Paige v. Safeway Inc.
(2022) 74 Cal.App.5th 1108

Although harmless in this case, prohibiting cross-examination of expert witness regarding published standards established as generally accepted in the scientific community during the expert's deposition was error

FACTS/ PROCEDURE

On a rainy day in November 2017, Debra Paige, slipped while walking in the crosswalk of a Safeway parking lot. She was wearing flip flops. She was sixty years old and suffered severe injuries including a fractured femur. Two months before the fall, Safeway contracted with Black Diamond Paving, an asphalt maintenance contractor in business for 24 years, to restripe the parking lot. Black Diamond was busy so it hired a sub, Sawcor, who specialized in painting parking lots, had been in business for 15 years and done 300-400 parking lot jobs for major retailers. Black Diamond had hired Sawcor previously and never received any complaints. Sawcor used Ennis-Flint traffic paint, which it had used without complaint for years. The head of Black Diamond also testified the paint was what "everybody used" and he had never received a complaint. The Sawcor contractor testified in deposition that although he was familiar with a non-paint product called HotTape, he had never seen it used in a parking lot. He acknowledged during the suit he became aware of a Watco paint that declared itself to be anti-slip paint and was $140 per gallon as opposed to Ennis-Flint's $22 per gallon. However, regardless of the price differential he would not have used the Watco paint because he was unaware of how it would perform. He had also never been involved in a job where grit or sand was added to the striping. He had never heard of someone slipping and falling on Ennis-Flint paint.

Safeway cross-complained against Black Diamond who cross-complained against Sawcor. All defendants shared traffic engineering expert, Dr. Shakir Shatnawi. He was eminently qualified. He had a Ph.D. and master's in engineering specialties and worked for Caltrans for 20 years. He had an expertise in selecting materials for use on pavement and asphalt. He opined the Ennis paint was reasonable and safe. In his deposition, he agreed there were other products and ways to stripe a parking lot but that did not make it unreasonable to use Ennis paint. Further, he examined the crosswalk and it was not slippery when wet and flip flops which are foamy and slippery are not reasonable to wear in the rain given their lack of traction. On cross, he agreed there was an ASTM standard for safe walking surfaces but did not agree this was a mandatory standard binding on Safeway. Plaintiff thereafter withdrew its expert. Safeway filed a MIL arguing as their expert did not rely on the ASTM for his opinions, he could not be crossed on them. The trial court agreed and the jury found for Safeway.

1st APPELLATE DISTRICT

Plaintiff appealed arguing the plain language of Evid. Code, § 721, subd. (b)(3), allowed a party to cross-examine an adverse expert about a publication established as a reliable authority. The appellate court agreed and found the MIL should have been denied. The plain language and the legislative history made it clear even if an expert did not rely on a learned treatise, if it is established as reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice it is admissible. Here, Dr. Shatnawi testified in deposition that ASTM was a reliable authority. Safeway argued it did not qualify as it did not impose mandatory rules on a defendant. The court rejected this argument as the statute does not impose such a requirement. However, the court ruled this was harmless error as Plaintiff did not have an expert testify ASTM was the standard of care, that the crosswalk was not slip resistant or even that Plaintiff had inspected the crosswalk. There was no testimony that had Safeway followed the ASTM standard, she would not have fallen. Given the testimony of the expert and the two experienced contractors, the paint was an appropriate method.