colleen Sylvester* v. Michael Wood	}	Superior Court, Orange Unit,
	}	Civil Division
	}	
	}	DOCKET NOS. 282-12-12 Oecv &
	}	254-11-13 Oecv
		Trial Judge: Timothy B. Tomasi

In the above-entitled cause, the Clerk will enter:

This is a premises liability case brought by residential tenants against their former landlord for carbon monoxide (CO) poisoning. Plaintiffs appeal the jury's verdict in favor of defendant. We affirm.

The following facts were presented to the jury. In March 2009, plaintiffs Scott and Jaimie Naylor signed a residential lease with defendant Michael Wood for a house he owned in Bradford. The house had two bedrooms on the first floor and four on the second floor. Defendant's brother, Matthew Wood, built the house in 2007 for a potential buyer, but the sale fell through. Matthew gave defendant the deed to the property in exchange for a loan. However, he continued to maintain the property himself and defendant never had any direct contact with plaintiffs or visited the house while they were living there.

Matthew was an experienced contractor but was not certified in plumbing, heating, or electrical work. He hired an electrician with whom he had worked on previous projects to install the electrical system, including smoke and CO detectors. The electrician installed a smoke detector in each bedroom and one combination CO/smoke detector near the stairway connecting the first and second levels of the home. The CO detector was about thirty feet from the downstairs bedrooms. The detectors were hardwired and had backup batteries.

After plaintiffs moved in with their family, they complained to Matthew that the detectors were "chirping." Matthew replaced the batteries. About three months later, Matthew was at the house for another issue and found the CO detector hanging from the ceiling with the batteries pulled out. Plaintiffs told him that they took it down because it "went off." Plaintiff Scott Naylor admitted that he had disconnected that unit at one time because "it would stay on constantly." Matthew replaced the unit, and plaintiffs did not report any other issues with the detector after that. Scott Naylor testified that the CO detector functioned during plaintiffs' "family fire drills." One of them would push the button on the CO detector, which caused all the detectors to alarm, and the family would practice evacuating the house.

On November 5, 2010, the Naylors, their four children, and their house guest Colleen Sylvester awoke with symptoms of CO poisoning. They called 911 and evacuated the house. The entire family was transported to the hospital, where they were found to have elevated levels of CO in their blood. No one suffered permanent injury.

The Bradford fire chief, who responded to the house that morning, inspected the CO detector in the hallway and found that the batteries were missing. Matthew Wood testified that he examined the CO detector after the incident and found that it had a disconnected wire. After he reconnected the wire and put in batteries, the detector operated properly when he tested it.

The fire chief found that the PVC exhaust pipe from the gas boiler was dislodged, allowing CO to escape into the house. He observed that a garden hose had been fed through the opening in the wall next to the exhaust pipe. Scott Naylor told the fire chief that he put the garden hose through the opening in order to fill an outdoor swimming pool. He told the fire chief that he had disconnected the exhaust pipe from the boiler and pulled the whole pipe out of the wall opening in order to get the hose through. He could not recall if he had tightened it afterward. However, at trial, Scott Naylor testified that he had installed the hose during the summer of 2009 but denied that he had to remove the vent pipe to get the hose through. He testified that there was a one-inch gap between the pipe and the wall through which he was able to feed the hose. His wife and son also testified that he did not remove the pipe. Matthew Wood testified that he measured the gap and it was between five-eighths and eleven-sixteenths of an inch wide. The fire chief also testified that the gap was "tight" and that he did not believe that a hose would fit through without removing the pipe.

Ed Jarvis, who was living in one of the downstairs bedrooms, testified that about three or four days before the incident, he awoke to the sound of a tool being used in the boiler room. He came out of his bedroom to see Matthew Wood exiting the boiler room. Colleen Sylvester testified that, roughly a week prior to the incident, she was at home recuperating from hip surgery when she heard banging and crashing in the garage area. The man who came out told her that he was fixing things.

Matthew Wood testified that he did not do anything to the boiler, the exhaust pipe, or the air intake pipe between the time the house was built and the date of the incident. He did have the boiler professionally serviced in the fall of 2009 after plaintiffs reported a problem with the heat. In October of 2010, plaintiffs again reported that the heat was not working, and Matthew went to the house to see if it was necessary to call a technician. He looked at the circulating system control box and determined that a switch was off. He switched it on, which fixed the problem. While there, he saw soda cans and a coffee can full of cigarette butts in the boiler room, leading him to suspect that people were "hanging out" in the boiler room. He did not notice any problems with the boiler exhaust pipe on that visit.

The jury found for defendant on plaintiffs' claims of negligence, breach of implied warranty of habitability, breach of covenant of good faith and fair dealing, and consumer fraud. Plaintiffs moved for a new trial, alleging that the verdict was against the weight of the evidence and the court improperly instructed the jury. Plaintiffs also asked the court to award them attorney's fees for defendant's allegedly improper denial of a request for admission. The court denied both motions. This appeal followed.

On appeal, plaintiffs argue they are entitled to a new trial because the verdict was contrary to the weight of the evidence. We review the superior court's denial of their motion for a new trial for abuse of discretion, viewing the evidence in the light most favorable to the verdict. Shahi v.

Madden, 2008 VT 25, ¶ 14, 183 Vt. 320. According to plaintiffs, the evidence clearly showed that defendant violated a safety statute, 9 V.S.A. § 2882, and therefore the jury should have found that he was negligent. Section 2882, which applies to homes constructed after July 1, 2005, provides that "[a] person who constructs a single-family dwelling shall install . . . one or more carbon monoxide detectors in the vicinity of any bedrooms in the dwelling in accordance with the manufacturer's instructions," and such detectors "shall be powered by the electrical service in the building and by battery." 9 V.S.A. § 2882(a). Plaintiffs argue defendant violated the statute by installing only one CO detector that was not "in the vicinity" of the bedrooms.

Plaintiffs' claim that defendant violated § 2882 relies principally on Matthew Wood's testimony that the home's single CO detector was located approximately thirty feet from the downstairs bedrooms. Although they claim that the upstairs bedrooms were even farther away from the detector, there is no evidence of the distance to the upstairs bedrooms besides Matthew Wood's statement that they were "right up there." The jury was not shown a floor plan or other measurements of the house. Plaintiffs presented no evidence of the effective range of a CO detector or any applicable standard for the number or location of CO detectors in residential homes such as this one. Given the vagueness of the statutory term "in the vicinity of" and the sparse record before it, the jury could reasonably conclude that the single, centrally located CO detector was sufficient to meet the requirements of § 2882, and that defendant did not breach his statutory duty.

Other evidence in the record supports the jury's determination that defendant was not negligent. Matthew Wood testified that he understood the law to require one CO detector "central to the bedrooms," and relied on his electrician to comply with the legal requirements for CO detectors. He replaced the original CO detector in 2009 when it appeared not to work, and the new detector had apparently functioned prior to the November 2010 incident. Such evidence tended to show that defendant, through his agent "acted as a reasonably prudent landlord under the circumstances." Bacon v. Lascelles, 165 Vt. 214, 223 (1996).

Moreover, the jury could reasonably have concluded that any breach by defendant of § 2882's requirements was not the proximate cause of plaintiffs' alleged injuries. See Collins v. Thomas, 2007 VT 92, ¶ 8, 182 Vt. 250 (explaining, in action based on alleged breach of safety statute, that liability for negligence still requires "evidence that defendant's unreasonable conduct caused the plaintiff's harm"). Plaintiffs had removed the batteries from the CO detector on more than one occasion and had disconnected it from the wires in the ceiling. After the November 2010 incident, the fire chief found that the unit had no batteries, and Matthew Wood testified that a wire was disconnected in the detector. When he reconnected the wire, the detector functioned properly. There was evidence that plaintiff Scott Naylor may have caused the CO to enter the house in the first place by disconnecting the exhaust pipe from the boiler in order to install the garden hose. The jury could have concluded based on the above record that the actions of plaintiffs, rather than defendant, caused their injuries. Plaintiffs' argument that the verdict was against the weight of the evidence and must have reflected bias against them is therefore without merit.[1]

[1] Plaintiffs claim that the fact that the jury deliberated for one hour demonstrates that the verdict was the result of prejudice against them. In addition, plaintiffs claim "the likelihood of a fair trial was further reduced in the current divisive environment with the tendency to stereotype along social and economic lines." The trial court found nothing in the record to suggest that the jury acted out of an improper motive, nor do we. Further, " '[t]here is no law which requires a jury to deliberate any longer than may be necessary to agree upon a verdict.' " B & F Land Dev.,

For similar reasons, plaintiffs' challenge to the jury instructions also fails. Plaintiffs argue that the court erred by declining to give their requested instruction that the jury had to find defendant negligent if it found that he violated 9 V.S.A. § 2882. Instead, the court described the requirements of § 2882 and told the jury that "if you find that the house leased by the two plaintiffs failed to comply with that law, you may consider that in assessing whether defendant acted with reasonable care on the case."

A party seeking to reverse a jury verdict based on an instruction "has the burden of establishing that the charge was both erroneous and prejudicial." Sachse v. Lumley, 147 Vt. 584, 588 (1987). We find no error in the court's instruction. Under Vermont law, proof that a safety statute has been violated "raises a rebuttable presumption of negligence and shifts the burden of production to the party against whom the presumption operates." Cooper v. Burnor, 170 Vt. 583, 585 (1999) (mem.). However, "[w]hen the party produces evidence that fairly and reasonably tends to support a finding that the presumed fact does not exist, the presumption disappears." Id. Because the existence of a statutory violation was in dispute, and defendant offered ample evidence to rebut any presumption of negligence arising from such a violation, the court properly instructed the jury that it could consider the safety statute without referring to the presumption. See V.R.E. 301(c)(3) (providing that "if the party against whom the presumption operates has met his production burden, the court shall submit the question of the existence of the presumed fact to the jury on the evidence as a whole without reference to the presumption"); Favreau v. Miller, 156 Vt. 222, 233 (1991).

Plaintiffs next argue that the trial court improperly excluded the fire chief's statement that one of his crew members told him at the scene that the CO detector had faulty wiring. They claim that this hearsay statement was admissible under the public records exception, which permits the admission of "records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report." V.R.E. 803(8). The trial court acted within its discretion in excluding the evidence. See Follo v. Florindo, 2009 VT 11, ¶ 19, 185 Vt. 390 (evidentiary rulings reviewed for abuse of discretion). The fire chief's recollection of oral statements made to him by a member of his crew plainly does not qualify as a public record. The statements were unrecorded and were never included in any record, report, statement, or data compilation created by the fire department. They therefore lacked the indicia of reliability required to fall under Rule 803(8). See In re Entergy Nuclear Vt. Yankee Discharge Permit 3-1199, 2009 VT 124, ¶ 36 n.9, 187 Vt. 142 (affirming trial court's exclusion of letter from government laboratory that did not represent official position of agency and therefore "lacked the indicia of reliability needed to fall under the exception of Rule 803(8)"). Moreover, as the trial court found, plaintiffs did not lay a proper foundation and demonstrate that the fire crew had a legal duty to report such information.

Finally, plaintiffs claim that the trial court should have granted their motion for attorney's fees pursuant to V.R.C.P. 37(c)(2), which provides that if a party denies a request to admit the truth of a matter and the requesting party later proves the truth of that matter, the requesting party may ask the court for "the reasonable expenses incurred in making that proof, including reasonable attorney's fees." During discovery, plaintiffs asked defendant to admit "that before November 4, 2010, you had failed to install carbon monoxide detectors in the house that properly functioned."

LLC v. Steinfeld, 2008 VT 109, ¶ 8, 184 Vt. 624 (mem.) (quoting State v. Morrill, 127 Vt. 506, 509 (1969)).

Defendant responded, "Denied." Plaintiffs argued that defendant falsely denied this request because there was only one CO detector in the home.

"[T]he award of sanctions for failure to comply with discovery requests is vested in the sound discretion of the trial judge." In re R.M., 150 Vt. 59, 64 (1988). Here, the court found that defendant's response was not improper because there was never any dispute about the number of detectors, the answer fairly met the substance of the requested admission, see V.R.C.P. 36(a), and plaintiffs could have challenged the response before trial but did not do so. The trial court provided reasonable grounds for its decision and we find no error.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice