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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MAIN STREET-SANTA ANA, LLC,

Plaintiff and Appellant,

v.

DONALD R. KAPPAUF,

Defendant and Respondent.

G048986

(Super. Ct. No. 30-2008-00116064)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Gladych & Associates, John A. Gladych; Law Offices of Roxanne Huddleston and Roxanne Huddleston for Plaintiff and Appellant.

Musick, Peeler & Garrett, Cheryl A. Orr; Worthe, Hanson & Worthe, and John R. Hanson for Defendant and Respondent.

\* \* \*

Plaintiff Main-Street-Santa Ana, LLC (Main Street), appeals from a judgment after a jury trial. Main Street sued its insurance broker, defendant Donald Kappauf, after an insurance company denied coverage of fire damage to Main Street's building. Kappauf had procured the policy. The crux of Main Street's claim is that Kappauf represented to the insurance company that the building had sprinklers, which became a condition of the policy, when, in fact, the building did not. In a series of responses to requests for admissions, Kappauf admitted that misdescribing the building was a breach of his duty of care. Nonetheless, the trial court permitted Kappauf to introduce evidence at trial contradicting those admissions. Main Street contends that was error, and we agree.

Kappauf contends, however, that despite any error in admitting evidence contrary to his admissions, there can be no prejudice because Main Street failed to introduce evidence of causation. In particular, another condition of the insurance policy was that the building maintain an automatic fire alarm that was connected to a "central station" or that was "reporting to a public or private fire alarm system." Sometime prior to the fire, however, Main Street disconnected the fire alarm from its monitoring service to save money. Main Street seems to assume that this still constituted an alarm connected to a "central station." But the standard definition of that term requires that it be monitored such that the authorities are immediately notified of a fire. Main Street's disconnected fire alarm at the time of the fire did not meet this definition. Because Main Street failed to present any evidence of a different definition of "central station," its admission that it disconnected the fire alarm precluded any showing of causation because the insurance policy would not have covered the loss even if the building did have sprinklers. Main Street has three responses.

First, Main Street contends the court erred by permitting Kappauf to withdraw his admission that, had Kappauf not breached his duty by erroneously claiming the building had sprinklers, the insurance company would have covered the fire losses —

a causation admission. Main Street contends it was error to permit withdrawal of this admission because Kappauf was not mistaken when he made it. Main Street's argument, however, is premised on its assumed, but erroneous, definition of a "central station" alarm, and thus the argument fails. Kappauf did not discover the alarm had been disconnected until after he made his admission, which was a more than adequate basis for establishing a mistake.

Main Street's second response, asserted in supplemental briefing after we alerted the parties to authorities defining "central station," is that Kappauf admitted at trial that he could have obtained an insurance policy for the building in its actual condition. What is lacking, however, is any evidence that he *would* have obtained a policy for a building that lacked both sprinklers *and* an automatic fire alarm connected to a central station. Kappauf thought the building had a central station alarm, and the jury found he was not negligent. It was plaintiff's burden to not only show he *could* have obtained a policy that covered the building, but that, but for his negligence with regard to the fire sprinklers, he would have done so.

Third, Main Street contends, despite the well recognized definition of "central station" in the industry, that the term was ambiguous. This is a theory, however, that was not raised at trial, and was instead raised for the first time in a supplemental letter brief to this court. It was forfeited. Accordingly, Main Street's failure to introduce evidence of causation is fatal and we affirm the judgment.

## FACTS

In 2006, Main Street purchased the Hightower Building, a 10-story office building in Midland, Texas. Thomas Murray worked for Main Street managing the company's real estate portfolio, obtaining insurance, dealing with tenants, and managing the books and cash flow. The day before the Hightower purchase closed, Murray

contacted defendant Kappauf, an insurance broker, to obtain fire insurance for the building. Kappauf filled out and signed an insurance application where he made a representation that is at the center of this dispute: that the building had an operational sprinkler system. It did not, in fact, have a sprinkler system.

Landmark American Insurance Company (Landmark) issued a fire insurance policy with a limit of \$14,750,000. The policy required the building to have two “protective safeguards”: an “Automatic Sprinkler System”; and an “Automatic Fire Alarm, protecting the entire building, that is: [¶] a. Connected to a central station; or [¶] b. Reporting to a public or private fire alarm station.”

In December 2006, an arsonist set fire to the building. Landmark denied coverage, stating in its denial letter, “There has been no evidence the Protective Safeguards that are a condition of this insurance were present . . . at the time of the occurrence,” citing both of the protective safeguards listed above.

Instead of repairing the building, Main Street packaged it with adjacent buildings and sold the properties as a unit. In February 2009, Main Street sued Kappauf for breach of contract and negligence.

On June 1, 2009, Kappauf served responses to requests for admission propounded by Main Street. Kappauf admitted several of them, including the following four that are central to this appeal:

**“REQUEST FOR ADMISSION NO. 15:**

Admit that Landmark Insurance Company would have covered the damages and losses caused by fire if the PROPERTY had an operational sprinkler system.”

**“REQUEST FOR ADMISSION NO. 20:**

Admit that YOU inaccurately represented the condition of the PROPERTY . . . when procuring the POLICY.”

**“REQUEST FOR ADMISSION NO. 21 . . . :**

Admit that erroneously representing to Landmark American Insurance Company that the PROPERTY had an operational sprinkler system fell below the standard of care YOU owed to Plaintiff.”

**“REQUEST FOR ADMISSION NO. 22 . . . :**

Admit that YOU had a duty to accurately represent the condition of the Property to Landmark American Insurance Company.”

A few days later, on June 5, 2009, Kappauf deposed Thomas Murray. Murray testified that he conducted an investigation after the fire and determined that “the Hightower Building did not have an automatic sprinkler system, and I discovered that the fire alarm system had recently been disconnected by the owner.” Murray was told by a Main Street employee that “we had a fire alarm system that was active and that 90 or 60 days prior to the fire Mr. Takahashi [Main Street’s owner] wanted to save some money, so he had that fire alarm system disconnected as an — as an effort to save money.” The attorney then asked, “I don’t understand how that would have saved money. Do you mean that the fire alarm system was tied in with some company that monitored the building and would then send somebody out if there was a fire?” Murray responded, “That’s my understanding.”

In July 2010, the matter went to trial. Kappauf testified and his attorneys sought to elicit testimony that his admissions had been mistaken, but the court did not permit him to contradict his admissions, explaining to the jury that the admissions are “hard and . . . fast for purposes of this trial.” The jury returned a verdict in favor of Main Street for \$1.5 million.

Kappauf filed a motion for new trial, which the court granted on the ground that the testimony of Takahashi, Main Street’s principal, on the issue of damages was both a surprise to Kappauf and insufficient to support the verdict. Main Street appealed,

and in a prior opinion (*Main Street v. Kappauf* (Apr. 25, 2012, G044446) [nonpub. opn.]) we affirmed the court’s new trial order, remanding for a new trial on all issues.

After remand, Kappauf filed a motion to withdraw his admissions based on “*new facts discovered indicating the earlier admissions are not factually accurate due to MAIN STREET not being forthcoming about the true condition of the property and sprinkler system as well as the fact that they disconnected the fire alarm . . .*” In support, Kappauf attached his trial testimony from the first trial where he testified that he had no reason to believe that the Hightower Building was not equipped with a “central monitored alarm system,” and that he found out for the first time after reading Murray’s deposition that Main Street had “turned off the alarm.” The court denied the motion on two grounds: first, that Kappauf failed to identify in the motion which admissions he sought to withdraw; second, that Kappauf failed to establish that the admissions were made based on a mistake.

Kappauf petitioned this court for a writ of mandate to direct the court to grant the motion to withdraw. We issued a suggestive *Palma*<sup>1</sup> notice indicating that there was sufficient evidence in the record to establish Kappauf was mistaken about request for admission No. 15 (the causation admission), and that to deny the motion as to that request would be an abuse of discretion. In response, the court vacated its prior order and granted the motion with respect to request for admission No. 15. We then denied the petition as moot.

Prior to the second trial, Main Street moved in limine to preclude Kappauf from presenting testimony from his insurance expert that would contradict the admissions that had not been withdrawn, particularly the admissions with respect to Kappauf’s duty to accurately represent the condition of the building in the insurance application, and the breach of that duty. The court denied the motion “without prejudice to the evidentiary

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<sup>1</sup> *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

objections, specifically with respect to qualifications or the propriety of expressing opinion about the formation of the contract.”<sup>2</sup>

Kappauf’s expert testified at the second trial that his assignment was to “review all available and provided material and to determine if the broker met the standard of care . . . .” The expert testified he “read Mr. Kappauf’s answers to requests for admissions,” but “just disagree[d] with some of them.” Kappauf had testified that he had asked Murray during a phone call if the building had sprinklers, and Murray said, “It must . . . . It’s over ten stories.” (Murray denied ever saying this). The expert assumed the truth of Kappauf’s claim and opined that Kappauf’s reliance on Murray’s representation was “acceptable and the norm.” He opined that “it is virtually universal that the information provided by an insured to the broker in completing of the application is provided under the assumption that that information is accurate and the basis upon which it will be submitted to the insurance company.” He also opined it was “not a breach of the standard of care” to fail to discuss the protective safeguards with Main Street prior to the fire.

Kappauf’s admissions were read to the jury. At that time, the court told the jury with respect to requests for admission, “the law basically will say the same thing as I told you [about] deposition, so you may consider these answers as though they had been given here in court. They were given under oath, or under declaration of penalty of perjury, when they were given.” Later, during the reading of the jury instructions, the court gave CACI No. 210, which, in contrast to the court’s earlier statements, states, “Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them.”

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The latter portion of the ruling was directed to another argument Main Street made in the same motion: that the expert should not opine on whether Main Street and Kappauf ever formed a contract. That issue is not relevant to this appeal.

During closing argument, Kappauf’s attorney explicitly encouraged the jury to disregard the admissions: “[Y]ou heard Mr. Ford [Kappauf’s expert] testify yesterday that even though Don Kappauf said it was a breach of the standard of care to have relied on Tom Murray, that it isn’t. Don Kappauf, I hesitate to use the term, is honest to a fault. If Don felt that there was — there were other things he could have done, that’s what he said. You saw him do it on the deposition clips that Main Street played. [¶] But Bob Ford analyzes and reviews broker actions for a living and Bob Ford says that if you are told by your client that a building is sprinklered, you’re entitled to rely on that.”

The jury returned a defense verdict. It found unanimously that the parties entered into a contract and that Kappauf did not breach it. By a vote of 9 to 3, the jury found Kappauf did not “negligently fail to procure insurance requested by [Main Street].” Main Street timely appealed.

## DISCUSSION

Main Street first contends the court erred by permitting Kappauf to introduce evidence that contradicted his admissions. “We review for abuse of discretion a trial court’s rulings on the admissibility of evidence.” (*People v. Cowan* (2010) 50 Cal.4th 401, 482.) We conclude the court abused its discretion.

We begin with Kappauf’s contention that Main Street forfeited its argument by failing to object to Kappauf’s expert’s testimony concerning a broker’s duty of care. Kappauf notes that, although Main Street filed a motion in limine to preclude the testimony, “[t]he trial court denied MAIN STREET’s Motion without prejudice, subject to evidentiary objections. [Citation.] [¶] Nevertheless, MAIN STREET’s counsel did not object to Mr. Ford’s [Kappauf’s expert] testimony when he took the stand, nor did he object to his testimony that KAPPAUF did not breach the standard of care. [Citation.] In fact, MAIN STREET’s counsel went further and even elicited that very testimony from

Mr. Ford on cross-examination by asking him to confirm that he disagreed with Kappauf's admission that he breached the standard of care!"

Main Street did not forfeit its argument. "A motion *in limine* to exclude evidence is normally sufficient to preserve an issue for review without the necessity for defendant to renew an objection at the time the evidence was offered." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184.) "[A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. When such a motion is made and denied, the issue is preserved for appeal. On the other hand, if a motion *in limine* does not satisfy each of these requirements, a proper objection satisfying Evidence Code section 353 must be made to preserve the evidentiary issue for appeal." (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824.)

Here, Main Street's motion in limine specifically objected to Kappauf's expert's anticipated testimony on the basis that it improperly contradicted Kappauf's admissions. In particular, the motion pointed out that, in a recent deposition, Kappauf's expert "openly disagreed with several admitted requests for admissions, and has formed opinions that he wishes to offer at trial that contradict such 'settled' admitted issues." This motion satisfied the three requirements above. Additionally, while Kappauf emphasizes that the denial was without prejudice, the court's actual words were, "without prejudice to the evidentiary objections, *specifically with respect to qualifications or the propriety of expressing opinion about the formation of the contract.*" (Italics added.) Thus it was only without prejudice to a limited extent, and not with respect to Main Street's central argument. Accordingly, Main Street preserved the argument for appeal.

We turn now to the merits of Main Street’s argument. The law with respect to the effect of admissions is well established. “Requests for admissions differ fundamentally from other forms of discovery. Rather than seeking to uncover information, they seek to eliminate the need for proof.” (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.) “The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial.” (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509.) “Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300.” (Code Civ. Proc., § 2033.410, subd. (a).) Indeed, such admissions “constitute binding judicial admissions.” (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979.) As a result of these rules, “[a]bsent leave of court to amend or withdraw the admission, no contradictory evidence may be introduced.” (*Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 736.) However, “[a]lthough admissions are dispositive in most cases, a trial court retains discretion to determine their scope and effect. An admission of a fact may be misleading. In those cases in which the court determines that an admission may be susceptible of different meanings, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence.” (*Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 277.)

Kappauf contends the court properly permitted his expert to contradict his admissions because, as he characterizes them, his admissions were just “*his opinion*” about whether his conduct fell below the standard of care. According to Kappauf, his “personal opinion did not establish the applicable standard of care,” and thus his expert’s testimony was admissible.

The fundamental problem with this argument is that the requests for admissions say nothing about Kappauf’s personal, nonbinding opinion. Kappauf

admitted he had a duty to accurately describe the property in the insurance application; admitted that he erroneously filled out the insurance application; and then admitted “that erroneously representing to Landmark American Insurance Company that the PROPERTY had an operational sprinkler system fell below the standard of care [he] owed to Plaintiff.” These are straightforward request for admissions, applying the facts to the relevant law, to eliminate an issue for trial. (See Code Civ Proc., § 2033.010 [permitting requests concerning “the truth of specified matters of fact, opinion relating to fact, or application of law to fact”].) Unless and until the court permitted these admissions to be withdrawn, no evidence could be introduced to establish that inaccurately describing the building as having an operational sprinkler system was within the standard of care. Accordingly, the court abused its discretion by permitting Kappauf to introduce expert testimony contradicting these admissions.

Kappauf counters that the error is not prejudicial because Main Street failed to present evidence that his negligence caused damages. In particular, he contends, “MAIN STREET did not present any evidence at trial that Landmark would have covered the fire loss in the absence of a centrally monitored alarm system which had been disconnected by MAIN STREET’s principal, Mr. Takahashi. Indeed, the evidence at trial showed the Hightower Building *did not* have either of the two protective safeguards both of which were conditions of insurance at the time of the fire: sprinklers and a centrally monitored alarm system.” Main Street contends this argument misconstrues the evidence, because “[i]t was undisputed the building had a central station fire alarm . . . .” In support of that claim Main Street cites testimony from Main Street’s owner, Takahashi, and one of Main Street’s employees. Both of them described essentially the same thing: pull stations on each floor of the Hightower building, which, when pulled, would break a piece of glass, sending a signal to an enunciator panel on the first floor to sound the fire alarm. Takahashi acknowledged, however, that the alarm “was not connected to any source or monitoring company.” This evidence was consistent with

Murray's testimony, who, when investigating after the fire, received an e-mail from a Main Street employee saying, "Oh, my God. We don't have any central alarm system. It was turned off." He later testified about the same e-mail that the *monitoring* was turned off.

In the insurance context, the term "central station" has an established meaning. National Fire Protection Association Code "72 defines 'Central Station Service Alarm System' as: 'A system or group of systems in which the operations of circuits and devices are transmitted automatically to . . . a . . . central station . . . operated by a person, firm, or corporation whose business is the furnishing, maintaining, or monitoring of supervised alarm systems.'" (*ADT Security v. Lisle-Woodridge Fire Protection* (7th Cir. 2012) 672 F.3d 492, 500-501, fn. 3; see also *Sunset Manor, Inc. v. U.S. Dept. of Health and Human Services* (10th Cir. 2009) 315 Fed.Appx. 97, 98; *Yerardi v. Pacific Indem. Co.* (D. Mass. 2006) 436 F.Supp.2d 223, 228 ["A central station alarm system is a burglar or fire alarm system that is connected to a central station, which is alerted of a fire or break-in and notifies the proper authorities"].) Main Street did not put on any evidence at trial suggesting that "central station" had a different meaning in the context of the policy at issue. Because Main Street's alarm was not monitored, it was not connected to a "central station," and, therefore, the insurance would not have covered the loss regardless of the presence of sprinklers. Accordingly, Main Street failed to present evidence that, but for Kappauf's misrepresentation regarding a sprinkler system, the insurance would have covered its losses. Main Street has three responses.

Main Street's first response, asserted in its opening brief, would potentially provide it an escape from this conundrum. It contends the court erroneously permitted Kappauf to withdraw admission No. 15. By way of refresher, in admission No. 15 Kappauf admitted "that Landmark Insurance Company would have covered the damages and losses caused by fire if the PROPERTY had an operational sprinkler system." Main Street argues Kappauf did not present evidence of a mistake, and thus the court had no

evidentiary basis upon which to grant the motion. If it is right, it had no need to put on evidence of causation because the issue was settled. We review a court's decision to permit withdrawal of an admission for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420.) We conclude, however, the court did not abuse its discretion.

Code of Civil Procedure section 2033.300, subdivision (a), provides that a party may withdraw an admission only upon leave of court. Subdivision (b) states, "The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits." (*Id.*, subd. (b).)

The mistake Kappauf claims is that he did not know Main Street had disconnected the fire alarm system from the monitoring service, and points to the fact that Murray testified, after Kappauf served his admissions, that the fire alarm had been disconnected. Main Street contends this was beside the point because the insurance protective safeguard did not require a monitoring service; it only required that the alarm be connected to a central station. Main Street concludes, therefore, that Kappauf has not shown a relevant mistake.

Main Street's argument, however, is premised on its erroneous understanding of a "central station" automatic fire alarm. As we have described above, Main Street's decision to disconnect the fire alarm was critical on the issue of causation. Main Street does not contend Kappauf already knew about the disconnection prior to serving the admissions. This is a clear basis for establishing a mistake. "The trial court's discretion in ruling on a motion to withdraw or amend an admission is not unlimited, but must be exercised in conformity with the spirit of the law and in a manner that serves the interests of justice. Because the law strongly favors trial and disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking

relief.” (*New Albertsons, Inc. v. Superior Court, supra*, 168 Cal.App.4th at p. 1420.) Because Kappauf demonstrated his admission was based on incomplete facts, he established he made a mistake, and the court did not abuse its discretion.

Because the parties appeared to have not located the authorities above defining a “central station” for purposes of fire insurance policies, we invited the parties to file supplemental briefs. Main Street’s second and third responses below are asserted in its supplemental brief.

Main Street’s second response is that its causation theory at trial was not that *this* policy would have paid out but for Kappauf’s negligence, but that he admitted he could have obtained a different policy to cover the building in its actual condition. Indeed, Kappauf testified, “Q. . . Could you have obtained fire insurance for the Hightower building in around August 2006 even though the building didn’t have sprinklers? [¶] A I think I could have. [¶] Q Could you have obtained fire insurance for the Hightower building in around August 2006, even though it didn’t have a monitored central alarm? [¶] A That I’m not sure about. [¶] Q The Hightower building back in August of 2006, it was insurable for property fire insurance coverage; correct, sir? [¶] A Yes. [¶] Q For replacement cost coverage; correct, sir? [¶] A Correct. [¶] Q And for actual cash-value policy, that could have been insured in the condition that it was; correct? [¶] A Correct.”

The problem with this argument is that Main Street needed to prove more than just Kappauf *could* have obtained insurance for the building in its actual condition; it had to prove Kappauf *would* have obtained such a policy. Although Kappauf could not remember a specific conversation, he testified that in the normal course of business he would have called Tom Murray to ask him if the building had a central station alarm. And while the insurance application was not provided to us in the record, Kappauf apparently submitted the insurance application for a building with a central station fire alarm, and thus believed the building did have such an alarm. The jury found that he was

not negligent. And importantly, Kappauf admitted negligence solely with respect to the sprinklers, not with respect to the alarm. There was no evidence that he would have gone through any different procedure with regard to the alarm system for procuring a policy for a building without sprinklers. There is no evidence, therefore, that a hypothetical alternate policy *would* have covered a building without a central station alarm, and, consequently, no evidence that Main Street would have recovered its fire loss but for Kappauf's admitted negligence regarding the sprinklers.

Main Street's final response is that the term "central station" is ambiguous and could reasonably be construed to include the type of alarm system present in the Hightower building. We deem this argument forfeited. Main Street raised this theory for the first time in supplemental briefing to this court. It was not brought up at trial. The interpretation of an ambiguous contract may turn on extrinsic evidence of the parties' intent. (*In re Marriage of Facter* (2013) 212 Cal.App.4th 967, 979.) By bringing this issue up for the first time on appeal, Kappauf was precluded from conducting any discovery or proffering any evidence concerning the meaning of the term. "The general rule is that defendants 'should not be required to defend for the first time on appeal against a new theory that "contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." [Citation.]' [Citation.] The proper forum for initial consideration of this claim was the trial court — plaintiff may not raise it for the first time here." (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 221-222, fn. 15.)

DISPOSITION

The judgment is affirmed. Kappauf shall recover his costs incurred on appeal.<sup>3</sup>

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

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<sup>3</sup> Main Street filed a motion for judicial notice in our court seeking to introduce excerpts of Kappauf's testimony from the first trial. We deny the motion because the excerpts are irrelevant and were not before the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["Reviewing courts generally do not take judicial notice of evidence not presented to the trial court"].) Main Street also filed an application to transmit exhibit 201, a complete copy of the insurance policy at issue, which was admitted at trial. That application to transmit exhibit is granted.