Lasek v. Vermont Vapor, Inc., and Downing Properties, LLC (2013-143)

2014 VT 33

[Filed 11-Apr-2014]

2014 VT 33

No. 2013-143

Johnathan Lasek	Supreme Court
v.	On Appeal from Superior Court, Rutland Unit, Civil Division
Vermont Vapor, Inc. and Downing Properties, LLC	January Term, 2014

William D. Cohen, J.

Kaveh S. Shahi of Cleary, Shahi & Aicher, P.C., Rutland, for Plaintiff-Appellant.

Andrew B. Delaney of Martin & Associates, P.C., Barre, for Defendant-Appellee Vermont Vapor, Inc.

Allan R. Keyes of Ryan Smith & Carbine, LTD., Rutland, for Defendant-Appellee Downing Properties, LLC.

PRESENT: Reiber, C.J., Dooley, Skoglund, Robinson and Crawford, JJ.

¶ 1. **CRAWFORD, J.** Plaintiff appeals the trial court's grant of judgment as a matter of law to defendants following a three-day jury trial in this negligence case. Plaintiff claims that the trial court erred in (1) excluding the testimony of plaintiff's expert witness on causation, (2) granting defendants' motion for judgment as a matter of law, (3) excluding an eyewitness's statements to police, (4) denying plaintiff's motion for a new trial, (5) awarding all deposition costs to defendants, and (6) refusing to disqualify counsel for defendant-landlord. We affirm the trial court's decision in all respects, with the exception of the award of deposition costs.

¶ 2. This case arose following a fire that destroyed a commercial building in Rutland, Vermont in April 2010. The following facts were introduced through plaintiff's witnesses at trial. Plaintiff Johnathan Lasek leased the northern half of the building and used the space as a workshop for his house-staining business. He stored staining products and other equipment and constructed a business office in the northeastern corner of the building. The southwestern corner of the building contained a fully enclosed room that was occupied by another commercial tenant, Vermont Vapor Inc. (VVI). The remainder of the building was used by landlord Downing Properties, LLC, as storage for ATVs, motorcycles, and snowmobiles.

¶ 3. VVI used its space as a laboratory for mixing the liquid filler for electronic cigarettes. The process involved diluting liquid nicotine with glycerin and other ingredients. VVI is owned by Adam Tredwell. Adam hired his father, Warren Tredwell, to alter the room to Adam's specifications. Warren added sheetrock and other materials to create a "clean room." He also installed an eight-inch fan on the south wall of the laboratory that vented to the outside of the building. An industrial space heater was suspended from the rafters of the warehouse, above the ceiling of the laboratory. The Tredwells connected the heater to a propane tank so that they could heat the space in the winter months. Warren was the last person in the laboratory the night before the fire.

¶ 4. The fire was reported at around 5:00 a.m. on April 7, 2010. When firefighters arrived a few minutes later, the northwest corner of the building—plaintiff's corner—had a large hole in the roof and was heavily engulfed in flames. VVI's corner was not on fire at that time.

¶ 5. Plaintiff sued VVI for negligence and strict liability, alleging that VVI had caused the fire by mishandling liquid nicotine. He also sued landlord for breach of the implied warranty of suitability for commercial use, negligence, breach of the duty to warn, and unjust enrichment. After plaintiff's presentation of his case, the trial court granted defendants' motion for judgment as a matter of law. This appeal followed.

I. Exclusion of Expert Testimony on Causation

¶ 6. Prior to trial, defendants filed a joint motion to exclude the testimony of plaintiff's fire investigator about the cause of the fire. The court did not rule on the motion at that time. Instead, it conducted a mid-trial hearing on admissibility after defendants renewed their objection.[1] The court ultimately ruled that the fire investigator could not offer his opinion regarding the cause of the fire because his opinion did not meet the standards of Vermont Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Plaintiff argues that this ruling was error.

¶ 7. Under Rule 702, a qualified expert witness may testify if his or her testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue" and "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." V.R.E. 702. Vermont Rule 702 is derived from Federal Rule 702, and the two provisions are substantively identical.

¶ 8. In Daubert, the U.S. Supreme Court held that Federal Rule 702 superseded the traditional test for admissibility of expert testimony set forth in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). 509 U.S. at 586, 592-93. The Daubert decision created "a flexible standard requiring only that expert testimony be both relevant and reliable to be admissible." 985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc., 2008 VT 14, ¶ 6, 183 Vt. 208, 945 A.2d 381 (citing Daubert, 509 U.S. at 588-89). Because our rules of evidence are "essentially identical" to the federal rules, we have adopted the standards set forth in Daubert and its progeny governing admissibility of expert testimony. Id. (quotation omitted).

¶ 9. "[W]e review trial court decisions on the admissibility of expert testimony only for abuse of discretion." Id. ¶ 9. However, we must "engage in a substantial and thorough analysis of the trial court's decision and order to ensure that the trial judge's decision was in accordance with Daubert and our applicable precedents." USGen New Eng., Inc. v. Town of Rockingham, 2004 VT 90, ¶ 24, 177 Vt. 193, 862 A.2d 269.

¶ 10. The proffered opinion of plaintiff's fire investigator was that vapors from liquid nicotine in the lab came into contact with the pilot light of the overhead industrial space heater, causing a flash fire. During the Daubert hearing, he admitted that he was not a chemical engineer and did not know how much of any chemical was present in the VVI lab the night of the fire. He further

admitted that he did not know the volume of air circulating through the lab because he did not know the size of the vent or the filter fabric that was used. When asked what methodology he used to determine how chemical vapors got out of the lab and reached the space heater overhead, he responded:

> There may have been penetrations in that ceiling. With having a supposed vent in the door you're saying that you mixed the chemicals within the room, we know that. The chemicals may or may not have been being drawn out by an exhaust fan. We know that the fumes and the vapor given off from these chemicals will fill the room, come out and rise.

The court asked, "How do we know that?" The fire investigator responded that "if you look at the [material safety data] sheets . . . some of those chemicals that were . . . used in this process were lighter than air." Landlord's attorney then asked how the fire investigator had calculated that the concentration of these chemicals in the air was high enough to be ignited by the pilot light from the space heater. Plaintiff's fire investigator responded that he was not an engineer, but that this was the "commonsense" approach for this type of investigation. He opined that if there were containers without lids that contained solutions of the chemicals used by VVI in the lab, the lab likely would have been saturated with fumes, and the fumes would have escaped through a hole in the ceiling or through the door, and made their way up to the space heater where they ignited. On cross-examination, he agreed that nicotine is much heavier than air and that its vapors would have gone down, not up. He thought that mixing the nicotine with other chemicals, perhaps alcohol, created a flammable vapor that reached the pilot light:

> [M]y thoughts and the process through this is, [with] this being mixed with other chemicals—all the properties . . . go out the window because we don't know what type of chemical this is now because we've mixed alcohol, we've mixed a couple other different chemicals with it. And they all have properties that will burn. . . . No, I don't know how else to explain it to you. I'm not a chemical engineer to break that all down.

¶ 11. The court excluded plaintiff's fire investigator's testimony pertaining to causation. The court explained that the fire investigator was not trained in chemistry, and did not know what chemicals were present, what their flammability or other characteristics were, or how they would interact with each other or flow through the air. The court noted that nicotine was present, but nicotine has a low flammability rating and is heavier than air. Even accepting that nicotine's properties could have been modified by a combination of other chemicals, there was no evidence of what the other chemicals were or how they would behave. The court concluded that the fire investigator could not offer his opinion regarding the cause of the fire because it did not meet the standards of Daubert and Rule 702.

¶ 12. "Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known." Daubert, 509 U.S. at 590. The trial court properly excluded the fire investigator's testimony because it was based on speculation. Although the evidence showed

that VVI used nicotine and other chemicals in the course of its business, there was no evidence that these chemicals were present in the lab in a quantity sufficient to ignite a flame at a space heater above and outside of the room on the night of the fire. Furthermore, the fire investigator was unable to offer a reliable explanation of how any nicotine vapors that were present would be able to travel up to the space heater because, as he conceded, nicotine vapors are heavier than air and would therefore tend to sink rather than rise. He opined that the combination of various chemicals might cause the vapors to rise, but admitted that he did not have a chemical engineering background and could not explain what mixture of chemicals might cause that to happen or whether it was likely to have occurred in this case. We agree with the trial court that the fire investigator's opinion about causation was not "based on sufficient facts or data," and was therefore unreliable. V.R.E. 702.

¶ 13. Plaintiff argues that in his motion for a new trial he provided the court with data showing that the density of liquid nicotine equals that of air at sixty-eight degrees Fahrenheit, so it was not "junk science" to conclude that vapor from liquid nicotine could reach the space heater. The fact remains, however, that plaintiff's fire investigator was unqualified to explain this information to the jury. He was also unable to say what amount of liquid nicotine had to be present in the open in order for the vapors to escape the lab in a sufficient concentration to ignite, or whether that concentration of vapors was present on the night of the fire. The trial court therefore did not abuse its discretion in excluding his testimony.

II. Rule 50 Motion

¶ 14. After plaintiff rested his case, the trial court granted judgment as a matter of law to defendants on all of plaintiff's claims pursuant to Vermont Rule of Civil Procedure 50. Rule 50(a)(1) permits the court to grant judgment as a matter of law against a party that has been fully heard on an issue where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." In evaluating the trial court's grant of judgment as a matter of law to defendants, we "consider the evidence in the light most favorable to the nonmoving party, excluding the effect of modifying evidence." Foti Fuels, Inc. v. Kurrle Corp., 2013 VT 111, ¶ 10, __Vt.__, __A.3d__ (quotation omitted). "If evidence exists that may fairly and reasonably support all elements of the nonmoving party's claim, judgment as a matter of law is improper." Brueckner v. Norwich Univ., 169 Vt. 118, 122, 730 A.2d 1086, 1090 (1999).

A. Negligence Claims Against VVI and Landlord

¶ 15. The trial court properly granted judgment as a matter of law in favor of defendants on plaintiff's claims of negligence against VVI and landlord. Without expert testimony on the issue of causation, plaintiff was unable to prove that VVI's use of liquid nicotine in its laboratory caused the fire. Without establishing that VVI caused the fire, plaintiff also could not prove that landlord was negligent in leasing the space to VVI or in maintaining VVI's leased space.

¶ 16. Plaintiff argues, however, that the trial court should have allowed the negligence claims to be decided by the jury because the doctrine of res ipsa loquitur applied to his case. The doctrine "allows the plaintiff to escape a directed verdict without directly establishing negligence, and . . . allows the jury a permissive inference of negligence." Cyr v. Green

Mountain Power Corp., 145 Vt. 231, 235, 485 A.2d 1265, 1268 (1984). For the doctrine to apply, a plaintiff must demonstrate the following elements:

> 1. A legal duty owing from the defendant to exercise a certain degree of care in connection with a particular instrumentality to prevent the very occurrence that has happened.
>
> 2. The subject instrumentality at the time of the occurrence must have been under the defendant's control and management in such a way that there can be no serious question concerning the defendant's responsibility for the misadventure of the instrument.
>
> 3. The instrument for which the defendant was responsible must be the producing cause of the plaintiff's injury.
>
> 4. The event which brought on the plaintiff's harm is such that would not ordinarily occur except for the want of requisite care on the part of the defendant as the person responsible for the injuring agency.

Id. at 235-36, 485 A.2d at 1268.

¶ 17. The doctrine of res ipsa loquitur allows an inference of negligence in certain cases, not causation. Established causation is a prerequisite to the application of the doctrine. As discussed above, plaintiff's expert was unable to present reliable testimony linking VVI's activities in the lab to the fire. Furthermore, plaintiff failed to show that a fire in a commercial warehouse is the sort of accident that ordinarily does not occur without negligence. See Metro. Prop. & Cas. v. Harper, 7 P.3d 541, 551 (Or. Ct. App. 2000) ("[R]es ipsa loquitur is not commonly applied to fires, because the cause of a fire is generally unknown [and] fires commonly occur where due care has been exercised as well as where due care was wanting." (quotation omitted)). The cause and origin of this fire were genuinely disputed. It was therefore appropriate for the court to decline to apply res ipsa loquitur in this case.

B. Unjust Enrichment Claim Against Landlord

¶ 18. Plaintiff also argues that the trial court erred in granting judgment as a matter of law to landlord on plaintiff's claim of unjust enrichment. "Under the doctrine of unjust enrichment, a party who receives a benefit must return the benefit if retention would be inequitable. Unjust enrichment applies if in light of the totality of the circumstances, equity and good conscience demand that the benefitted party return that which was given." Kellogg v. Shushureba, 2013 VT 76, ¶ 22, __Vt.__, 82 A.3d 1121 (quotations and alteration omitted). Plaintiff claims that he spent over $40,000 improving his portion of the warehouse. Because landlord's insurance proceeds covered the total loss of the building, he seeks some share of the payment. Assuming without deciding that Vermont law recognizes an unjust enrichment claim by a tenant against a landlord to recover the value of improvements made by the tenant, plaintiff's claim fails because he did not show that landlord received a benefit from his improvements.[2] There was no evidence that the improvements resulted in a higher insurance settlement for landlord or

increased the value of the warehouse. The trial court accordingly did not err in dismissing plaintiff's unjust enrichment claim.

C. Remaining Claims

¶ 19. The trial court granted judgment as a matter of law on plaintiff's strict liability claim against VVI on the grounds that there was no ultrahazardous activity being conducted. It dismissed plaintiff's breach-of-warranty-of-suitability claim against landlord on the ground that no such action has been recognized in Vermont. Finally, it dismissed plaintiff's duty-to-warn claim against landlord on the ground that landlord did not owe a duty to warn plaintiff about VVI's activities. Plaintiff's brief does not challenge the court's rulings on these counts, and we will not disturb them. See Catlin v. Town of Hartford, 138 Vt. 1, 2, 409 A.2d 596, 597 (1979) (declining to disturb trial court's ruling where appellant failed to challenge it in appellate brief).

III. Exclusion of Warren Tredwell's Statements to Police

¶ 20. Plaintiff argues that the trial court erred in excluding two statements that Warren Tredwell made to police the morning of the fire and a few days later. He argues that the statements were admissible nonhearsay evidence pursuant to Vermont Rule of Evidence 801(d)(2)(D). That rule provides that a statement offered against a party is not hearsay if it is "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." V.R.E. 801(d)(2)(D).

¶ 21. The first statement was contained in the report written by a state police investigator who interviewed Warren the morning of the fire:

> [Warren] stated there was a five gallon pail of glycerin and approximately 800 bottles of pre-made electronic cigarette material inside the shop. He advised each bottle of the product contained approximately 70% glycerin, and the rest was propylene glycol, distilled water and a "small dosage of nicotine." He further advised the refrigerator in the shop held containers of 99.9% nicotine. [Warren] advised his son was the only one who handled the nicotine and diluted it down to what they called a "base liquid," before he himself entered the process of bottling, labeling and capping the product for sale.

The second statement was contained in the report written by the investigator hired by landlord's insurer. Warren told the investigator that he was the last person in the warehouse the night of the fire, that he left at 2:00 a.m. "after completing an order of electronic cigarettes to be shipped out the next day," and that he worked for his son.

¶ 22. The court agreed with plaintiff that Warren was an agent of VVI, but excluded the statements because plaintiff had not established that they were made within the scope of Warren's agency or employment. The court allowed plaintiff to use the statements for purposes of impeachment, which he ultimately did not do.

¶ 23. The trial court based its ruling on this Court's decision in Westinghouse Electric Supply v. B.L. Allen, Inc., 138 Vt. 84, 94, 413 A.2d 122, 129 (1980), in which we stated that it is "only when an agent is acting within the scope of his authority and his admission relates to an act or negotiation connected therewith that it is admissible against his principal." Id. (quoting Jones v. Gay's Express, Inc., 110 Vt. 531, 534, 9 A.2d 121, 123 (1939)). The rule stated in Westinghouse has since been modified by Rule 801(d)(2)(D). See Reporter's Notes, V.R.E. 801(d)(2)(D) (explaining that in contrast to "traditional view" expressed in Westinghouse and other cases, "[t]he present rule adopts the broader view allowing statements about matters within the scope of employment in order to prevent loss of valuable evidence"); see also Contractor's Crane Serv., Inc. v. Vt. Whey Abatement Auth., 147 Vt. 441, 451, 519 A.2d 1166, 1173 (1986) (explaining that "[s]tatements made by an [agent] concerning a matter within his employment may be admissible against the party retaining the [agent]" (quotation omitted)). It was therefore error to require plaintiff to show that Adam Tredwell authorized Warren Tredwell to make his statements to the police and the investigator. Under Rule 801(d)(2)(D) and our case law, an agent's statements are not hearsay if they concern a matter within the scope of the agent's agency or employment. Contractor's Crane Serv., 147 Vt. at 451, 519 A.2d at 1173. Warren's employment in the lab provided a sufficient foundation for the admission of his statement.

¶ 24. However, the court's error was harmless because plaintiff has not shown that admission of the testimony would have changed the outcome of the case.[3] V.R.C.P. 61. The statements did contradict Warren's testimony that he never took part in bottling and capping the e-cigarette material. Nonetheless, even if he had been handling the pre-mixed material on the night of the fire, there was no showing that the vapors from that material were flammable or present in sufficient concentrations to escape the lab and come into contact with the pilot light. Warren's statements would not have solved the problem of establishing causation. Thus, their exclusion did not affect the outcome of this case.

IV. Motion to Alter Judgment and for a New Trial

¶ 25. Plaintiff argues that the court should have granted his motion for a new trial because its dismissal of the case was based on incorrect scientific reasoning.[4] He argues that his motion for a new trial provided the court with evidence that "density depended on temperature, and that indeed liquid nicotine was lighter than air at temperatures above 68 degrees." According to plaintiff, this evidence demonstrated that at a temperature of seventy degrees liquid nicotine would evaporate and the vapors would rise and reach the pilot light of the heater. We review the trial court's denial of a motion for a new trial for abuse of discretion. Gregory v. Poulin Auto Sales, Inc., 2012 VT 28, ¶ 17, 191 Vt. 611, 44 A.3d 788 (mem.).

¶ 26. The trial court acted within its discretion in denying plaintiff's motion for a new trial. The court's decision to grant judgment as a matter of law in favor of defendants was not based on its own scientific conclusions. Rather, it was based on plaintiff's failure to provide reliable evidence at trial to prove that VVI's activities caused the fire. The information plaintiff offered in his motion was available to him prior to the judgment and could have been offered through a qualified expert witness at trial. His failure to provide admissible evidence in support of causation led to the Rule 50 motion being granted. Plaintiff has failed to demonstrate that the court's denial of his motion for a new trial was an abuse of discretion. See Gardner v. Town of

Ludlow, 135 Vt. 87, 91, 369 A.2d 1382, 1385 (1977) (explaining that Rule 59 is directed at preventing a "miscarriage of justice" and is not a device for putting "merely dilatory" evidence before the court).

V. Deposition Costs

¶ 27. Vermont Rule of Civil Procedure 54(g) allows the court to award "costs in the taking of depositions" to the prevailing party in its discretion. The depositions must have been "reasonably necessary," whether or not they were actually used at trial. V.R.C.P. 54(g). The rule provides that deposition-related costs "may include the cost of service of subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer's reasonable fee for attendance, and the cost of the original transcript of the testimony or such part thereof as the court may fix." Id.

¶ 28. Plaintiff argues that the trial court improperly awarded defendants the costs of obtaining copies of transcripts of depositions that they did not take themselves.[5] We disagree. The trial court has broad discretion to award the prevailing party the costs of obtaining copies of the transcripts provided that the depositions were "reasonably necessary" to prepare for the litigation. V.R.C.P. 54(g); Peterson v. Chichester, 157 Vt. 548, 553, 600 A.2d 1326, 1329 (1991) ("The trial court has discretion in awarding costs."); see also Maurice Mitchell Innovations, L.P. v. Intel Corp., 491 F. Supp. 2d 684, 686 (E.D. Tex. 2007) (stating that trial court has "great discretion to tax the costs of taking, transcribing, and reproducing depositions"). All of the depositions for which defendants requested costs—with the exception of that of Lieutenant James Cruise, which is addressed below—were of witnesses who testified at trial or were essential to the case. While plaintiff correctly points out that the rule mentions only "the cost of the original transcript," the list of costs is nonexclusive and the trial court may, in its discretion, award other deposition-related costs if it sees fit. V.R.C.P. 54(g).

¶ 29. The court abused its discretion, however, in ordering plaintiff to pay defendants for the cost of concurrently videorecording the depositions. Rule 30(b)(4)(B) provides that "[a]ny party or witness may at his or her own expense concurrently record a deposition by a method other than that being used by the party taking the deposition."[6] (Emphasis added.) Although this provision applies to parties who are not conducting the deposition, the principle also applies to parties who opt to preserve the testimony by more than one means. Defendants recorded their depositions stenographically and had already recovered the costs of those transcripts. They were not entitled to be reimbursed for the additional costs they incurred in videorecording the same depositions. We remand this portion of the case for the trial court to adjust its award of costs.

¶ 30. Plaintiff argues that he should not have to pay for the costs of the deposition of Lieutenant Cruise, who did not testify at trial. The trial court did not address whether Lieutenant Cruise's deposition was "reasonably necessary." V.R.C.P. 54(g). We accordingly remand so that the trial court may make that determination in the first instance.

¶ 31. Contrary to plaintiff's claim, landlord's insurer is not precluded from recovering its deposition-related costs because it defended the suit instead of landlord. "Ordinarily, an insurer who defends and indemnifies on behalf of its insured will be subrogated to the rights of its

insured." Jefferson Ins. Co. v. Travelers Ins. Co., 159 Vt. 46, 49, 614 A.2d 385, 387 (1992). As a prevailing party in this common-law action, landlord's insurer—acting on landlord's behalf—was entitled to recover litigation costs related to the defense, including deposition costs. V.R.C.P. 54; Murphy v. Sentry Ins. Co., 2014 VT 25, ¶ 53, ___Vt.___, ___A.3d___.

VI. Motion to Disqualify Landlord's Attorney

¶ 32. Prior to the commencement of this suit, in October 2010, plaintiff placed a lien on the property involved in the fire that was owned by landlord. Plaintiff's attorney Kaveh Shahi advised the court in December 2011 that plaintiff was withdrawing the lien. In May 2012, landlord's attorney Harry Ryan wrote a letter to Attorney Shahi stating that his client "went into some sort of shock and required medical attention" after discovering that plaintiff's lien was still in the land records. The letter stated "[y]ou are now on notice that [landlord] may suffer additional significant personal injury if you do not take appropriate action to make sure that the lien is removed," and requested that plaintiff's attorney write to the town clerk's office and ask them to remove the lien.

¶ 33. Following receipt of the letter, plaintiff sought to disqualify Attorney Ryan and his firm, Ryan Smith & Carbine, Ltd. (RSC), from defending landlord in this case. At the time that Attorney Ryan wrote the letter to Attorney Shahi, RSC was retained as counsel by the malpractice insurer for Attorney Shahi's firm, Cleary Shahi & Aicher, P.C. (CSA) to defend a separate suit against Attorney Shahi's partners.[7] Plaintiff argued that Attorney Ryan's letter was a threat to bring suit against Attorney Shahi. He argued that RSC therefore had a concurrent conflict of interest because it was asserting a claim against Attorney Shahi while simultaneously defending his firm against another malpractice action.

¶ 34. Following a hearing, the trial court denied plaintiff's motion for disqualification. We review the trial court's ruling for abuse of discretion. See Stowell v. Bennett, 169 Vt. 630, 631, 739 A.2d 1210, 1211 (1999) (mem.) ("A motion to disqualify counsel is a matter that rests within the sound discretion of the trial court, and its ruling will not be disturbed absent an abuse of discretion.").

¶ 35. We affirm the trial court's decision for two reasons. First, plaintiff has not produced a transcript of the hearing below, which would allow us to determine whether the trial court had an appropriate factual basis for making its ruling. See Cody v. Cody, 2005 VT 116, ¶ 16, 179 Vt. 90, 889 A.2d 733 (holding that evidentiary hearing was necessary to resolve motion to disqualify attorney where material facts were in dispute).

¶ 36. Second, plaintiff has failed to show that disqualification was warranted. Rule 1.7 of the Vermont Rules of Professional Conduct prohibits an attorney from representing a client:

> if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or

> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

V.R.Pr.C. 1.7(a). RSC's representation of landlord was not directly adverse to CSA. Representation is directly adverse where a lawyer "act[s] as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." V.R.Pr.C. 1.7 cmt. 6. RSC was not acting as an advocate against Attorney Shahi or his firm, but rather against one of Attorney Shahi's clients. Attorney Ryan's letter cannot reasonably be interpreted as threatening a claim of litigation against Attorney Shahi personally. The letter simply asked Attorney Shahi to do what he had already claimed to have done: remove plaintiff's lien from the land records.[8]

¶ 37. As we have noted in the past, "disqualification of counsel is only one of several avenues available to a court . . . and it is a drastic measure which courts should hesitate to impose except when absolutely necessary." Cody, 2005 VT 116, ¶ 23 (quotation omitted). The trial court could have reasonably concluded that any potential for conflict in this situation was outweighed by landlord's right to choose its own counsel. Stowell, 169 Vt. at 630, 739 A.2d at 1212 (explaining that in considering whether to disqualify attorney, court must be "solicitous of a client's right freely to choose his counsel" and mindful that client may suffer loss of time and money in finding new counsel, as well as benefit of counsel's familiarity with case (quotation omitted)). It therefore did not err in denying plaintiff's motion to disqualify RSC from the case.

The case is affirmed in all respects except for the award of deposition costs, which is reversed and remanded for recalculation consistent with this decision.

FOR THE COURT:

_____

Associate Justice

[1] Plaintiff's fire investigator was permitted to testify regarding his investigation of the fire's source, and to offer his opinion that the fire originated in the southwest corner of the building, near the space heater. Defendants renewed their objection when he began to testify regarding causation.

[2] In the absence of an agreement to the contrary, a tenant is generally not entitled to compensation by the landlord for improvements made to the leased premises. Commercial Trust & Sav. Bank v. Christensen, 535 N.W.2d 853, 858 (S.D. 1995). Courts in several states have recognized an equitable exception permitting a tenant to recover under an unjust-enrichment theory where there is a breach of the lease or other inequitable conduct by the landlord. See, e.g., Hertz v. Fiscus, 567 P.2d 1, 2 (Idaho 1977); Christensen, 535 N.W.2d at 858. Vermont so far has not recognized this exception. Even if we were to adopt such a doctrine, however, plaintiff's claim would still fail because there is no evidence of inequitable conduct by landlord. See In re Estate of Vangen, 370 N.W.2d 479, 480 (Minn. Ct. App. 1985) (holding that tenant failed to state a claim for unjust enrichment for value of improvements he made to landlord's property where landlord "had done nothing illegal or inequitable").

[3] Plaintiff actually managed to get the first statement into evidence anyway through the testimony of the police officer who took the statement.

[4] Although plaintiff moved to "alter" the judgment in this case under Vermont Rule of Civil Procedure 59(e), the relief he sought was a new trial and we therefore review the denial of the motion under the standard applicable to Rule 59(a) motions.

[5] VVI requested the costs of electronic copies of depositions of Johnathan Lasek, Adam and Warren Tredwell, and Jan and Hartford Downing. It also requested half the costs of obtaining the original and a copy of the transcript of the deposition of plaintiff's fire investigator William May, as well as the cost of videorecording Mr. May's deposition.

Landlord requested the costs of original and electronic copies of the depositions of Mr. Lasek, the Tredwells, and the Downings, as well as Ray Weed (plaintiff's expert on damages), James Cruise and Timothy Austin (defendants' fire expert), as well as half the costs of obtaining the original and a copy of the transcript of the deposition of Mr. May, and half the cost of the videorecording Mr. May's deposition. Landlord also requested the costs of videorecording the depositions of Mr. Lasek, Mr. Austin, and Mr. Cruise.

[6] By contrast, Federal Rule 30 permits any party to designate another method of recording, and states that "that party bears the expense of the additional record or transcript unless the court orders otherwise." F.R.C.P. 30(b)(3)(B); see also 28 U.S.C. § 1920(2) (allowing federal judge to tax as costs "[f]ees for printed or electronically recorded transcripts necessarily obtained for use

in the case"). Unlike the federal rule, Vermont Rule 30 contains no authorization for a court to award the prevailing party the costs it incurred in making its own recording of a deposition by another method.

[7] RSC subsequently withdrew from representing CSA in the malpractice case with that court's permission.

[8] Plaintiff has not argued that RSC's representation of CSA's insurer would materially impact RSC's representation of either client, so we do not reach the second provision of Rule 1.7.

(2013-375)

2014 VT 32

[Filed 11-Apr-2014]

2014 VT 32

No. 2013-375

In re A.W., Juvenile

Supreme Court

On Appeal from
Superior Court, Franklin Unit,
Family Division

February Term, 2014

James R. Crucitti, J. (Emergency Care Order); Geoffrey W. Crawford, J. (CHINS Decision)

Matthew F. Valerio, Defender General, and Rebecca Turner, Appellate Defender, Montpelier, for Appellant Mother.

Michael Rose, St. Albans, for Appellant Father.

William H. Sorrell, Attorney General, and Bridget C. Asay, Assistant Attorney General, Montpelier, and Jody Racht, Assistant Attorney General, Waterbury, for Appellee.

PRESENT: Reiber, C.J., Dooley, Skoglund and Robinson, JJ., and Burgess, J. (Ret.), Specially Assigned

¶ 1. **DOOLEY, J.** Mother and father appeal from a family court order adjudicating the minor A.W. to be a Child in Need of Care and Supervision (CHINS). They contend: (1) the court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); and (2) the evidence did not support the trial court's finding that the child was without proper parental care. We affirm.

¶ 2. The rather tangled background to this dispute may be summarized as follows. Mother and father were married and living in Enosburg, Vermont in January 2012 when mother became pregnant with A.W. Mother had struggled with substance abuse and mental health issues, which continued during the pregnancy. Father had a history of alcohol abuse. Based on concerns from its earlier involvement with mother's older children,[1] the Department for Children and Families interviewed mother during her pregnancy and learned of her continued use of alcohol. In April 2012, the police responded to two incidents involving mother and father, one in which mother allegedly assaulted father because she thought he was drinking too much, and the

other in which both mother and father were found intoxicated in a hotel in St. Albans, Vermont, resulting in a charge against father for disorderly conduct.

¶ 3. In June 2012, the parents moved to Plattsburgh, New York, although mother maintained her medical care in Vermont at Fletcher Allen Health Care (FAHC). A.W. was born at FAHC on September 17, 2012. DCF made a report that day to the New York child protection agency in Plattsburgh expressing its concerns about the parents' continued alcohol and possible drug abuse.

¶ 4. After two to three days in hospital at FAHC, mother was discharged with A.W., and the family went to father's parents' house in Swanton, Vermont before returning to their apartment in Plattsburg. About a week after A.W.'s birth, on September 25, 2012, the New York police responded to a dispute between mother and father. This led to mother's hospitalization for in-patient psychiatric care at the Champlain Valley Physician's Hospital in Plattsburgh.

¶ 5. While mother was hospitalized, father took A.W. to live with his parents in Swanton. The New York child protection agency, in response, advised DCF that there was an open case involving the family and requested that DCF contact father in Vermont. Two DCF caseworkers visited father at his parents' house in early October 2012. Father told them that he could not remain sober while he was with mother, and that he planned to live with A.W. at his parents' house. Over the next few days, DCF officials met with father and established a safety plan for the child in which father agreed to engage in substance abuse services and to apply for benefits to help support himself and the child at his new residence. Father also filed a relief-from-abuse complaint against mother in Vermont, and was issued a temporary order. Mother was released from the hospital after a few days and filed her own relief-from-abuse petition in New York, but testified that she intentionally failed to appear at the scheduled hearing so that it would be dismissed.[2]

¶ 6. On October 5, 2012, DCF received information that father's substance abuse was continuing and filed a CHINS petition in response. A few days later, on October 8, 2012, mother and father appeared at the scheduled hearing on father's relief-from-abuse petition, where father had it dismissed. On the same day, the State filed a request for an emergency care order supported by a DCF social worker's affidavit stating that the child's grandfather in Swanton had reported that, following the relief-from-abuse hearing, the parents had returned home, picked up A.W., and left. The grandfather believed that they were returning to Plattsburgh. The grandfather stated that mother had behaved aggressively and that father may have been using drugs. The court, in response, issued an order finding that father had "stopped the safety plan that was necessary for the safety of the child," and transferred temporary custody to DCF pending a hearing scheduled for the following day. The parents did not appear at the hearing, and the court issued an order noting that the parents' and the child's "whereabouts [were] unknown," and that the State "suspects they have returned to New York." The court directed DCF to "prepare a temporary care order which will allow DCF to take custody in either state."

¶ 7. The child was taken into DCF custody the following day, October 10, 2012, in Vermont, where he was attending a medical appointment with mother. Following a hearing the next day, where both parents were represented, the court issued a temporary care order finding that the

parents had been abusing drugs and alcohol, that returning custody to the parents would result in substantial danger to the health and safety of the child, and that temporary custody would remain with DCF. The child was placed with his paternal grandparents in Swanton, where he has since remained.

¶ 8. Shortly before the next scheduled hearing in December 2012, mother moved to dismiss the proceeding for lack of jurisdiction. Mother maintained that New York was the child's home state under the UCCJEA, and that there was no basis under the Act for an assertion of emergency jurisdiction in Vermont. In support of the motion, mother filed a letter from New York's child protection agency to mother, dated December 5, 2012, stating that she had been the subject of an investigation commenced on September 17, 2012, the date of A.W.'s birth, that some evidence had been uncovered to support a determination that the child had been maltreated or abused, and consequently that she would remain in the "New York State Child Abuse and Maltreatment Register" unless she requested an amendment or expungement. The State opposed the motion to dismiss, asserting that Vermont could exercise jurisdiction under the UCCJEA as either the child's home state, or on the basis that there was no home state, and Vermont had a significant connection with the family, or under the Act's provision for temporary emergency jurisdiction. The State subsequently filed a letter from New York's child protection agency, dated January 16, 2013, stating that its case concerning A.W. and his parents had been closed on November 14, 2012 because the child had been taken into DCF custody on October 10, 2012, and the child was residing with his paternal grandparents in Vermont. The State also filed a memorandum outlining the family's Vermont connections, including the fact that father had retained a Vermont driver's license and vehicle registration.

¶ 9. Following a hearing on the motion to dismiss in January 2013, the trial court issued a brief entry order, ruling that, while Vermont was not the child's home state, the court had properly exercised temporary emergency jurisdiction. The court also directed DCF to contact New York's child protection authorities to inquire about transferring the case, and set the matter for a further hearing "to monitor progress." The State, in response, filed a memorandum asking the trial court, presumably pursuant to 15 V.S.A. § 1068, to contact the New York State Family Court to determine whether a transfer would be in the best interests of the child. The court did not do so.

¶ 10. At the next scheduled hearing in March 2013, the State reported that the child remained with his grandparents in Swanton, that the parents remained in New York, and that the matter had not been transferred to the New York child protection agency. Mother asserted that any emergency giving rise to the transfer of custody had passed, and requested that the case be dismissed and custody returned to the parents. The State countered that the chaos surrounding the child at birth validated the court's exercise of emergency jurisdiction, and that the circumstances justified retaining jurisdiction through to the merits hearing on the CHINS petition.

¶ 11. In response to these arguments, the court noted that there appeared to be no judicial proceeding in New York and no open case with the New York child protection agency, acknowledged the difficulties which the child's residence in Vermont posed for the parents, expressed the need for an "orderly transition" of custody to the parents, but ultimately

remained reluctant to transfer custody or dismiss the case without more information about the parents' situation. The parties agreed to return at a follow-up hearing with more specific information regarding the parents' housing situation, employment, daycare arrangements, and the services in which they were enrolled.

¶ 12. At the next hearing in early April 2013, however, the court learned that father had since been incarcerated in New York on a domestic violence charge, that mother had moved from Plattsburgh to Norfolk, New York, that the extent of her participation in substance abuse and other services could not be verified, and that she had recently been a passenger in a vehicle which struck and killed a pedestrian. Mother restated her request for dismissal of the CHINS proceeding on jurisdictional grounds, while the State claimed that Vermont was the child's home state under the UCCJEA and that the matter should proceed to a merits hearing. The court declined to return custody to the parents, retained jurisdiction, and set the matter for a merits hearing.

¶ 13. The merits hearing was held in September 2013, and the court issued a written ruling that month, concluding that A.W. was CHINS. The court initially addressed the jurisdictional issue, ruling that it had emergency jurisdiction "when the petition was filed since A.W. was present in Vermont" and that, in the absence of any court proceeding in another state, its jurisdiction to rule on the merits had continued "by default." On the merits, the court found that A.W. had been without proper parental care since birth "due to the persistent and serious problems experienced by his parents with mental health, alcohol abuse, and domestic violence." Both parents have appealed.[3]

¶ 14. We turn first to the parents' renewed assertion that the court lacked subject-matter jurisdiction. Because all events occurred after its effective date, this case is governed by the UCCJEA, 15 V.S.A. §§ 1061-1096, which replaced the Uniform Child Custody Jurisdiction Act (UCCJA).[4] Like the former law, the UCCJEA dictates when a court of this State has jurisdiction to decide child custody matters. The jurisdictional criteria "to make an initial child custody determination" are set forth in 15 V.S.A. § 1071, and include, in essence, four circumstances: (1) where "Vermont is the home state of the child on the date of the commencement of the proceeding" or "Vermont was the home state of the child within six months before the commencement of the proceeding and the child is absent from Vermont, but a parent or person acting as a parent continues to live in Vermont," id. § 1071(a)(1); (2) "[a] court of another state does not have jurisdiction" under (1) above, or "a court of the home state has declined to exercise jurisdiction on the ground that Vermont is the more appropriate forum" and a parent and the child have a significant connection with Vermont and substantial evidence is available in Vermont "concerning the child's care, protection, training, and personal circumstances," id. § 1071(a)(2); (3) "[a]ll courts having jurisdiction" under (1) or (2) above "have declined to exercise jurisdiction," id. § 1071(a)(3); and (4) "[n]o court of any other state would have jurisdiction under the criteria specified in" (1), (2) or (3) above, id. § 1071(a)(4).

¶ 15. In addition, the UCCJEA contains a provision authorizing a Vermont court to exercise "temporary emergency jurisdiction if the child is present in Vermont, and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." Id.

§ 1074(a). This section goes on to provide that, where "a child custody proceeding has not been commenced in a court of a state having jurisdiction," an order under this section becomes a final determination, "and Vermont becomes home state of the child." Id. § 1074(b).

¶ 16. The parents here initially respond to the trial court's determination that it had "temporary emergency jurisdiction" under 15 V.S.A. § 1074(a), arguing that § 1074(a) did not apply because A.W. was not "present in Vermont" when the court issued the emergency care order, and because the child was not "subjected to or threatened with mistreatment or abuse." Id. They also dispute that the court properly exercised continued jurisdiction to address the CHINS petition, arguing that a "child custody proceeding" had been commenced in New York, so that the Vermont court exercising emergency jurisdiction was required to contact the court in New York pursuant to § 1074(d).

¶ 17. We need not address these claims, however, inasmuch as we conclude that jurisdiction was otherwise properly established under § 1071 at the time the CHINS petition was filed on October 5, 2012. The trial court's jurisdictional ruling under the UCCJEA "is a question of law that we review de novo." In re C.P., 2012 VT 100, ¶ 13, 193 Vt. 29, 71 A.3d 1142. Any factual findings by the court underlying its ruling are reviewed for clear error. Pahnke v. Pahnke, 2014 VT 2, ¶ 17, ___ Vt. ___, ___ A.2d___; see also Harignordoquy v. Barlow, 2013 WY 149, ¶ 16, 313 P.3d 1265 (noting that while trial court's jurisdictional ruling under the UCCJEA is reviewed de novo, its underlying factual findings are reviewed for clear error); In re Z.Z., 2013 UT App 215, ¶ 8, 310 P.3d 772 (same).

¶ 18. Like its predecessor, the UCCJEA defines "home state" to mean the state in which the child lived with a parent or a person acting as parent "for at least six consecutive months immediately" preceding the commencement of the proceeding, or "[i]n the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned." 15 V.S.A. § 1061(7); see also 15 V.S.A. § 1031(5) (repealed July 1, 2011). Periods of "temporary absence" by any of the mentioned persons are considered to be "part of" this six-month or less-than-six-months period. Id. We construed this definition of "home state" in In re Cifarelli, 158 Vt. 249, 611 A.2d 394 (1992), which involved a child who was born and lived in Bermuda for one month, was taken to New York for a brief period, and then moved with her family to Vermont. Because the child was not yet six months old when a guardianship proceeding commenced in Vermont, following the death of her parents, we concluded that the child effectively "ha[d] no home state" since she had neither lived consecutively in one state for six months nor "had she lived in any one state 'from birth' to the commencement of the proceeding." Id. at 253-54, 611 A.2d at 397; see also In re D.T., 170 Vt. 148, 152, 743 A.2d 1077, 1081 (1999) (holding that, with respect to a child less than six months old, "Vermont is not [the child's] 'home state' because he did not live in Vermont 'from birth'").

¶ 19. The trial court here found, and the evidence showed, that A.W. was born in Vermont on September 17, 2012 and then returned to New York, where his parents had moved about two months earlier. As the court further found, about a week after A.W.'s birth, father took the child to his parents' house in Vermont with the stated intention of residing there and took steps to obtain benefits and services to support himself and the child in Vermont. Father and A.W. then

lived in Vermont for almost two weeks before DCF filed a CHINS petition and emergency care request, at which point they returned briefly with mother to New York before the child was taken into custody in Vermont.

¶ 20. Thus, A.W. was barely three weeks old when the instant proceeding commenced, and had plainly not "lived from birth" in either Vermont or New York as this requirement was interpreted in Cifarelli. As noted, although the parents resided in New York when A.W. was born, father took the child to Vermont with the intention of residing there when the child was only a week old, applied for welfare benefits, committed to a safety plan for the child, and continued to reside in Vermont until the CHINS petition was filed about two weeks later. The facts as found by the trial court thus do not support a conclusion that the child had "lived from birth" in either New York or Vermont, and neither, therefore, qualifies as the child's home state under the UCCJEA.

¶ 21. Although the trial court here concluded that New York was the child's home state and that the time spent in Vermont was merely a "temporary absence" from New York, its factual findings do not support these conclusions. As noted, the question of what constitutes a child's home state under the UCCJA or its successor the UCCJEA is a question of law which this Court reviews de novo. In re C.P., 2012 VT 100, ¶ 13. Furthermore, courts addressing the question of "temporary absence" have noted that the term is not defined under the UCCJA or its successor the UCCJEA, and many, therefore, have adopted a "totality of the circumstances" test, looking to whether all of the facts as found by the trial court, including the parent's purpose in removing the child from one state to another and the duration of the absence, support a conclusion that a child's absence was temporary. See, e.g., In re S.M., 938 S.W.2d 910, 918 (Mo. Ct. App. 1997) (holding that, in "resolving the temporary absence issue, the totality of the circumstances test is best" and concluding that, "[r]eviewing the totality of the circumstances, here, it is clear from the record that the three months which the children spent in Kansas . . . was a temporary absence"); Chick v. Chick, 596 S.E.2d 303, 308-09 (N.C. Ct. App. 2004) (adopting totality of circumstances test to determine whether absence from state was temporary under UCCJEA, and concluding that court's findings supported holding that absence was temporary).

¶ 22. Here, the court's findings that father brought the child to Vermont with the specific intent to reside here, and took additional, affirmative steps to establish residency in Vermont, including applying for welfare benefits and agreeing to follow a safety plan, are not reconcilable with its conclusion that the time period which the child spent in Vermont, up to and including the date of CHINS filing, was merely a "temporary absence" from New York. At best, it would appear that the circumstances and intentions of the parties fluctuated over a short period, and do not support a conclusion that either Vermont or New York was the child's home state.

¶ 23. Accordingly, we hold that neither Vermont nor New York meets the definition of A.W.'s "home state" under the UCCJEA, and we therefore turn to § 1071(a)(2) to determine whether there are sufficient family connections and evidence in Vermont for the courts here to exercise jurisdiction at the time of the CHINS filing. See In re E.T., 137 P.3d 1035, 1042-43 (Kan. Ct. App. 2006) (holding that child under six months who was born in Missouri and later lived in Kansas "did not have a 'home state' " when the child protection proceeding commenced, and therefore the court must determine whether Kansas had sufficient connections and evidence

to exercise jurisdiction); In re R.P., 966 S.W.2d 292, 300 (Mo. Ct. App. 1998) (holding that infant who was born in Kansas and thereafter lived several months in Missouri had no "home state" under the UCCJA, and therefore court must look to which state had most significant connection and evidence concerning family). This is ultimately a legal issue we must resolve based on the facts as found by the trial court. See, e.g., Hart v. Hart, 327 S.E.2d 631, 636-37 (N.C. Ct. App. 1985) (holding that trial court's factual findings were sufficient to support the conclusion that the children and at least one parent had sufficient connections with the State, and substantial evidence concerning their welfare, to support the exercise of jurisdiction).

¶ 24. We conclude that Vermont's ties to this matter are sufficient to exercise jurisdiction. As the trial court found, when this proceeding commenced the child was residing in Vermont with his father and paternal grandparents. Father had applied for housing and other benefits in Vermont to help support himself and A.W. and had continued to retain a Vermont driver's license and vehicle registration. Father had entered into a safety plan with DCF in which he agreed to participate in a variety of services in Vermont. Thus the child and at least one parent had a significant connection with Vermont, and the most direct and best evidence concerning the child's day-to-day care and well-being at the time of the CHINS petition was in Vermont. Accordingly, we conclude that Vermont is the appropriate state to exercise jurisdiction.

¶ 25. For similar reasons we reject father's additional assertion that, even if the Vermont family court had jurisdiction, it should have declined to exercise it at the CHINS proceeding on the basis of forum non conveniens. See 15 V.S.A. § 1077(a) (stating that a Vermont court which has jurisdiction "may decline to exercise it" if it determines that it is an "inconvenient forum" and that "a court of another state is a more appropriate forum"). Initially, we note that neither parent sought to raise this issue "upon motion," as provided by § 1077(a). See Follo v. Florindo, 2009 VT 11, ¶ 15, 185 Vt. 390, 970 A.2d 1230 (noting that issue not raised at trial is waived on appeal). Moreover, although the parents reside in New York, the child's placement with his paternal grandparents in Vermont, his continued residence there during the intervening months, the evidence concerning his day-to-day care, the absence of any New York judicial child custody proceeding, and the trial court's understandable reluctance to dismiss the case with no plan in place for the child, all supported its retention of jurisdiction through the merits proceeding. See 15 V.S.A. § 1077(b) (providing that, in determining whether Vermont is an inconvenient forum, court shall consider "all relevant factors," including which State's exercise of jurisdiction may best protect the child, the nature and location of the evidence, and the familiarity of the court with the facts and issues in the litigation). Accordingly, we find no abuse of discretion in the court's exercise of jurisdiction. Rocissono v. Spykes, 170 Vt. 309, 317, 749 A.2d 592, 598 (2000) (noting that the decision to decline jurisdiction under the UCCJA "is discretionary and thus subject to review under an abuse-of-discretion standard").

¶ 26. On the merits, the parents contend that the evidence was insufficient to support the court's determination that A.W. was without proper parental care. They assert, in particular, that the principal concern at the time of the CHINS petition and emergency care order was the possible presence of drugs or alcohol in the baby's system, and cite the State's concession that tests subsequently showed that this was not the case. They also assert that the trial court improperly relied on events occurring after the filing of the petition.

¶ 27. The record shows, however, that the CHINS petition was predicated on a variety of risks apart from the possibility of drugs or alcohol in A.W.'s system. To be sure, the State's concerns resulted from a number of circumstances preceding the child's birth, including father's alcohol and drug use and mother's substance abuse and mental health issues, as well as a series of incidents involving public intoxication and domestic violence which resulted in criminal charges against both parents. The source of the concerns also included an incident when A.W. was about a week old in which the parents became involved in a physical dispute and father tried to pull the baby away from mother, resulting in police intervention and mother's hospitalization for mental health treatment, and more recently father's violation of the safety plan to which he had agreed by failing to attend substance abuse counseling and by continuing to use illegal drugs. The evidence introduced at the CHINS hearing substantiated these concerns, and showed that substance abuse and domestic violence continued to plague both parents. This was sufficient to support the court's conclusion that A.W. was "without proper parental care due to the persistent and serious problems experienced by his parents with mental health, alcohol abuse, and domestic violence." See In re D.T., 170 Vt. at 156, 743 A.2d at 1084 ("The trial court's findings will stand unless clearly erroneous, and its conclusions of law will be upheld if supported by the findings.").

¶ 28. The record further discloses that neither parent objected to the admission of evidence concerning matters occurring after the CHINS petition; indeed mother affirmatively agreed with the court that it should consider events "up to the present date," and both parents attempted to show recent progress in addressing their substance abuse issues. Objections that are waived or not raised at trial are not preserved for review on appeal. Florindo, 2009 VT 11, ¶ 15. Accordingly, we find no basis to disturb the judgment.

Affirmed.

FOR THE COURT:

Associate Justice

¶ 29. **ROBINSON, J., concurring.** I concur completely in the majority's opinion. I write separately to make two points. First, the consequences of the delay in resolving the ongoing jurisdictional issues in this case could have been tragic. The CHINS petition was filed on October 5, 2012. The request for an emergency care order was filed on October 8, 2012, and the order issued shortly thereafter. Mother's first motion to dismiss for lack of jurisdiction was filed on December 4, 2012. The trial court subsequently issued several entry orders raising doubts about its own authority to continue to assert jurisdiction and urging the parties to take steps to initiate a proceeding in New York. However, the trial court did not on its own take steps to contact the New York court or courts in which the proceedings referenced in the parties' various

pleadings were initiated, see 15 V.S.A. § 1074(d), and did not dismiss the action. The jurisdictional question was not definitively resolved by the trial court until September 17, 2013, nearly a year after the child was removed from his parents. During that year, the child lived with his paternal grandparents in Vermont, and parents' ability to demonstrate their compliance with DCF's requirements, and to build bonds with the child, were significantly constrained by geography and life circumstance. Had the trial court's earlier instincts that it lacked continuing jurisdiction proven correct, the trial court would have been in the position of removing the child from the only home and parent figures he had truly known for the first year of his life, and returning him to parents with whom he had visited weekly, but had not lived since he was three weeks old. If they deemed it appropriate, New York authorities would have then started the whole process from scratch.

¶ 30. Although the reason for nearly a full year's delay in deciding the question is not entirely clear from the record, it seems to be the result of a series of decisions, actions, and inactions by the parties and the court rather than a single identifiable failing. Moreover, it is clear that the trial court acted, or refrained from acting, in part due to concern for the well being of the dependent child over whose welfare the court had ultimate decisionmaking authority. In the absence of a plan to provide for the child's welfare, the court was reluctant to simply dismiss the case. And, of course, as more time passed, the prospect of such a precipitous transition no doubt felt more untenable.

¶ 31. The Legislature has recognized the risk of dragging out these jurisdictional challenges, and has specifically instructed that "[i]f a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously." 15 V.S.A. § 1065. Although it is not clear that the parties aggressively sought priority in scheduling, it is clear that the jurisdictional question in this case was not handled expeditiously.

¶ 32. This was not the first, and won't be the last CHINS case involving thorny issues under uniform child custody laws. See, e.g. In re C.P., 2012 VT 100, 193 Vt. 29, 71 A.3d 1142 (CHINS case involving parents living in New York and child who had been staying with an aunt in Vermont prior to the CHINS petition). Going forward, I urge everyone in the process—the State, counsel for parents and children in CHINS cases, court staff, and judges—to be vigilant about bringing such jurisdictional questions to a speedy resolution.

¶ 33. My second point goes to father's argument that the trial court abused its discretion in failing to decline to exercise jurisdiction on the ground that Vermont is an inconvenient forum. 15 V.S.A. § 1077. For the reasons set forth in the majority's opinion, I believe the trial court's decision to exercise its jurisdiction was within its broad discretion. But I also want to emphasize that had the trial court dismissed this case on inconvenient forum grounds, I would have sustained that decision as well. A host of factors would have supported such a decision. The financial circumstances of the parties were such that travel to Vermont to participate in these proceedings was and is no doubt burdensome, id. § 1077(b)(4), and much of the evidence required to resolve the litigation was and is largely in New York, where the parents lived and availed themselves of services designed to improve their parenting capabilities, id. § 1077(b)(6).

¶ 34. More significantly, the decision to move forward in Vermont created an immediate obstacle to the goal of reunification—an obstacle the parents no doubt continue to face as this case has moved from merits to disposition. See 33 V.S.A. § 5101(a)(3) (stating that one purpose of juvenile judicial proceedings is to "preserve the family and to separate a child from his or her parents only when necessary to protect the child from serious harm or in the interests of public safety"). Given the limitations of time, as well as financial and transportation limitations, parents' ability to travel to Vermont with the frequency necessary to build their relationship with their child is tenuous. They are no doubt expected to successfully engage in a host of services designed to address the issues that gave rise to this petition in the first place. The tasks associated with that critical personal work, combined with travel to and from Vermont to spend time with their child, could take up all their time and effort, leaving little capacity for employment, and steep barriers to success. That is not a recipe for smooth reunification.

¶ 35. I realize that the prospect of dismissing a CHINS petition, in the face of allegations that a child's welfare is at risk with his or her parents, may seem untenable. But I have confidence that Vermont is not the only state with attentive and concerned child protection professionals ready to take necessary steps to protect a child's well being. In fact, in this case the record reflects that New York's Department of Social Services (DSS)—New York's DCF analog—was well aware of this family. Although the record does not provide definitive evidence on this point, it appears that the reason the New York authorities discontinued their own engagement with this case was that Vermont had assumed jurisdiction.

¶ 36. Moreover, had the trial court decided to decline to exercise its jurisdiction, it could have ensured an orderly transfer by setting a date certain for its dismissal that left sufficient time for New York authorities to initiate a proceeding in that state and secure an interim order of some sort if they so desired. The trial court tried to do this at one point, ordering defendants to take action to transfer the case to New York and indicating that Vermont would maintain jurisdiction until that occurred. In the absence of a date certain for dismissal of the case, and given Vermont's continued retention of jurisdiction, it is disappointing but not surprising that New York's DSS apparently declined to initiate a proceeding in New York.

Associate Justice

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[1] Mother testified that her three older children all live with their fathers.

[2] The date of dismissal of the relief-from-abuse petition is not evident from the record. While this appeal was pending, mother filed a request to supplement the appellate record, or alternatively to take judicial notice of certain additional documents relating to the New York proceeding, including: (1) a motion filed by mother in the New York family court, dated October 1, 2012, seeking custody of the child; (2) a supplemental affidavit by mother seeking "emergency custody"; and (3) a New York family court order of the same date directing the New York child-protective services agency "to conduct a child protective investigation." The State has opposed mother's motion, observing that the records were not brought to the trial court's attention in the proceedings below, and asserting that they do not affect the outcome in any event. While a Vermont family court is obligated to stay a proceeding and communicate with the court of another state if "information supplied by the parties" indicates that a child custody proceeding has been commenced in the court of another state having jurisdiction, 15 V.S.A. § 1076(b), that did not occur here; mother did not disclose that she had commenced such a proceeding, and the State was apparently unaware of any proceeding other than mother's petition for relief from abuse, which she testified had been voluntarily dismissed prior to the CHINS proceeding. Accordingly, we agree that the records in question do not affect our conclusion, discussed infra, that neither Vermont nor New York was the child's "home state" under 15 V.S.A. § 1071, and that Vermont has sufficient connections with the child to exercise jurisdiction. Therefore, we need not address the motion.

[3] Although mother and father have filed separate briefs, with one exception all of the principal claims are set forth in mother's brief, which father has joined.

[4] The UCCJEA was enacted effective July 1, 2011. 15 V.S.A. § 1096. On the same date, the UCCJA was repealed. 2011, No. 29, § 8.