[Cite as *Commonwealth Real Estate Investors v. Paolone,* 2010-Ohio-751.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

COMMONWEALTH REAL ESTATE INVESTORS,	)	
PLAINTIFF-APPELLEE,	)	CASE NO. 09 MA 51
- VS -	)	O P I N I O N
DOMENIC PAOLONE,	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 06CV4861.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney W. Stephen Meloy
211 South Main Street
Poland, Ohio 44514

Attorney Walter Strine, Jr.
630 Fairview Road, Suite 205
Swarthmore, Pennsylvania 19081

For Defendant-Appellant:

Attorney Michael Harlan
6630 Seville Drive
Canfield, Ohio 44406

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: February 24, 2010

VUKOVICH, P.J.

¶{1} Defendant-appellant Domenic Paolone appeals the decision of the Mahoning County Common Pleas Court entered in favor of plaintiff-appellee Commonwealth Real Estate Investors (CREI). Appellant raises two issues on appeal. First, he contends that CREI's claim actually sounded in negligence so that a two-year statute of limitations applied. However, CREI's claim was based solely upon a breach of a contractual duty and was thus subject to the fifteen-year statute of limitations for contracts.

¶{2} Second, appellant argues that damages were not sufficiently established because the adjustor's testimony was based upon an estimator's report that was ruled inadmissible. However, appellant did not object to the adjustor's testimony, and this issue does not arise to the level of plain error. Consequently, the judgment of the trial court is affirmed.

STATEMENT OF FACTS

¶{3} Commonwealth Real Estate Investors owned the Legal Arts Center, a building in downtown Youngstown. In 1994, appellant entered into a lease for a small office space in the building in which to run a jewelry repair shop. The lease provided in pertinent part:

¶{4} "the Lessee will at Lessee's own expense repair any damage caused by the Lessee or any of the Lessee's agents, or licensees or invitees."

¶{5} On June 4, 2004, appellant exchanged empty oxygen and acetylene tanks for full tanks at Linde Gas as usual. He transported the two newly-filled tanks into his office. He removed the cap from the oxygen tank, and then, as he started removing the cap from the acetylene tank, a "ball of fire" exploded from the tank. A fire spread, causing fire, smoke and water damage to the building, which has still not reopened.

¶{6} On December 21, 2006, CREI filed a breach of contract complaint against appellant based in relevant part upon the aforequoted lease clause as appellant failed to repair the damages caused by the explosion and fire. A bench trial proceeded before a magistrate on October 14, 2008.

¶{7} At trial, appellant testified as to his actions on the day of the fire. Appellant related that after pulling the fire alarm and attempting to use a fire hose (that

could only be operated by the fire department upon their activation in the case of a fire), he called 911 on his cellular telephone.

¶{8} CREI presented the expert testimony of a public insurance adjustor who opined that the fire caused nearly $260,000 in damages and that it would cost $84,000 to make the fire alarm operational. (Tr. 37). On cross-examination, defense counsel elicited that, besides the issue of the fire alarm, the damage caused to the building was estimated to be approximately $259,000 pursuant to a report of a cost estimator at the expert's firm. (Tr. 42). On defense counsel's objection, the written estimate by the firm's estimator was later ruled inadmissible. (Tr. 56).

¶{9} The defense called a fire inspector who testified that the fire alarm was not in working order during inspections that she conducted in 1997 and 1999. (Tr. 91, 93). In closing, CREI urged that the lease required appellant to repair damage caused by him or his invitees and that this lease term did not require negligence by the tenant in order to impose liability. (Tr. 108). Appellant countered that CREI's claim actually turned on negligence.

¶{10} On December 11, 2008, the magistrate ruled that appellant breached the lease term requiring him to repair any damage he caused and that appellant caused the fire damage by bringing the tanks into the premises and removing their caps. The magistrate awarded $259,049.43 in damages, after refusing to award damages for the cost of making the fire alarm operational due to evidence that it may not have been operational before the fire.

¶{11} Appellant filed timely objections. First, he argued that since this case sounds in negligence, it should be subject to a two-year statute of limitations. Second, he urged that CREI failed to substantiate their damages because the expert's opinion was based upon an estimate that had been ruled inadmissible.

¶{12} On February 11, 2009, the trial court adopted the magistrate's decision and entered judgment in favor of CREI in the amount of $259,049.43. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

¶{13} Appellant sets forth two assignments of error, the first of which contends:

¶{14} "THE TRIAL COURT ERRED IN FAILING TO DISMISS APPELLEE'S COMPLAINT WHICH WAS BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS."

¶{15} Appellant urges that merely because the complaint is entitled breach of contract does not permit CREI to use the fifteen-year statute of limitations for written contracts. See R.C. 2305.06 (an action upon an agreement in writing shall be brought within fifteen years after the cause of action accrued). He notes that it is the actual subject matter of the complaint, rather than the headings that matter. See *Hunter v. Shenango Furnace Co.* (1988), 38 Ohio St.3d 235, 237. Appellant insists that the essence of CREI's action is negligence. Appellant then concludes that the two-year statute of limitations in R.C. 2305.10 should apply.

¶{16} There are various reasons why appellant's arguments are without merit. First of all, the two-year statute of limitations in R.C. 2305.10 applies only to an action based on a product liability claim, an action for bodily injury, or an action for injury to personal property. In addition, the cases appellant cites involve personalty, not realty, and are thus inapposite. See *Shorter v. Neapolitan*, 179 Ohio App.3d 608, 2008-Ohio-6597 (7th Dist.) (damage to tenant's personal belongings); *National Car Rental v. Allen* (1964), 1 Ohio App.2d 321 (damage to vehicle). Contrary to appellant's assertion, the two-year statute of limitations in R.C. 2305.10 is clearly inapplicable to this case.

¶{17} Assuming arguendo the essence of the action was something other than breach of contract, CREI alternatively posits that the only other applicable statute of limitations would be R.C. 2305.09(D). This statute provides a four-year statute of limitations for an injury to the rights of the plaintiff not arising on contract nor enumerated in R.C. 2305.10 (among other sections). R.C. 2305.09(D). This includes tortious damage to real property. See *Harris v. Liston* (1999), 86 Ohio St.3d 203, 205 ("tort actions for injury or damage to real property are subject to the four-year statute of limitations set forth in R.C. 2305.09(D)"); *NCR Corp. v. U.S. Mineral Prods. Co.* (1995), 72 Ohio St.3d 269, 271 (asbestos claim). As CREI points out, this action was filed within four years of the fire, and thus, even if appellant's "essence of the complaint" argument had merit, the statute of limitations would not have run.

¶{18} Regardless, R.C. 2305.09(D) is applicable to cases involving damages to realty only where the plaintiff does not assert a breach of any express contractual provisions. See id. See, also, *Doty v. Fellhauer Elec., Inc.*, 166 Ohio App.3d 328, 2008-Ohio-1294, ¶42 (breach of implied warranty); *Creaturo v. Duko*, 7th Dist. No. 04CO1, 2005-Ohio-1342, ¶39-41 (breach of fiduciary and breach of duty of good faith

and fair dealing arise in tort unless contract expresses these duties); *Crowninshield/Old Town Country Urban Redev. Corp. v. Campeon* (Apr. 17, 1996), 1st Dist. No. C-940731, C-940748. And, even a breach of an implied warranty is contractual where the agreement is for future construction and the contract governs the warranty of good workmanship for instance. See *Kishmarton v. William Bailey Constr.* (2001), 93 Ohio St.3d 226, 229.

¶{19} As the relevant statutory provision specifies, the four-year statute of limitations applies only to other injury to the plaintiff's rights "**not arising on contract**". R.C. 2305.09(D) (emphasis added). This is because R.C. 2305.06 provides a fifteen-year statute of limitations for actions upon an agreement in writing.

¶{20} Here, CREI argued a non-negligent cause at trial, and the trial court thus excluded evidence of negligence or other tortious behavior. CREI specifically asserted a breach of an express lease provision. That is, in the complaint and at trial, CREI relied on a contract clause requiring appellant to repair any damages caused by him, his agents, his licensees, or his invitees. The contract did not state that appellant was only liable for negligent damages.

¶{21} The crux of the claim stemmed from a contractual provision rather than tortious conduct. See *Rehkoph v. REMS, Inc.* (C.A. 6 2002), 40 Fed. Appx. 126, 2002WL 1455183 (fifteen-year statute of limitations applied to breach of lease obligation to make substantial permanent repairs to leasehold as opposed to four-year statute of limitations for waste). In other words, the essence of the action was not negligent breach of duty but was breach of a contractual duty.

¶{22} As CREI's claim was based upon a written contract, it was subject to the fifteen-year statute of limitations. Because this limitations period had not expired, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{23} Appellant's second and final assignment of error provides:

¶{24} "THE TRIAL COURT ERRED IN AWARDING DAMAGES IN FAVOR OF THE APPELLEE AND AGAINST THE APPELLANT IN THE AMOUNT OF $259,049.43."

¶{25} Appellant argues that there was not competent and credible evidence concerning the damages caused by the fire. He notes that the trial court excluded the cost estimator's report from evidence and that this estimator did not testify. He

concludes that CREI's expert insurance adjustor improperly based his opinion concerning the amount of damages on the hearsay of the estimator. Thus, his essential argument is that if the adjustor's testimony had been excluded, damages would not have been established.

¶{26} A witness may testify as an expert if: (A) the testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and (C) the testimony is based on reliable scientific, technical, or other specialized information. Evid.R. 702.

¶{27} "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid.R. 703.[1] Where the facts or data upon which the expert bases an opinion were not admitted at the hearing, this rule can be satisfied if the expert bases his opinion "in whole or in main part" on facts or data perceived by him. *State v. Solomon* (1991), 59 Ohio St.3d 124, 126.

¶{28} In interpreting the rule as such, the *Solomon* Court held that a physician can testify as to his opinion even if based in part on the reports of other physicians and hospital records as long as the testifying physician also examined the patient and arrived at his opinion based in major part on his perception gained from such examination. Id. The *Solomon* Court distinguished prior cases where a testifying physician did not personally examine the patient and based his testimony wholly on reports and records prepared by others. Id., citing *State v. Jones* (1984), 9 Ohio St.3d 123 and *State v. Chapin* (1981), 67 Ohio St.2d 437.

¶{29} Thus, the phrase "facts or data perceived by the expert" does not include hearsay provided to and reviewed by the expert. Still, an expert can partly base an opinion on hearsay as long as the opinion is based in "major part" on facts or data which he personally gleaned.

¶{30} Here, the expert was an independent insurance adjustor for ten years and then worked for seven years as a licensed public insurance adjustor for the firm

---

[1]Notably, the federal counterpart to Evid.R. 703 contains the following additional language, "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

retained by plaintiff. (Tr. 29). He toured the building more than five times after the fire. (Tr. 44). On some of those occasions, his estimator accompanied him. He personally perceived the fact and location of damage, the type of damage, and the extent of damage.

¶{31} However, the itemized damages, which the adjustor used to arrive at his figure for the total amount of damages, were derived from a report generated by the estimator. (Tr. 40-41). In order to testify as an expert, one need not be the best witness available. See *Scott v. Yates* (1994), 71 Ohio St.3d 219, 221. Yet, the adjustor stated that he did not have expertise in estimating the cost to repair damages. (Tr. 52-53, 55). On the other hand, he also explained that as the general adjustor and branch manager, he reviewed the report and had the authority and experience to object to items in the report, raise points overlooked, and increase amounts allocated that seemed too low. (Tr. 45, 49, 54).

¶{32} In one case, the Eighth District held that one who inspected the site and was familiar with the costs of material and labor was permitted to testify even though he used a computer program to calculate an estimate. *Czarnecka v. Basta* (1996), 112 Ohio App.3d 418. Here, the adjuster used an employee rather than a computer or a table. An expert can also rely on his assistant's work in many situations. See *Orange City Sch. Bd. of Edn. v. Cuyahoga Cty. Bd. of Rev.* (1996), 74 Ohio St.3d 415, 417 (however, this was an administrative agency case, which is not subject to the Rules of Evidence). Yet, the employee utilized here was more than a mere assistant. Rather, the estimator appears to be a different kind of expert as the adjustor admitted that he had no expertise in cost estimating.

¶{33} However, he did have experience in reviewing the estimates, second-guessing them, and approving them. The First District has once held that it was not an abuse of discretion to allow testimony of a project manager who was hired to determine the cost of repairing property damage and who relied on estimates from subcontractors where he visited the site, noted areas of damage, and had expertise allowing him to review the data supplied to him. *Brant v. Benedict Ent., Inc.* (July 25, 1990), 1st Dist. Nos. C-890196, C-890216.

¶{34} Yet, if the testifying expert has no expertise in the area adopted in his opinion from another source, the premise in *Solomon* would not appear to be satisfied merely because the expert personally examined the item at issue. That is, the

physician in *Solomon* can look at another physician's report only as long as the final opinion is based in major part on his own examination and expertise. In other words, the expert that personally examines the damaged item must be an expert at estimating the damages in order for his conclusion on the amount of damages to be "in major part" based upon his own perceptions of facts or data. Thus, if the adjustor cannot arrive at the figures on his own and if the figures are not admissible in evidence at trial, then the adjustor should not be permitted to testify to the amount of damages arrived at only by a different type of expert, a cost estimator.

¶{35} However, at trial, appellant objected only to admission of the estimator's report, which was not even utilized by CREI at trial. Notably, appellant did not object to the admissibility of the expert's testimony on the basis now raised. The admission of expert testimony is subject to the trial court's sound discretion, and such decision is typically reviewed for an abuse of discretion. See *Scott v. Yates* (1994), 71 Ohio St.3d 219, 221. However, where the appellant fails to object to an expert opinion below, any error is waived. *State v. Moreland* (1990), 50 Ohio St.3d 58, 63; Evid.R. 103(A) (error cannot be predicated on admission of evidence unless timely objection or motion to strike appears in the record stating the ground of the objection). See, also, *Willis v. Martin*, 4th Dist. No. 06CA3053, 2006-Ohio-4846, ¶25, 35 (failing to object to expert waives all but plain error, and eliciting expert testimony on cross-examination is invited error).

¶{36} It is well-established that where no timely objection was made on a particular issue, plain error is not often recognized in a civil case. The doctrine can be applied only in an "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶43, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122-123.

¶{37} We conclude that allowing this expert insurance adjustor to testify as to his firm's conclusion on the amount of damages did not seriously affect the basic fairness, integrity or public reputation of the judicial process in a way that challenges the underlying judicial process. The adjustor was an expert in his field. The adjustor visited the damaged structure more than five times. He witnessed the fact, location,

and extent of fire, smoke, and water damage. His firm's estimator, who performed the cost itemization, accompanied him to some of these visits. The adjustor is an experienced adjustor and a branch manager. The estimator worked under him at the firm. The adjustor regularly reviews, adjusts, and approves or rejects reports from estimators at his firm, including the one at issue.

¶{38} The finding that there is no plain error is further bolstered by the observation that the estimator's report may very well have been admissible as a business record. Had the adjustor's testimony been properly challenged on the failure to perceive the facts and data (due to the lack of expertise in itemizing the costs of labor and material), then CREI could have pushed more strongly for the introduction of the estimator's report. CREI did not identify or introduce this document and only sought to have it admitted after *appellant* identified it, questioned the adjustor on its contents, and elicited information on the itemization. As CREI had already elicited the adjustor's opinion on damages without objection, they were not concerned with the report itself.

¶{39} However, the estimator's report could have been admitted under the business records exception to the hearsay ban, which provides in pertinent part:

¶{40} "Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. * * *." Evid.R. 803(6).

¶{41} Here, there is a report on the condition of CREI's fire-damaged building made upon viewing those conditions by a person with knowledge, the cost estimator. The report was kept by Alex N. Sill Co. in the course of a regularly conducted business activity. It was the regular practice of the adjustor's company to make such reports. The report was reviewed and approved by the adjustor, who was a manager at Alex N. Sill Co. Finally, there is no indication that the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness.

¶{42} Notably, the inability to cross-examine is not a defense to the business records hearsay exception. See *Eastern Svgs. Bank v. Bucci*, 7th Dist. No. 08MA28, 2008-Ohio-6363, ¶111. Had the adjustor's testimonial damage estimate been objected to, CREI would have had incentive to have the report introduced as a business record.

¶{43} In any event, as analyzed supra, civil plain error was not apparent by the admission of an expert insurance adjustor's testimony on damages where said adjustor viewed the scene multiple times and regularly approves the estimates of his firm's employees. As such, this assignment of error is overruled.

¶{44} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.