

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JIMMY DAO,

Plaintiff and Appellant,

v.

TRINA TRAN,

Defendant and Respondent.

G045915

(Super. Ct. No. 30-2009-00320643)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Allen, Flatt, Ballidis & Leslie and Michael C. Bock for Plaintiff and Appellant.

Macrae & Edrington and Andrew W. Macrae; Law Office of Priscilla Slocum and Priscilla Slocum for Defendant and Respondent.

*

*

*

Jimmy Dao, a minor by and through his mother as his guardian ad litem, appeals from a defense verdict in his negligence suit against his caregiver, Trina Tran, after seven-year-old Dao left a bedroom where he was watching television to ride a motorized utility cart and injured his leg. Dao contends the trial court erred by declining to allow Dao's expert, a social worker, to opine that Tran was negligent. Given the deferential abuse of discretion standard concerning the admission or exclusion of expert testimony, there is no merit to the appeal, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Neither party provides a narrative of the events leading up to Dao's injury in March 25, 2007, but it appears Dao's father authorized Tran and her boyfriend, Scott Sepulveda, to take Dao to the home of Andy and Catherine Andalibian in Temecula "for a visit with friends and/or relatives," according to the complaint. The parties do not explain how Tran or Sepulveda knew Dao, nor do they provide even a brief sketch of the familial or personal history among *any* of the various people involved in the events that took place that day, but it is undisputed Tran and Sepulveda volunteered to take Dao with them to the Andalibian home and received no compensation for caring for Dao that day.

Besides Tran, Sepulveda, and Catherine Andalibian, at least one other adult was present at the Andalibian home with five or six children including Dao, who was the youngest. The other children included Tran's eight-year-old daughter, two sisters who were supervised by their mother, and one of the eventual defendants: a 12- to 14-year-old boy named Johan Bach. Tran had not met Bach or some of the other children previously, but nothing she observed before the accident at the end of the day suggested Bach was "some sort of psychopath or a criminal." To the contrary, "he seemed [a] very

good boy,” and none of the children seemed irresponsible given their ages, but instead acted in a well-mannered and respectful fashion. On a previous occasion at the beach, however, Tran admitted she cautioned Dao not to “wander off.”

The Andalibians kept a motorized cart in a detached garage on the property, which was situated near a fruit orchard. Dao characterized the cart as an “ATV” in his complaint, but also suggested it was the type of vehicle a person “enter[s] and ride[s],” instead of mounting. Tran described it as “[s]imilar to [a] golf cart”

Several people rode the cart throughout the day. For example, Tran and Sepulveda drove the cart for approximately 15 minutes while leaving Dao with the other adults, and Sepulveda later took Dao for a 15-minute ride on the cart without Tran’s knowledge. After the latter excursion, Tran specifically warned Dao not to attempt to drive the cart himself. Tran did not know whether Bach drove or rode in the cart anytime that day. Andalibian was the last to use the cart and, after picking some fruit, she returned the cart to the attached garage and parked it there. She did not testify and the record is silent about whether she left the key in the ignition. Dao also sued Bach’s father, Dong Bach,¹ for allowing his son to drive the Andalibian’s cart on previous occasions, but nothing in the record suggests Tran knew of this prior driving history.

As the visit came to a close, the adults left the children in a bedroom to watch television, and Tran busied herself in the kitchen with the other adults packing up to leave. All of the adults and children were inside the home at the time. Tran had instructed Dao earlier to stay inside the house with the other children. The bedroom was

¹ It is unclear from the parties’ briefs or the limited record on appeal whether the elder Bach was present on the day of the accident. Dao includes in the record on appeal a transcript of only one day of the four-day trial.

down a hallway out of sight from the kitchen, and the bedroom had a door to the outside. The garage was located around 100 feet from the home.

About 15 minutes after Tran left Dao in the bedroom, she learned from one of the children that Dao and Bach had been in an accident on the cart. It took the child approximately five minutes to return to the house from the scene of the accident, so Bach and Dao must have left the bedroom and taken the cart within 10 minutes from when Tran had last checked on Dao. The record on appeal includes no details about how Dao agreed to accompany Bach, how they obtained the key to the cart, or how the accident occurred, including whether any other drivers or vehicles were involved, or whether there were any mechanical failures or other contributing or supervening causes. Dao was ejected from the cart and fractured on his right foot his third metatarsal, one of the bones between the base of the toes and the top of the foot, and he suffered a permanent scar on the top of his right foot. Tran learned after the accident that the Andalibians had allowed Bach to drive the utility cart “many times, not just the one time.”

At trial, Dao sought to call Joni Diamond, a social worker, as an expert witness to opine that Tran negligently failed to properly supervise Dao when he was injured, but the trial court excluded this testimony in a pretrial ruling. The court declared a mistrial when the Andalibians failed to appear, and rescheduled the trial. Five weeks later the court conducted another pretrial hearing and after hearing a preview of Diamond’s proposed testimony and argument by counsel, the court again excluded Diamond’s testimony. The court concluded expert testimony “in this particular case” was not necessary “to assist the ladies and gentlemen of the jury in matters of commonsense, so I’m declining to have this witness testify.”

After the jury rendered its verdict in favor of Tran, Dao moved for a new trial on grounds Diamond should have been permitted to testify, but the court denied the motion. Dao does not provide the transcript of the hearing on his new trial motion, but the court explained in a minute order: “Plaintiff has not convinced the Court that an expert opinion would assist the jury in determining the standard of care in this ordinary negligence case that involved no professional or institution[al] defendants. The amount of supervision it is reasonable to give a group of children under the facts of this case was a matter for the jury to determine. [Citation.] In addition, an expert opinion on the standard of care could have been prejudicial to the Defendant because of the danger that the jury would give undue deference to the expert. [Citation.]” Dao now appeals.

II

DISCUSSION

Dao contends the trial court erred by excluding his expert witness. “Expert testimony is needed when it will assist the trier of fact. It is not appropriate in all cases.” (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1146, super.) A trial court has “wide discretion to admit or exclude expert testimony” (*People v. Page* (1991) 2 Cal.App.4th 161, 187), and a reviewing court may not disturb the trial court’s ruling absent “a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason.” (*People v. Dean* (2009) 174 Cal.App.4th 186, 193). An expert’s testimony *should* be excluded if it is not “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact” (Evid. Code, § 801, subd. (a).) In other words, the trial court *must* exclude proposed expert testimony when it “would add nothing at all to the jury’s common fund of information.” (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1169.) But whether the testimony adds

sufficiently to the jury’s understanding is a judgment call in the trial court’s discretion, and neither the appellant nor the reviewing court may substitute its judgment. The trial court in its discretion also may exclude expert testimony if it is cumulative, will waste time, create undue prejudice, confuse the issues, or mislead the jury. (*Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371; Evid. Code, § 352.)

We cannot say the trial court abused its discretion here. Dao insists expert testimony reasonably would have aided the jury in evaluating a multitude of risk factors facing a babysitter at the Temecula estate. Specifically, he identifies as risk factors the “strange surroundings” new to the children, “the multiple older children, the attractive nuisance in the form of an ATV that had been used earlier in the day, and the number of people,” including both adults and children.

Dao’s challenge, however, is ill-conceived in two ways. First, on appeal our role is not to “consider whether a trial court reasonably *could have* admitted the expert opinion evidence in this case. Our only inquiry . . . is whether the trial court’s decision to exclude the expert opinion testimony constituted an abuse of discretion.” (*People v. McDowell* (2012) 54 Cal.4th 395, 428, fn. 22, italics added.) Thus, we discern no abuse of discretion where Dao himself acknowledges that “in complex, multi-children settings, [even] adults with no training or experience [in childcare] might realize the danger of an unlocked ATV in the presence of a large group of unsupervised children” Simply put, the trial court reasonably could conclude the jury would profit little from an expert’s cumulative testimony reiterating these dangers.

Second and related, it was the jury’s province to evaluate the risk factors and determine in light of them whether Tran acted negligently. Nothing about the particular risk factors lay outside the common experience of reasonable jurors, who could

appreciate as Dao acknowledges the supervisory challenges posed by a new setting with multiple children and the attractive utility vehicle. (Cf. *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [“where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. Use of expert testimony for that purpose would invade the jury’s function”].)

Dao acknowledged below he had found no precedent in which an expert witness opined on a babysitter defendant’s duty of care and breach of that duty. The absence of authority bolsters our conclusion the trial court did not abuse its discretion. Dao’s reliance on *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895 is misplaced. There, the competing experts did *not* opine the defendants met or breached the standard of care for supervising children playing near an open, low second-story window. To the contrary, the reviewing court concluded merely there was a triable issue of fact *for the jury* to decide “whether defendants breached their duty of care by maintaining a low . . . , open, unprotected hallway window on the second floor of the building, knowing young children were likely to play in the area.” (*Id.* at pp. 896, 900.) The experts had offered no testimony on the question of supervising children, but instead on whether the defendants met the applicable fire, building, and safety codes and whether the window was reasonably situated and maintained. Dao also cites inapposite dependency proceedings in which a social worker testifies pursuant to a statutory duty to keep the juvenile court informed of the child’s and parents’ progress towards reunification, but Diamond offered no similar historical reporting. Instead, the facts concerning the risk factors at the Temecula property were established and undisputed, and it was the jury’s province to evaluate them. No expert testimony was required.

III

DISPOSITION

The judgment is affirmed. Respondent is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.