

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**FREIGHT HOUSE LOFTS CONDO ASSOCIATION,
RESPONDENT
vs.**

**VSI METER SERVICES, INC.,
APPELLANT**

DOCKET NUMBER WD75227

DATE: JUNE 25, 2013

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable James D. Youngs, Judge

Appellate Judges:

Division Three: Joseph M. Ellis, P.J., Cynthia L. Martin, J. and Robert M. Clayton III,
Sp.J.

Attorneys:

Jeffrey A. Benoist, for Respondent

Portia C. Kayser, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

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WESTERN DISTRICT**

FREIGHT HOUSE LOFTS CONDO ASSOCIATION, RESPONDENT

v.

VSI METER SERVICES, INC., APPELLANT

WD75227

Jackson County, Missouri

Before Division Three Judges: Joseph M. Ellis, P.J., Cynthia A. Martin, J. and Robert M. Clayton III, Sp.J.

Appellant VSI Meter Services, Inc. entered into a contract with the City of Kansas City, Missouri (“the City”), under which it agreed to install an automated water meter reading system in the basement of Respondent Freight House Lofts Condo Association’s property, the Freight House Lofts. On September 1, 2009, Appellant replaced the existing water meter at Freight House Lofts. On October 18, 2009, a maintenance technician for Respondent noticed water draining from the Freight House Lofts building. He later discovered the basement of the building had flooded and told the director of maintenance over the phone that the right flange of the water meter was leaking. Steve Eden was called to the Freight House Lofts basement soon after the maintenance technician discovered the basement had flooded to determine whether the backflow preventer had caused the leak. He identified the source of the leak as the right side of the water meter. He also reported that the nuts and bolts holding the flanges in place were not very tight and that the ends of the gasket had been cut.

In 2011, Respondent filed a petition for damages alleging a count of negligence against both Appellant and the City, and the case proceeded to trial. Prior to the submission of the case to the jury, the City was dismissed from the case. Ultimately, the jury entered a verdict in favor of Respondent, and the trial court entered its judgment accordingly. Appellant now raises five points of error on appeal.

AFFIRMED

Division Three holds:

(1) Appellant failed to establish that it was prejudiced by the admittance of hearsay testimony from Respondent’s director of maintenance regarding his phone conversations with the maintenance technician that discovered the flooded basement under the excited utterance exception to the hearsay rule. Although Appellant avers that the director of maintenance’s testimony was the only evidence of the source of the water contemporaneous with the flooding, Steve Eden’s testimony and work ticket reiterated the maintenance director’s testimony that the water meter was leaking from

the right flange soon after the leak was discovered. Accordingly, even if the director of maintenance's testimony regarding the phone calls was inadmissible under the excited utterance exception, such testimony was harmless, as it amounted to cumulative evidence, the admission of which had no prejudicial effect on Appellant.

(2) The trial court did not err in refusing to give Appellant's proposed comparative fault instruction because Appellant's claim that he was entitled to a comparative fault instruction was based entirely on speculation and conjecture. Appellant offered no evidence regarding the condition of Respondent's plumbing equipment at the time of the flood and, likewise, failed to produce any testimony or evidence that Respondent's maintenance technicians were not properly trained. Therefore, Appellant's claim that it was entitled to a comparative fault instruction because there was evidence that Respondent's plumbing equipment was less than optimal and the technicians were not properly trained is without merit.

(3) The trial court did not err in refusing to submit an instruction that would permit jurors to apportion fault to the City. Fault can be apportioned only among the parties at trial. At the time the case was submitted to the jury, the City was no longer involved in the trial because the trial court had granted the City's motions for directed verdict. Therefore, no fault could be apportioned to the City, as it was no longer a party to the case.

(4) The trial court did not err in refusing to give spoliation instructions because Appellant failed to establish that the fact that Respondent could not produce the maintenance and access logs for the Freight House Lofts or the gaskets removed from the water meter meant that Respondent intentionally destroyed such evidence.

(5) The trial court did not err in allowing Respondent's expert Robert Webster to testify because the fact that Webster had no first-hand knowledge of the flooding incident and based his opinion on other witnesses' depositions did not make his testimony inadmissible as experts are permitted to base their opinions on facts and data derived from sources outside of court and other than by their own perceptions. Furthermore, Webster provided expert testimony regarding torque loss and explained the process for properly installing the type of water meter at issue in the case. Thus, we cannot say that Webster's testimony provided no aid or assistance to the jury in determining the issues presented in this case. Accordingly, the trial court did not err in admitting Webster's expert testimony.

(6) The trial court did not err in denying Appellant's motion for judgment notwithstanding the verdict because Respondent made a submissible case of negligence against Appellant in that Webster's expert testimony was sufficient to establish the applicable standard of care. Even though Webster's testimony did not conform precisely to the formulated words used in the negligence instruction, it clearly set forth what a plumber in the industry should have done to properly install a water meter and provided the jury with a sufficient explanation as to what the standard of care

in the plumbing industry is for installing a water meter. Thus, Webster testimony sufficiently articulated the requisite standard of care to the jury.

(7) The trial court did not err in denying Appellant's motion for judgment notwithstanding the verdict because Respondent made a submissible case of negligence against Appellant in that Respondent offered sufficient evidence from which a reasonable juror could find Appellant was the actual and proximate cause of Respondent's basement flooding. The evidence, viewed in the light most favorable to the verdict, established that Appellant installed a new meter in Respondent's basement on September 1, 2009. Testimony at trial indicated that there was no record of any City employee performing maintenance of any kind on the water meter in Respondent's basement between September 1, 2009, and October 18, 2009, when the flood occurred. Steve Eden testified that when he turned the water back on, the water came shooting from the flange of the water meter. He further testified that the bolts holding the flange in place were not as tight as they should have been and that the gasket had been cut. Respondent's expert opined that, due to torque loss, the failure to tighten the bolts in excess can result in a water meter leaking. He further testified that failing to tighten the bolts to the point of excess and installing a cut gasket fell below the standard of care for installing water meters in the plumbing industry. From such evidence, the jury could have logically concluded that Appellant negligently installed the water meter, the natural and probable consequence of which was Respondent's basement flooding. Thus, Respondent made a submissible case with respect to causation.

Opinion by Joseph M. Ellis, Judge

Date: JUNE 25, 2013

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