STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 19, 2013)

FERRIS AVENUE REALTY, LLC	:	
	:	
V.	:	**C.A. No. PB 07-1995**
	:	
HUHTAMAKI, INC. as successor to HUHTAMAKI FOODSERVICE, INC. and HUHTAMAKI-EAST PROVIDENCE, INC.	:	

DECISION

SILVERSTEIN, J. A Superior Court jury found the Defendant Huhtamaki, Inc. ("Defendant" or "Huhtamaki") liable to Plaintiff Ferris Avenue Realty, LLC ("Plaintiff" or "Ferris Avenue") for breach of an indemnity agreement. This Decision addresses two post-trial motions: (1) Huhtamaki's Renewed Motion for Judgment as a Matter of Law and (2) Huhtamaki's Motion for New Trial.[1]

I

Facts and Travel

On March 6, 2003, Huhtamaki accepted Ferris Avenue's offer to purchase real estate located at 275 Ferris Avenue in East Providence (the "Property").[2] Historically, manufacturing operations had been conducted on the Property, and areas of the Property had been contaminated by hazardous materials. Given this history, the parties negotiated and executed an Indemnity Agreement, which provided that Huhtamaki would "indemnify, protect and hold harmless [Ferris

[1] Ferris Avenue's Motion for Attorney's Fees, Costs and "Damages" and Motion to Adjudge In Contempt, which relates to this Court's denial of Huhtamaki's Motion to Quash Ferris Avenue's Subpoena Duces Tecum, are still pending.

[2] The offer was made by Ferris Avenue's managing member, Granoff Associates. Evan Granoff is the principal of Granoff Associates.

Avenue] . . . from and against any and all Damages (including without limitation reimbursement of clean-up costs) directly or indirectly arising from or as a result of" the presence or release of various hazardous substances existing on the Property on or prior to Closing. (Tr. Ex. 2.) The Closing date was May 22, 2003. Id.

In 2005, Ferris Avenue contemplated subdividing the Property with the intention of developing a 4.5 acre area ("Parcel A") for residential use. Ferris Avenue hired environmental consultants Vanasse Hangan Brustlin, Inc. ("VHB") to analyze the environmental issues with the Property. In late 2005, elevated concentrations of hazardous materials were found on the Property. On December 21, 2005, the Rhode Island Department of Environmental Management ("RIDEM") sent a letter of responsibility regarding the contamination to both Ferris Avenue and Huhtamaki.[3] Ferris Avenue began excavating the contaminated soil. On February 14, 2006, Ferris Avenue mailed a letter to Huhtamaki, notifying Huhtamaki of its indemnification claim. On March 12, 2006, Huhtamaki denied the claim and refused to pay for any costs incurred in connection with the clean-up.

Ferris Avenue brought this action to recover under the Indemnity Agreement. On February 18, 2011, this Court granted summary judgment to Ferris Avenue on all of Huhtamaki's Counterclaims and as to liability on Count II of its First Amended Complaint. Ferris Avenue Realty, LLC v. Huhtamaki, Inc., No. PB-2007-1995, filed Feb. 18, 2011, Silverstein, J., at 25-26 ("Summary Judgment Decision"). The Court denied a request for Reconsideration of that Decision on May 25, 2011. Ferris Avenue Realty, LLC v. Huhtamaki, Inc., No. PB-2007-1995, filed May 25, 2011, Silverstein, J., at 8 ("Reconsideration Decision"). In the Reconsideration Decision, however, the Court noted that Ferris Avenue still had to prove:

[3] It seems that Huhtamaki received the notice from RIDEM inadvertently, as it was no longer the owner of the Property.

> "(1) whether hazardous substances or materials were located on the Property; (2) whether the hazardous substances or materials, if any, were on the Property prior to the Closing; (3) whether Plaintiff incurred costs or Damages as a result of the hazardous substances or materials; and (4) whether Plaintiff's costs or Damages, if any, were reasonably incurred." Id. at 5.

After a thirteen-day trial, a jury found Huhtamaki liable under the Indemnity Clause and awarded $251,121.06 to Ferris Avenue.

II

Discussion

A

Renewed Motion for Judgment as a Matter of Law

Rule 50 of the Superior Court Rules of Civil Procedure provides:

> "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Super. R. Civ. P. 50(a)(1).

When reviewing a motion for judgment as a matter of law, the trial justice must consider "the evidence in the light most favorable to the nonmoving party, without weighing the evidence or evaluating the credibility of the witnesses, and draw from the record all reasonable inferences that support the position of the nonmoving party." McGarry v. Pielech et al., 47 A.2d 271, 279 (R.I. 2012) (internal quotations and citations omitted). After such a review, if "the nonmoving party has not presented legally sufficient evidence to allow the trier of fact to arrive at a verdict in his favor," judgment as a matter of law is appropriate. Id. at 280. "However, the motion must be denied if there are factual issues upon which reasonable people may have differing conclusions." Broadley v. State, 939 A.2d 1016, 1020 (R.I. 2008). When considering a motion

for judgment as a matter of law, the Court must not "invade[] the province of the jury by weighing the evidence and assessing the credibility of witnesses." Franco v. Latina, 219 A.2d 1251, 1259 (R.I. 2007).

Huhtamaki presents four separate grounds to support its Renewed Motion for Judgment as a Matter of Law: (1) the Plaintiff failed to present evidence of "Claim Notice"; (2) the Plaintiff failed to present sufficient evidence that costs awarded were "reasonably incurred"; (3) the Plaintiff's theory of liability and the jury verdict were based upon an impermissible pyramid of inferences; and (4) the Plaintiff's theory of liability and the jury verdict were based on evidence that was spoliated by the Plaintiff and should have been excluded. The Court will address these claims in seriatim.

1

Claim Notice

Huhtamaki argues that Ferris Avenue did not provide an evidentiary basis for the jury to find that Ferris Avenue provided Claim Notice to Huhtamaki, as required by the Indemnity Agreement. Section 6(c) of the Indemnity Agreement, which governs indemnification between the parties only, provides: "If an indemnified party should have a claim against the Indemnitor . . . the Indemnified Party shall send a Claim Notice with respect to such Claim to the Indemnitor." The argument follows that as a capitalized term, Claim Notice is defined in Section 6(a), which governs situations where a third party is asserting a claim or demand. Section 6(a) provides: ". . . [an] Indemnified Party shall with reasonable promptness give notice ('Claim Notice') to the Indemnitor of such claim or demand, specifying the nature of and specific basis for such claim or demand and the amount or the estimated amount thereof to the extent then feasible . . . ." Huhtamaki contends that Ferris Avenue was obligated to prove Claim Notice at

trial and that the Plaintiff rested without evidence of proper Claim Notice; testimony that Mr. Granoff had instructed his attorneys to send a demand to Huhtamaki was insufficient.

The issue of Claim Notice, however, was decided on Summary Judgment. When addressing Huhtamaki's Breach of Contract Counterclaim in the Summary Judgment Decision—finding that Ferris Avenue did not breach the Indemnity Agreement—this Court concluded, as a matter of law, that Ferris Avenue had "fulfilled the notice requirements as specified by section 6(c) of the Indemnity Agreement, and as a result, Ferris Avenue remains entitled to indemnification for the Damages 'reasonably incurred' for the clean-up of the Property." Summary Judgment Decision, at 24. Therefore, the issue of Claim Notice had been decided and was not an issue for trial.

Further corroboration that Claim Notice was not an issue for trial comes from the case description read to the jury at the beginning of the trial. In what the Court described as "essentially an undisputed statement of what this case is about," it stated that "Ferris Avenue demanded indemnification and reimbursement of its costs from Huhtamaki under the indemnity agreement regarding hazardous materials." (Trial Tr. 1:17-18, 2:10-12, Nov. 26, 2012.)

Huhtamaki excerpts a sentence from this Court's Reconsideration Decision to argue that the Reconsideration Decision limited the effect of the Claim Notice finding in the Summary Judgment Decision. In describing the Summary Judgment Decision, the Court did write that "the Court's [Summary Judgment] Decision did no more than hold, as a matter of law, that the Indemnity Agreement provided Ferris Avenue with a right to indemnification for its own claims." Reconsideration Decision, at 4. While Huhtamaki's argument may hold water in the excerpted abstract, the ship begins to sink when considering the two preceding sentences:

> "Huhtamaki contends that when construing the Indemnity Agreement, the Court assumed the existence of, or overlooked

> Ferris Avenue's failure to provide, evidence that: (1) Hazardous Materials were located on the Property before the Closing; and (2) Plaintiff incurred costs or Damages related to those Hazardous Materials. The Court, however, faced with the narrow issue of Ferris Avenue's right to bring its own claims for indemnification, did not, and needed not, address these matters at that time." Id. at 4-5.

Thus, the Court was responding to specific allegations of issues that the Court allegedly overlooked in its Summary Judgment Decision, and "Claim Notice" was not one them. Additionally, in the next paragraph, the Court set out what remained for Ferris Avenue to establish:

> "(1) whether hazardous substances or materials were located on the Property; (2) whether the hazardous substances or materials, if any, were on the Property prior to the Closing; (3) whether Plaintiff incurred costs or Damages as a result of the hazardous substances or materials; and (4) whether Plaintiff's costs or Damages, if any, were reasonably incurred." Id. at 5.

"Claim Notice" does not appear in this list. Indeed, the Reconsideration Decision never uses the phrase "Claim Notice." Finally, the Motion for Reconsideration was denied; thus, the Reconsideration Decision was clearly not meant to disturb any conclusion from the Summary Judgment Decision. See id. at 8. Therefore, the Court did not resurrect the issue of Claim Notice in its Reconsideration Decision: that issue was not one to be proven at trial and cannot serve as the basis to grant judgment as a matter of law to Huhtamaki.[4]

2

Reasonably Incurred Costs

Huhtamaki contends that the Plaintiff did not put forth sufficient evidence for a reasonable jury to find that the Plaintiff "reasonably incurred" costs. Although Ferris Avenue

[4] For the same reasons, the Court denies Huhtamaki's request for reconsideration contained in Footnote 2 of its Memorandum in Support of Its Renewed Motion for Judgment as a Matter of Law.

did put forth evidence that the hourly rates charged by VHB and disposal fees charged by Earthworks were reasonable, Huhtamaki alleges that there was no opinion as to the reasonableness of the number of hours spent, the "overall reasonableness of the costs incurred," or the reasonableness of the "remediation approach." Additionally, Huhtamaki claims that no one did a cost-benefit analysis of submitting a Short Term Response Action Work Plan ("STRAWP") instead of a Site Investigation Report ("SIR"). Finally, Huhtamaki argued that "the evidence showed that had Plaintiff simply executed and filed the Environmental Land Use Restriction ("ELUR") that was prepared by Huhtamaki and approved by RIDEM in 2004, then no further remediation work would have been needed at the Property." (Def.'s Mem. Supp. Mot. for J. as Matter of Law 13.)

Despite Huhtamaki's assertions, there was sufficient evidence from which the jury could conclude that Ferris Avenue's costs were reasonably incurred. Timothy O'Connor, Ferris Avenue's expert in the investigation and remediation of environmentally contaminated sites, testified that Ferris Avenue's remediation of the Property was reasonable and appropriate given the hazardous substances of concern and the history of the Property. Further, O'Connor testified that the ELUR proposal by Huhtamaki was not appropriate and such a plan had been previously rejected by RIDEM when proposed by prior owners of the Property. Additionally, Michelle Paul, VHB's Project Manager, testified to the scope of VHB's work and methods (including confirmatory sampling) and her oversight of Earthworks—the contractor engaged in the excavation, removal, and disposal of the contaminated soil. Viewing all of this evidence in the light most favorable to the Plaintiff, as well as John Hartley's testimony about rates charged, the jury was permitted to conclude that the costs incurred by Ferris Avenue were reasonable. See McGarry, 47 A.2d at 279.

Finally, Huhtamaki's arguments that a cost-benefit analysis comparing a SIR and a STRAWP was required to decide the reasonableness of the costs—as well as its argument that "the evidence showed that had Plaintiff simply executed and filed the [ELUR] that was prepared by Huhtamaki and approved by RIDEM in 2004, then no further remediation work would have been needed at the Property"—are conjectural and would require a credibility determination. (Def.'s Mem. Supp. J. as Matter of Law 13.) On a motion for judgment as a matter of law, it is not appropriate for the Court to invade the province of the jury and make a credibility determination. See Franco, 219 A.2d at 1259. Therefore, Huhtamaki is not entitled to judgment as a matter of law given the evidence that the Plaintiff provided on the reasonableness of costs incurred.

3

Pyramiding of Inferences

Huhtamaki presents extensive argument based on the Waldman standard. Under Waldman v. Shipyard Marina, Inc., 102 R.I. 366, 373-74, 230 A.2d 841, 845 (1967), a fact-finder is permitted to draw a reasonable inference from another inference—"pyramiding of inferences"—in certain circumstances:

> "Obviously a court should never draw an inference from an inference that is itself speculative or of remote possibility. However, in cases that do not reach this extreme, justice may be promoted by the acceptance of an inference as having probative force which rests on another inference where that inference clearly excludes the drawing from the same fact of another reasonable inference. But an inference resting on an inference drawn from established facts must be rejected as being without probative force where the facts from which it is drawn are susceptible of another reasonable inference."

Thus, "the second or ultimate inference drawn by the factfinder is permissible only if the first or prior inference has been established to the exclusion of other reasonable inferences." Carnevale

v. Smith, 122 R.I. 218, 225, 404 A.2d 836, 841 (1979) (citing Waldman, 102 R.I. at 373, 230 A.2d at 845). Huhtamaki argues, "To prove their case, Plaintiff built a pyramid of inferences." (Pl.'s Mem. Supp. J. as Matter of Law 15.) It alleges that the base of the pyramid is the inference that hazardous materials remained on the Property after a clean-up was conducted in 1997-98 by Paragon Environmental Services, Inc. ("Paragon"). Based on that clean-up (including Paragon's December 31, 1998 Closure Report), a "No Further Action Letter" issued by RIDEM in October 2000, and other testimony, Huhtamaki contends that the jury could have drawn the inference that the Property was clean in 1998; thus, the second inference that the hazardous materials were on the Property at Closing in 2003 is impermissible.

Huhtamaki misapprehends the applicability of Waldman. Rather than asking the jury to stack a three-dimensional pyramid, the Plaintiff presented the jury with pieces to a two-dimensional puzzle and asked the jury to draw the conclusion that some combination of the pieces fit. Ferris Avenue presented evidence that hazardous materials were found on the Property in 2005 and that the Property had a long history of environmental problems, including until at least the late 1990s. These pieces of circumstantial evidence provide the basis for the jury to reasonably infer that hazardous materials were on the Property at Closing in 2003. See Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 100 (R.I. 2006) ("This Court has indicated that even when there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence."); State v. Hornoff, 760 A.2d 927, 931 (R.I. 2000) ("It is well settled in Rhode Island that there is no difference in the probative value of direct evidence and circumstantial evidence.").

Furthermore, Huhtamaki's application of Waldman's principles is misguided on the facts of this record. Huhtamaki claimed that the base of the inferential pyramid was the existence of

hazardous materials after the 1997-98 Paragon clean-up. That is incorrect. If Ferris Avenue was building a pyramid, the base would be the fact that hazardous materials were found on the Property in 2005; any evidence of hazardous materials prior to 2003 is circumstantial evidence used to buttress the inference that what was there in 2005 was there in 2003. The primacy of the 2005 evidence is evident from the fact that the first question on the Verdict Form given to the jury was, "Do you find that hazardous substances or materials were located on the Property in 2005?" The Verdict Form does not reference any time prior to 2003. Finally, the competing inference that Huhtamaki wants the Court to draw—the 1997-98 clean-up fully remediated the Property—to show that reasonable minds could differ is weak, at best. The "No Further Action" Letter did not mean that the Property no longer had any hazardous substances in the ground; it merely stated that no more action is necessary at the time. Therefore, the inferences drawn by the jury were appropriate. Thus, Huhtamaki is not entitled to judgment as a matter of law on its pyramiding of inferences theory.

4

Spoliation

Huhtamaki argues that the central evidence in this case—the allegedly contaminated soil—was destroyed by the Plaintiff when it excavated the soil and dumped it into piles. Huhtamaki contends that the only remedy to cure the prejudice caused by the excavation would be to strike the spoliated evidence. Accordingly, the Plaintiff would not be able to show that hazardous materials were located on the Property in 2005—Question 1 on the Verdict Form—and judgment as a matter of law in Huhtamaki's favor would be appropriate.

Dismissal of a case on the basis of spoliation is a "drastic" remedy. Farrell v. Conetti Trailer Sales, 727 A.2d 183, 186 n.2 (1999). Under Rhode Island law, spoliation requires some

form of willful, deliberate action by the alleged spoliator. See id. at 187 ("Preclusion of all [allegedly spoliated evidence] was unwarranted, we conclude, because defendants introduced no evidence of bad faith or willful destruction of this evidence."). In Farrell, the Supreme Court held that a trial justice "went too far" by barring all allegedly spoliated evidence. Id. at 188. The Supreme Court instructed that on remand, the remedy would be limited to a jury instruction that the jury could, but was not required to draw an adverse inference against the party that allegedly spoliated the evidence. Id. A later Superior Court case has followed this approach, even when the alleged destruction was in violation of a court order. See Dodson v. Ford Motor Co., 2006 WL 2405868, at *9-10 (R.I. Super. Ct., Aug 17, 2006) (Savage, J.).

Here, the Court followed Rhode Island law by permitting an adverse inference to be drawn. The Court charged the jury: "If you find Ferris Avenue destroyed evidence by excavating it from Parcel A and did so deliberately then you are permitted, but not required, to inter [sic] that the evidence would have been unfavorable to Ferris Avenue's position in this case." (Jury Instructions 15-16.) Therefore, Huhtamaki's spoliation argument is also unavailing, and Huhtamaki's Motion for Judgment as a Matter of Law is denied.

B

Motion for New Trial

Rule 59 of the Superior Court Rules of Civil Procedure provides: "A new trial may be granted to all or any of the parties and on all or part of the issues for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted in the courts of this state." "A trial justice's role in considering a motion for a new trial is that of a superjuror, who must weigh the evidence and assess the credibility of the witnesses." McGarry, 47 A.3d at 280 (citations omitted). The Court "need not perform an exhaustive analysis of the evidence,"

but it must "independently weigh, evaluate, and assess the credibility of the trial witnesses and evidence." Id. (citations omitted). In discharging this function, a trial justice:

> "can accept some or all of the evidence as having probative force; or he can reject some of the testimony because it is impeached or contradicted by other positive testimony or by circumstantial evidence, or because of inherent improbabilities or contradictions which alone or in connection with other circumstances satisfies him of its falsity, or because it is totally at variance with undisputed physical facts or laws; or he can add to the evidence by drawing proper inferences therefrom and giving weight thereto." Barbato v. Epstein, 97 R.I. 191, 193-94, 196 A.2d 836, 838 (1964) (citations omitted).

Finally, a trial justice "may grant a new trial if the verdict is against the preponderance of the evidence and thereby fails to either do justice to the parties or respond to the merits of the controversy." Blue Coast, Inc. v. Suarez Corp. Indus., 870 A.2d 997, 1008 (R.I. 2005).

Huhtamaki posits four reasons for its request for a new trial: (1) the improper admission of expert testimony; (2) the improper admission of certain documentary evidence and its associated testimony; (3) errors in the jury instructions; (4) the improper interruption and foreclosure of Huhtamaki's closing argument; and (5) the weight of the evidence not supporting the presence of contamination at the time of Closing or the reasonableness of damages awarded. Again, the Court will address these claims in seriatim.

1

Admission of Expert Testimony

Two experts testified for Ferris Avenue: Timothy O'Connor, an environmental remediation expert, and John Hartley, a damages expert. Huhtamaki claims that the admission of certain testimony was error, requiring a new trial. Specifically, Huhtamaki contends that O'Connor should not have been permitted to testify that Ferris Avenue's remediation work was reasonable or that hazardous substances found on the Property in 2005 were located on the

Property in 2003. Huhtamaki also contends that Hartley applied no reliable or scientific methodology in forming his expert opinion.

Rhode Island Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion." Before an expert so testifies, "a trial justice must consider whether the testimony sought is relevant, within the witness's expertise, and based on an adequate factual foundation." Rodriquez v. Kennedy, 706 A.2d 922, 924 (R.I. 1998). If these prerequisites are met, "the evidence generally ought to be admitted." Id. "As a rule of thumb, expert testimony should be permitted on nearly every subject so long as it is beyond the understanding of laypersons of ordinary intelligence." State v. Lyons, 725 A.2d 271, 274 (R.I. 1999). "The qualification of an expert is a matter addressed to the sound discretion of the trial justice," and the trial justice is "afforded wide latitude" in his or her "determination of the competency of an expert witness." DeChristofaro v. Machala, 685 A.2d 258, 267 (R.I. 1996).

a

Timothy O'Connor

The Court is not persuaded that its allowance of O'Connor's testimony at trial was error. It was proper for Mr. O'Connor to testify as to the reasonableness of VHB's remediation even though he did not have personal knowledge of the facts on which he based his opinions. See R.I. R. Evid. 703 ("An expert's opinion may be based on . . . facts or data perceived by the expert at or before the hearing, or facts or data in evidence.") Additionally, the testimony of VHB Project Scientist Christopher Mazzolini does not put into question the credibility of the reports relied on

by O'Connor. O'Connor testified that the reports are of the type that are reasonably and customarily relied upon by experts in the field. Furthermore, Ms. Paul testified about the work documented in the reports, and most of the experts, including Huhtamaki's environmental expert, Ms. Pallister, relied on VHB's reports to some degree.

Additionally, the Court is satisfied that O'Connor's testimony opining that the hazardous substances found in 2005 were present in 2003 was properly admitted. Huhtamaki claimed that O'Connor did not have the necessary scientific expertise to render the opinion. Although O'Connor did not have expertise in chemical degradation, O'Connor possessed interdisciplinary skills and knowledge as an environmental scientist and engineer to opine about the presence of the hazardous substances. See Mills v. State Sales, Inc., 824 A.2d 461, 470 (R.I. 2003) ("An individual need not hold a particular license, title or certificate in a specialized field to testify as an expert; he or she need only possess knowledge, skill, experience, training, or education [that] can deliver a helpful opinion to the fact-finder.") (citations omitted). These skills, experience, training, and education include degrees in environmental engineering, ten years of experience as a regulator at RIDEM, and fourteen years providing environmental services in the private sector.

Huhtamaki also attacks O'Connor's methodology, essentially claiming that it was simply to compare reports, which is not science. While O'Connor could not point to academic articles, professional organizations, or rate of error statistics, O'Connor was able to draw his conclusion based on the facts and data in the environmental reports. Proof of one or more of the non-exclusive factors—(1) whether the proffered knowledge has been or can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the scientific community—is not a condition precedent to the expert's opinion,

"especially when the proffered knowledge is neither novel nor highly technical." Owens v. Silvia, 838 A.2d 881, 892 (R.I. 2003). Here, O'Connor's testimony was not so technical that it required peer-reviewed publication support, but his opinion was helpful to the jury because of his skills, experience, training, and education in environmental engineering—skills beyond the understanding of laypersons of ordinary intelligence. See R.I. R. Evid. 702 (requiring that specialized knowledge will "assist the trier of fact to understand the evidence"); Lyons, 725 A.2d at 274.

b

John Hartley

Huhtamaki asserts that John Hartley's expert opinion on the reasonableness of VHB's hourly rates was improper because it was speculative and not based on a reliable methodology. However, Hartley, a principal in charge and office manager of a regional environmental consulting firm, testified to his annual review of his company's rates and comparative rates of other Rhode Island firms. In connection with his work, Hartley also testified to his familiarity with charges associated with excavation, removal, loading, and transport to off-site disposal of contaminated soils. This review is a reliable way to assess the reasonableness of rates charged for similar work. And Hartley did just that here; he reviewed the environmental reports, correspondence, contracts and change orders, invoices, quotes, fee schedules, and the Earthworks documentation to conclude that the rates were reasonable. Therefore, the admission of testimony from either of Ferris Avenue's experts does not require a new trial.

2

Admission of Documentary Evidence

a

Historical Environmental Reports

Huhtamaki argues that historical environmental reports about the Property—Trial Exhibits 10, 14-17, 19-23, and 26—should not have been admitted into evidence. It claims that these reports are inadmissible hearsay under R.I. R. Evid. 801 and 802, and that their admission "through the back door" under R.I. R. Evid. 703 was improper.

R.I. R. Evid. 703 provides: "If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source." The historical environmental reports are clearly admissible under the plain language of this rule. Huhtamaki's attempt to suggest that admission of the reports was error is based on federal law. See Def.'s Mem. Supp. Mot. for New Trial 10-11. The Federal version of Rule 703 is starkly different than the Rhode Island Rule:

> "If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703.

Given that this Rhode Island state court applies Rhode Island's Rules of Evidence, the admission of the reports under R.I. R. Evid. 703 was not error. See State v. Gaspar, 982 A.2d 140, 148 (R.I. 2009) (discussing federal approach when the Federal Rules of Evidence were "substantially analogous" to the Rhode Island Rules).

Alternatively, Huhtamaki argues that the reports are inadmissible under Rule 403. Again, Huhtamaki cites to no Rhode Island case law to support this argument (although Ferris Avenue's conclusory one-sentence response is not particularly helpful either). Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "The decision to exclude evidence pursuant to Rule 403 is confided to the sound discretion of the trial justice." Gaspar, 982 A.2d at 148. Here, the probative value of the historical reports is high because the records substantiate the conclusions drawn by Mr. O'Connor, as his environmental analysis is based significantly on historical reports. The prejudicial effect is minimal because O'Connor still would have been permitted to testify about the history of the Property, just without the documents going to the jury room. Additionally, the admission of the documents would not confuse or mislead the jury as the timing of the events is clear.

Therefore, the admission of the historical environmental reports was not error requiring a new trial.

b

Earthworks Invoice

Huhtamaki argues that invoices from Earthworks should not have been admitted into evidence as business records under R.I. R. Evid. 803(6). It contends that Mr. Granoff was not a qualified witness to testify that the invoices were made "at or near the time" of the excavation, "with knowledge," or "kept in the regularly conducted course of business."

Rule 803(6) provides:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near

> the time by, or from information transmitted by, another 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, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

"[I]n general [Rule 803(6)] is interpreted expansively in favor of admitting hearsay records into evidence." Fondedile, S.A. v. C.E. Maguire, Inc., 610 A.2d 87, 94 (R.I. 1992). Thus, "[i]n most situations a trial justice should interpret foundation requirements in favor of admitting records and thereafter let the trier of fact determine the evidence's probative value." Id.

The Court properly admitted the Earthworks invoices as a business record of Ferris Avenue. In United States v. Doe, 960 F.2d 221, 222-23 (1st Cir. 1992) (Breyer, J.), evidence that a firearm traveled in interstate commerce included an invoice made by a South Carolina telemarketing firm (Ellet Brothers) and received by a Massachusetts sports shop. The federal district court admitted the record through the testimony of the owner of the Massachusetts sports shop. See id. The First Circuit affirmed:

> "It was not necessary for an Ellett Brothers "custodian" to testify because the court did not admit the invoice as an Ellett Brothers business record. Rather, the court admitted the invoice as a business record of the sports shop owner. And, the sports shop owner, as custodian of his own records, qualified the document for admission under the 'business records' exception.
> . . . .
>
> The fact that the invoice was a piece of paper which (except for the handwriting) had earlier been the record of a different business, namely Ellett Brothers, is irrelevant. Because it was relied on by the sports shop owner, the Ellett Brothers record was integrated into the records of the sports shop, along with the additional handwritten notation." Id. at 223.

Similarly, here, the Court admitted the Earthworks invoice as a Ferris Avenue business record. Mr. Granoff testified that the Earthworks invoice was maintained in the ordinary course of Ferris Avenue's business, and based on his review of the document, he issued two checks as payment for the services rendered. See Tr. Exs. 75, 76. Thus, the admission of the Earthworks invoice under Rule 803(6) was not error. See Doe, 960 F.2d at 222-23; R.I. Managed Eye Care, 996 A.2d at 690-91 (noting expansive interpretation of 803(6)); Gaspar, 982 A.2d at 148 (discussing federal approach when the Federal Rules of Evidence were "substantially analogous" to the Rhode Island Rules). But see United States v. Savarese, 686 F.3d 1, 12-13 (1st Cir. 2012) (noting lack of "uniform conclusion" on integration of third-party records and collecting relevant cases).

Neither the admission of the historical environmental reports nor the Earthworks invoice requires a new trial.

3

Jury Instructions

Huhtamaki argues that four errors in the jury instructions require a new trial. Those errors relate to the instructions, or lack thereof, on Claim Notice, spoliation, affirmative defenses, and apparent authority.

As discussed above, the issue of Claim Notice was decided in this Court's Summary Judgment Decision. Therefore, there was no reason to give an instruction on Claim Notice.

Regarding spoliation, Huhtamaki first asserts that the instruction was inadequate because it did not sufficiently explain the type of adverse interest that the jury could draw. However, as described above, this Court followed Rhode Island law suggesting the proper remedy is an instruction that the jury is permitted to draw an adverse inference against the alleged despoiler.

See Farrell, 727 A.2d at 188. Additionally, this Court stated that the jury could infer "that the evidence would have been unfavorable to Ferris Avenue's position in the case," thus explaining the inference that may be drawn. (Jury Instructions 15-16.)

Huhtamaki also alleges error in the Court's instruction that the jury may not draw the adverse inference if it found that:

> ". . . Huhtamaki knew or should have known that [Plaintiff planned to excavate the soils from Parcel A before [Plaintiff] did so and that Huhtamaki had an opportunity to request that [Plaintiff] refrain from excavating the soil and allow Huhtamaki an opportunity to test it in the ground, and if you find further that Huhtamaki did nothing to stop [Plaintiff] from excavating the soil . . . ." (Jury Instructions 16.)

While a duty to preserve evidence exists, such a duty does not extend indefinitely. See Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 458 (2d Cir. 2007). "Courts have in many cases been unwilling to award sanctions for spoliation of evidence when the moving party has had an adequate opportunity to inspect the evidence prior to its destruction." Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd., 769 F. Supp. 2d 269, 291 (S.D.N.Y. 2011) (collecting cases). Here, Huhtamaki had notice of the presence of hazardous materials on the Property as of December 21, 2005 when it received the Letter of Responsibility from RIDEM. (Tr. Ex. 32.) While there was no suit yet pending, Huhtamaki then knew about the contamination and knew that it was bound by an Indemnification Agreement. The facts gave Huhtamaki the opportunity to at least signal to Ferris Avenue that it may want to inspect the soil as it lay in the ground. Thus, the Court's instruction was appropriate.

Huhtamaki contends that the jury should have been instructed on its asserted affirmative defenses of estoppel, waiver, and laches. These equitable defenses rest on two bases: Claim Notice, and the imposition of a site-wide ELUR. (Def.'s Mem. Supp. Mot. For New Trial 20.) As discussed above, the issue of Claim Notice was resolved at Summary Judgment, thus it

cannot serve as a basis for an affirmative defense. Likewise, the Court also decided that "Huhtamaki may not now argue that Ferris Avenue breached the Indemnity Agreement by failing to execute the Revised ELUR." Summary Judgment Decision, at 22. Additionally, "quasi-contractual remedies such as equitable estoppel are inapplicable when the parties are bound by an express contract." Zarrella v. Minnesota Mut. Life Ins. Co., 24 A.2d 1249, 1260 (R.I. 2003). Estoppel, waiver, and laches are equitable defenses, and this case is governed by the Indemnity Agreement. Therefore, it was proper for the Court to deny the request for instructions on those theories.

Finally, Huhtamaki asserts that the jury should have been instructed on apparent authority pertaining to Pamela McCarthy's status. Pamela McCarthy was a VHB consultant, and Huhtamaki sought to show that she had the authority to speak on behalf of Ferris Avenue. Bob Steeves, Huhtamaki's corporate environmental manager, was not permitted to opine about McCarthy's authority to speak on behalf of Ferris Avenue. (Trial Tr. 23:21-24:3, Dec. 7, 2012.) Therefore, there was nothing in evidence to support a jury instruction. Counsel later made an offer of proof that would have shown McCarthy's authority. Id. at 42:17-43:12. However, in the Summary Judgment Decision, the Court notes that Huhtamaki only argued that McCarthy stated that "she planned to advise the buyer that it made no difference to her whether the ELUR covered a small area or the whole site." Summary Judgment Decision, at 19 (emphasis in original). This only showed McCarthy's opinion that she intended to relay to Ferris Avenue, not any representation she made on Ferris Avenue's behalf. Id. Therefore, it was not error to refuse the apparent authority instruction.

Therefore, Huhtamaki's arguments pertaining to jury instructions do not require a new trial.

4

Defendant's Closing Argument

Huhtamaki argues that the Court improperly interrupted counsel's closing argument when he was addressing spoliation. This argument was not waived for lack of objection, as contended by Ferris Avenue. As the record contains no voiced objection from Ferris Avenue's counsel, the Court essentially rebuked Huhtamaki's counsel sua sponte. In addition to the impracticality and awkwardness of requiring counsel to object to the Court's interruption while in mid-closing argument, an objection for the record would have been futile. Cf. State v. Fortes, 922 A.2d 143, 149 (R.I. 2007).

The Court's instruction on spoliation has been discussed above. See supra 10-11, 19-21. For purposes of this argument, the most key sentence of the instruction states, "If you find Ferris Avenue destroyed evidence by excavating it from Parcel A and did so deliberately then you are permitted, but not required, to inter [sic] that the evidence would have been unfavorable to Ferris Avenue's position in this case." (Jury Instructions 15-16) (emphasis added). The Court then expanded upon the considerations for what constitutes the deliberate destruction of evidence. See id.

The Court interrupted Huhtamaki's counsel twice during his argument on spoliation. During his argument, counsel stated:

> "Spoliation is the destruction of evidence. The judge is going to give you an instruction on spoliation. The instruction will speak for itself, and you will need to listen to the judge's words. But if you conclude that by digging up the soils from Parcel A in January and February 2006 without first giving Huhtamaki notice, Ferris Avenue prevented Huhtamaki from conducting its own testing and analysis of these soils . . . if Huhtamaki was prevented from conducting these tests that could have helped it defend itself in this lawsuit, then you're permitted to draw an adverse inference against Ferris Avenue." (Closing Argument Tr. 29-30.)

After a bench conference, the Court told the jury that "counsel is not permitted to give you instructions on the law" and noted that counsel's comments were "an intrusion on [the Court's] authority"; thus, the jury should disregard the comments. Id. at 30. While counsel's language in the closing argument tracked the jury instructions somewhat, it was lacking in one very important respect: it ignores the requirement that the destruction be deliberate. The lack of a reference to the deliberate requirement may be of dispositive significance as Ferris Avenue's motive for its remediation actions was an issue at trial. Given this important omission, the Court's first interruption was not error.

The Court's second interruption came after Huhtamaki's counsel stated the following:

> "The reason that the law has a doctrine of spoliation is to make sure that the balances of justice are equal. Here justice requires that you draw an inference and not allow Ferris Avenue to benefit from evidence that it destroyed without telling Huhtamaki, and if you draw this inferences as you should, Ferris Avenue cannot recover in this case without the destroyed evidence. Ferris Avenue does not even have a basis to ask you to speculate about what was found in 2005 or what may have been present in 2003. By applying the doctrine of spoliation, that argument is foreclosed and you must find for Huhtamaki." Id. at 35-36 (emphasis added).

This is a blatant intrusion on the Court's authority by any standard, and it is even more glaring in light of the Court's first rebuke. The jury instructions contained no reference to the legal theory underpinning the doctrine of spoliation, and it is inappropriate for counsel to describe such purely legal intricacies to the jury. Additionally, counsel is in no place to tell a jury what "justice requires." Justice requires that the jury find facts based on the evidence and apply the law as given by the judge. Furthermore, counsel's argument misstated the Court's instruction. The Court's instruction permitted, but did not require, that the jury draw an adverse inference against Ferris Avenue if they found that Ferris Avenue deliberately destroyed evidence. (Jury Instructions 15-16). The instructions did not require that the jury refuse to grant recovery even if

they drew the adverse inference. See id. Finally, Huhtamaki points to counsel's comments to the jury that the judge will instruct on spoliation and that the jury should listen to the judge's instructions. Telling the jury to listen to the judge's instructions does not give counsel carte blanche to characterize the law as he or she sees it.

Therefore, the interruptions of Huhtamaki's counsel during his closing argument were not improper; thus a new trial is not warranted.

5

Weight of the Evidence

Lastly, Huhtamaki argues that the weight of the evidence does not support the jury's finding that hazardous substances found in 2005 were present on the Property in 2003 and that Ferris Avenue's damages were reasonably incurred. In discharging its functions as a superjuror, the Court "should allow the verdict to stand if he or she "determines that the evidence is evenly balanced or is such that reasonable minds, in considering that same evidence, could come to different conclusions." Seddon v. Duke, 884 A.2d 413, 413-14 (R.I. 2005) (mem.).

The Court finds that the weight of the evidence does support the jury's conclusion that the hazardous substances found in 2005 were present on the Property in 2003. The Court credits the testimony of Mr. O'Connor and the associated documentary evidence. Additionally, the Court finds Huhtamaki's interpretation of the pre-2003 reports and events unpersuasive. While RIDEM issued a "No Further Action" letter, the letter does not state that the Property was completely clean—an inference requested by Huhtamaki. Additionally, the Paragon Report does not support the argument that Parcel A was cleaned up because it was not an "exhaustive

investigation of subsurface conditions." Finally, the testimony of Kristie Rabasca[5] was of limited probative value. Her company only performed a Phase I investigation, which was insufficient to conclude that the Property was free of contamination. Finally, logic suggests that when Property has been historically contaminated by hazardous substances and the contamination has never been completely remediated, the hazardous substances have remained on the property since their initial dumping.

The Court also finds that the weight of the evidence does support the jury's conclusion that the damages were reasonably incurred. The Court credits Mr. O'Connor's testimony about the reasonableness of Ferris Avenue's method and Mr. Hartley as to the relevant rates. While Ms. Pallister testified that there were alternative remediation methods available, she could not opine as to the relative costs of those other methods. At a minimum, reasonable minds could differ; thus it is not appropriate for this Court to order a new trial. See Seddon, 884 A.2d at 413-14.

Therefore, as the weight of the evidence supports the jury's verdict, a new trial is not required.

III

Conclusion

For the foregoing reasons, the Court denies Huhtamaki's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.

[5] Ms. Rabasca testified that her environmental consulting company, Environmental Engineering & Remediation, Inc., reviewed the Property's historical reports, inspected the Property, and tested the Property.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Ferris Avenue Realty, LLC v. Huhtamaki, Inc., et al
CASE NO:	C.A. No. PB 07-1995
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 19, 2013
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	Richard J. Welch, Esq. Michael T. Eskey, Esq.
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