

155 A.D.2d 772, 547 N.Y.S.2d 935  
(Cite as: 155 A.D.2d 772, 547 N.Y.S.2d 935)

**FIND Request:** 155 A.D.2d 772

Supreme Court, Appellate Division, Third Department, New York.  
FLAH'S, INC., Respondent,  
v.  
RICHARD ROSETTE ELECTRIC, INC., et al., Appellants,  
and  
Balcor Realty Investors 75, doing business as Mohawk Mall Shopping Center, Respondent, et al., Defendants (Action No. 1.)  
Gary A. SMITH, Respondent,  
v.  
PEMBROOK ELECTRIC COMPANY, INC., et al., Appellants,  
and  
Balcor Realty Investors 75, doing business as Mohawk Mall Shopping Center, Respondent, et al., Defendants. (And a Third-Party Action.) (Action No. 2.)

Nov. 16, 1989.

Electrician and mall tenant brought negligence action against mall owner, general contractor, electrical subcontractor, and electrician's employer for damages sustained as result of circuit breaker "explosion." The Supreme Court, Albany County, Cheeseman, J., rendered judgment for plaintiffs, and appeal was taken. The Supreme Court, Appellate Division, Harvey, J., held that: (1) slightly inaccurate diagram of electrical system was properly admitted and relied on by expert; (2) mall owner was not liable; and (3) evidence was sufficient to establish that subcontractor was 60% at fault and that electrician was free from fault.

Affirmed.

West Headnotes

**[1] Evidence 157 ↪ 358**

157 Evidence  
157X Documentary Evidence  
157X(C) Private Writings and Publications

157k358 k. Maps, Plats, and Diagrams.  
Most Cited Cases

Electrical system diagram was admissible in suit arising out of circuit breaker malfunction to explain or illustrate expert's testimony and thus to aid jury in comprehending disputed issue even though diagram differed from actual system in that it depicted only one electrical line rather than three; diagram was fair representation of system, difference between one line and three lines was discussed and presented to jury, and expert was subject to extensive cross-examination; moreover, original plans were unavailable and diagram was authenticated by witnesses other than expert.

**[2] Electricity 145 ↪ 16(5)**

145 Electricity  
145k12 Injuries Incident to Production or Use  
145k16 Defects, Acts, or Omissions Causing Injury  
145k16(5) k. Inspection and Knowledge of Defects or Dangers. Most Cited Cases

Mall owner was not liable for damages resulting from circuit breaker malfunction; there was no indication that owner was aware of breaker's defective condition or acted to create it, or that diligent inspection would have disclosed condition.

**[3] Electricity 145 ↪ 19(5)**

145 Electricity  
145k12 Injuries Incident to Production or Use  
145k19 Actions  
145k19(5) k. Weight and Sufficiency of Evidence. Most Cited Cases

Evidence was sufficient to establish that electrical subcontractor was 60% at fault for circuit breaker malfunction at shopping mall; subcontractor was original installer of electrical equipment and was responsible for irregularities and omissions that caused circuit breaker to "explode," and there were not substantial changes in circuit breaker subsequent to subcontractor's work.

155 A.D.2d 772, 547 N.Y.S.2d 935  
(Cite as: 155 A.D.2d 772, 547 N.Y.S.2d 935)

**[4] Evidence 157 571(3)**

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(3) k. Due Care and Proper Conduct. Most Cited Cases

Expert testimony that problem with circuit breaker was “accident ready to happen” and that circuit breaker was capable of “blowing up just by tapping it with a screwdriver” was sufficient to establish that worker was free from negligence in attempting to resolve electrical problem, which resulted in circuit breaker “explosion.”

**\*\*936** Bouck, Holloway, Kiernan & Casey (John R. Casey, of counsel), Albany, for Flah's Inc., respondent in Action No. 1.

Carl J. Cochi, Utica, for Balcor Realty Investors 75, respondent in Action Nos. 1 and 2.

James L. Pemberton (Paul Briggs, of counsel), Schenectady, for Pembroke Elec. Co., Inc., appellant in Action No. 2.

Buckley & Mendelson, P.C. (George H. Barber, Albany, of counsel), Albany, for Gary A. Smith, respondent in Action No. 2.

Before CASEY, J.P., and WEISS, LEVINE, MERCURE and HARVEY, JJ.

**\*772 HARVEY, Justice.**

Appeal from a judgment of the Supreme Court (Cheeseman, J.), entered August 3, 1988 in Albany County, upon a verdict rendered in favor of plaintiffs against certain defendants.

These actions arose out of an accident which occurred at the Mohawk Mall Shopping Center in Schenectady County. It was alleged that an electrical explosion which occurred in a switchboard located in the utility room was caused by the negligence of defendant L.H. Swyer Company (hereinafter Swyer) as general contractor in the construction of the mall,

defendant Pembroke Electric Company, Inc. (hereinafter Pembroke) as the electrical subcontractor in the construction of the mall, and defendant Richard Rosette Electric, Inc. (hereinafter Rosette), regularly called upon for electrical maintenance.

On March 23, 1983, plaintiff Gary A. Smith, an electrician employed by Rosette, arrived at the rear utility room of the mall **\*\*937** to investigate an electrical problem pertaining to the mall's parking lot lights. Upon examining the circuit breaker panel which controlled the malfunctioning parking lot lights, Smith tested the voltage coming in, removed the wires feeding power to the parking lot and turned the circuit breaker to the “on” position. At that point, the circuit breaker “exploded”, a fire started and Smith jumped outside of the room. As a result of this explosion and fire, plaintiff Flah's, Inc., a tenant in the mall, sustained property damage and subsequently brought Action No. 1 against the various entities involved in the construction, ownership and servicing of the electrical components and system in the mall. In addition, Smith brought action No. 2 for the personal injuries he sustained in the explosion.

After a bifurcated trial on the issue of liability, the jury held Rosette to be 10% liable, Swyer 30% liable and Pembroke 60% liable. During the trial, several expert witnesses testified concerning the cause of the accident. Among the various theories proposed as to the cause were, for example, **\*773** the deteriorated condition of the parking lot circuit breaker due to constant short circuits, the absence of a fuse disconnect switch to protect the panel and an illegal electrical connection. After the presentation of all testimony was completed, defendant Balcor Realty Investors 75 (hereinafter Balcor), the present owner of the mall, moved to dismiss all claims and causes of actions against it. The motion was granted. Rosette, Pembroke and Swyer (hereinafter collectively referred to as defendants) have appealed.

**[1]** Initially, defendants contend that Supreme Court erred in allowing the engineering expert for Flah's, Robert Persons, to display and refer to a diagram concerning the applicable electrical system and components before it was admitted into evidence. Defendants also argue that the exhibit should not have been admitted at all because it was an inaccurate depiction of the electrical wiring and components. We do not agree. In our view, the subject diagram

155 A.D.2d 772, 547 N.Y.S.2d 935  
(Cite as: 155 A.D.2d 772, 547 N.Y.S.2d 935)

was, at a minimum, a fair representation of the electrical system and was therefore admissible to explain or illustrate the testimony in order to aid the jury in comprehending the disputed issue (see, Archer v. New York, New Haven & Hartford R.R. Co., 106 N.Y. 589, 13 N.E. 318; Fisch, NY Evidence § 141, at 81 [2d ed] ).

Although the diagram made by Persons differed from the actual electrical layout in that the diagram depicted one electrical line while the actual system had three lines, the difference was discussed and the jury was informed of this fact (see, Kane v. County of Cayuga, 254 App.Div. 613, 2 N.Y.S.2d 812). Significantly, defense counsel was permitted to cross and re-cross-examine Persons, and defendants have failed to persuasively demonstrate any prejudice which resulted from the use of the diagram (see, *id.*). Notably, the diagram was essentially a reconstruction of the original electrical plans, which were unavailable (see, Carrols Equities Corp. v. Villnave, 57 A.D.2d 1044, 395 N.Y.S.2d 800, *lv. denied* 42 N.Y.2d 810, 399 N.Y.S.2d 1026, 369 N.E.2d 775), and was also authenticated by the testimony of other witnesses besides Persons having knowledge of the electrical layout (see, Kidder v. Niagara Mohawk Power Corp., 37 A.D.2d 1029, 1030, 325 N.Y.S.2d 758). Under those circumstances we do not find that Supreme Court abused its discretion in admitting the exhibit.

[2] Next, we find that Supreme Court did not err in granting Balcor's motion to dismiss. Despite defendants' allegations to the contrary, the record is devoid of any evidence which indicates that Balcor had knowledge of the defective condition or acted affirmatively to create it (see, Greene v. Vijax Fuel Corp., 108 A.D.2d 897, 485 N.Y.S.2d 781, *lv. denied* 65 N.Y.2d 611, 494 N.Y.S.2d 1026, 484 N.E.2d 1053; \*774 Kennedy v. McKay, 86 A.D.2d 597, 446 N.Y.S.2d 124; 79 N.Y.Jur.2d, Negligence, §§ 12, 13, at 321-324, 325). In the instant case, the testimony at trial established that even a diligent inspection by Balcor as the owner would not have disclosed the particular malfunction at issue (see, Greene v. Vijax Fuel Corp., *supra* ).

[3][4] We also reject defendants' contention that the jury verdict finding Pembroke \*\*938 to be 60% negligent and finding Smith free from negligence was against the weight of the evidence. With respect to Pembroke's liability, there was sufficient evidence

adduced for the jury to conclude that Pembroke, the original installer of the electrical equipment, was responsible for the irregularities and omissions that caused the explosion and that no substantial changes or modifications were made to the circuit breaker subsequent to the work performed by Pembroke. As for Smith's alleged culpable conduct, one expert testified that the electrical situation on the day in question was "an accident ready to happen, a bomb about to go off. \* \* \* [I]t was probably capable of blowing up just by tapping it with a screwdriver". Since the preponderance of the evidence presented here is not contrary to the jury's verdict to the extent that it could not have been rendered by any fair interpretation of the evidence (see, Hapgood v. P & C Food Mkts., 149 A.D.2d 770, 539 N.Y.S.2d 565; Halvorsen v. Ford Motor Co., 132 A.D.2d 57, 522 N.Y.S.2d 272, *lv. denied* 71 N.Y.2d 805, 529 N.Y.S.2d 76, 524 N.E.2d 430), defendants' arguments must be rejected.

Finally, we find no reversible error in Supreme Court's charge to the jury as to Pembroke. Viewed in its totality, both the charge and the trial were fair (see, Osorio v. Stuyvesant Oil Burner Corp., 50 A.D.2d 541, 542, 375 N.Y.S.2d 332, *lv. denied* 39 N.Y.2d 705, 384 N.Y.S.2d 1027, 349 N.E.2d 882).

Judgment affirmed, with one bill of costs.

CASEY, J.P., and WEISS, LEVINE and MERCURE, J.J., concur.

N.Y.A.D. 3 Dept., 1989.  
Flah's, Inc. v. Richard Rosette Elec., Inc.  
155 A.D.2d 772, 547 N.Y.S.2d 935

END OF DOCUMENT