

1990 Minn. App. LEXIS 876, *

**Harvey D. and Rose M. Damsgard, husband and wife, d/b/a Formaster, Appellant, v.
Reliance Insurance Company, Respondent, James I. Carlson, et al., Defendant**

No. C6-90-750

Court of Appeals of Minnesota

1990 Minn. App. LEXIS 876

**August 24, 1990, Decided
September 4, 1990, Filed**

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

PRIOR HISTORY: Appeal from District Court, Hennepin County; Hon. Isabel Gomez, Judge.

DISPOSITION: *Affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs brought an action against defendant, seeking to recover proceeds of a fire insurance policy issued by defendant. The jury returned a verdict finding that plaintiff husband intentionally set the fire and that plaintiffs failed to establish their damages. The District Court, Hennepin County (Minnesota) denied plaintiffs' motion for judgment notwithstanding the verdict (JNOV) or for a new trial. Plaintiffs appealed from the decision.

OVERVIEW: Plaintiffs sought to recover the proceeds of a fire insurance policy issued by defendant. The jury found that plaintiff husband intentionally set the fire and that plaintiffs failed to establish their damages. The trial court denied plaintiffs' motion for JNOV or for a new trial. On appeal, the court held that the trial court did not abuse its discretion in allowing the testimony of an expert who testified regarding observations he made in the basement of the building at the time of the fire. Although the expert's testimony contradicted the expected testimony of plaintiffs' expert witness, plaintiffs did not depose him. Further, the court held that the trial court's factual determination regarding the availability of another witness was not clearly erroneous. The trial court determined that this witness was available and did not allow plaintiffs to introduce her videotape deposition. Although the trial court erred by prohibiting plaintiffs from cross-examining the expert witness with a reliable authority, the court held that this error did not affect the outcome of the trial.

OUTCOME: The court affirmed the trial court's decision.

CORE TERMS: deposition, treatise, expert witness, basement, authoritative, new trial, answers to interrogatories, continuance, cold-start, disclose, suppress, hearsay, evidentiary rulings, intentionally, offering, procure, door

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > Interrogatories > General Overview

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

Legal Ethics > Sanctions > General Overview

[HN1] Under Minn. R. Civ. P. 26.02(d)(1)(A), a party has an absolute right to a summary of the grounds for each opinion held by an opponent's expert. Inadequate answers to interrogatories may warrant sanctions by the trial court. When counsel inexcusably fails to disclose evidence and his failure disadvantages his opponent, the trial court should suppress the evidence. Suppression is discretionary with the trial court and may be ordered if the opponent has been prejudiced to any appreciable degree; however, failure to suppress is not an abuse of discretion where the opposing party does not seek a continuance and fails to show prejudice.

Civil Procedure > Pretrial Matters > Subpoenas

Civil Procedure > Trials > Depositions

Evidence > Hearsay > Unavailability > Absence of Declarants

[HN2] Any party may use a witness' deposition at trial, for any reason, if the court finds that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Minn. R. Civ. P. 32.01(c)(4). Testimony of a witness given at a deposition is not hear-

say if the declarant is unavailable as a witness. Minn. R. Evid. 804(b)(1). The rule defines "unavailability as a witness" to include the situation where the witness is not present at trial and the party offering the deposition has been unable to procure the witness' presence at trial by process or other reasonable means. Minn. R. Evid. 804(a)(5).

Evidence > Hearsay > Exceptions > Learned Treatises > Authoritativeness

Evidence > Hearsay > Exceptions > Learned Treatises > Expert Witness Requirement

Evidence > Testimony > Experts > Admissibility

[HN3] Learned treatises, if established as authoritative by expert testimony or relied upon by an expert witness, are not excluded by the hearsay rule. Minn. R. Evid. 803(18).

Evidence > Procedural Considerations > Rulings on Evidence

[HN4] Where the trial court erroneously excludes evidence, the omitted evidence must reasonably tend to change the result of the trial before the exclusion warrants a new trial.

COUNSEL: Philip John Bloedel, Bloedel, Slade & Hawkinson, Minneapolis, Minnesota, for Appellant.

Charles J. Noel, Pustorino, Pederson, Tilton & Parrington, Minneapolis, Minnesota, for Respondent.

JUDGES: Edward Parker, Presiding Judge, Forsberg, Judge, and Lommen, Judge. *

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

OPINION BY: PARKER

OPINION

UNPUBLISHED OPINION

Appellants Harvey and Rose Damsgard brought this action against respondent Reliance Insurance Company, seeking to recover the proceeds of a fire insurance policy issued by Reliance. Following a two-week trial, a jury returned a verdict finding that Harvey Damsgard intentionally set the fire and that the Damsgards failed to establish their damages. The Damsgards moved for judgment notwithstanding the verdict or a new trial. The trial court denied this motion and the Damsgards appeal. They challenge evidentiary rulings and contend the trial

court erred in submitting the issue of the extent of their [*2] damages to the jury.

DECISION

1. Fust Testimony.

The Damsgards contend the trial court erred in permitting William Fust to testify regarding observations he made in the basement of the Formaster building at the time of the fire. They contend Reliance failed to disclose this testimony during discovery and the trial court should have instructed the jury not to consider it.

[HN1] Under Minn. R. Civ. P. 26.02(d)(1)(A), a party has an absolute right to a summary of the grounds for each opinion held by an opponent's expert. *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. 1986). Inadequate answers to interrogatories may warrant sanctions by the trial court. *Id.* When counsel inexcusably fails to disclose evidence and his failure disadvantages his opponent, the trial court should suppress the evidence. *Krech v. Erdman*, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975). Suppression is discretionary with the trial court and may be ordered if the opponent has been prejudiced to any appreciable degree; however, "failure to suppress is not an abuse of discretion where the opposing party does not seek a continuance and fails to show prejudice." *Phelps v. Blomberg Roseville [*3] Clinic*, 253 N.W.2d 390, 394 (Minn. 1977) (citing *Krech*, 305 Minn. at 218, 233 N.W.2d at 557).

The Damsgards did not move for a continuance in this case. As the trial court noted, their counsel effectively cross-examined Fust about his failure to record his observations in the basement and about his statement that he observed the fire in the basement through a door which apparently does not exist. In closing argument, Damsgards' counsel referred to the "phantom door" and Fust's failure to mention the basement in his reports.

Reliance identified Fust as an expert witness in May 1987. Its answers to interrogatories indicated that Fust would testify that the fire was of incendiary origin and had begun in the southwest corner of the first floor. The majority of his testimony was consistent with this. Although Fust's testimony contradicted the expected testimony of the Damsgards' expert witness, Damsgards did not depose him. The Damsgards called Fust as a witness at a nonbinding arbitration hearing long prior to trial and had opportunity to question him thoroughly. Under the circumstances of this case, the trial court did not abuse its discretion in allowing Fust's testimony.

2. [*4] Juanita Larson Deposition.

On April 14, 1988, the Damsgards' counsel deposed Juanita Larson, the younger sister of Formaster employee Cynthia Larson. At the time of the deposition, counsel stated he was deposing her because she might not be available to testify at trial.

The Damsgards also subpoenaed Juanita Larson for trial, but she did not respond. Two strikingly different versions of her availability were presented. The trial court determined that Juanita Larson was available and did not allow the Damsgards to introduce her videotape deposition. The trial court stated that her testimony "is quite duplicative" and expressed some reservation about her competence to testify because of her age at the time of the fire.

[HN2] Any party may use a witness' deposition at trial, for any reason,

[i]f the court finds * * * (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

Minn. R. Civ. P. 32.01(c)(4). Testimony of a witness given at a deposition is not hearsay if the declarant is unavailable as a witness. Minn. R. Evid. 804(b)(1). The rule defines "unavailability as a witness" to include the situation where the witness is not [*5] present at trial and the party offering the deposition has been unable to procure the witness' presence at trial "by process or other reasonable means." Minn. R. Evid. 804(a)(5).

The trial court made a factual determination regarding Juanita Larson's availability as a witness. This determination, based on differing statements of counsel regarding their efforts to contact Juanita Larson, is not clearly erroneous and will not be disturbed on appeal. See Minn. R. Civ. P. 52.01.

3. Learned Treatises

The Damsgards contend the trial court erred in two ways regarding the use of learned treatises. First, they contend the trial court erred in not permitting use of Un-

derwriter's Laboratory Bulletin No. 51 to cross-examine William Fust. Second, they argue that the trial court erred in not permitting John Carroll, their expert witness, to read from *Electrical Fire Analysis* by Robert Yearance regarding cold-start fires.

[HN3] Learned treatises, if established as authoritative by expert testimony or relied upon by an expert witness, are not excluded by the hearsay rule. Minn. R. Evid. 803(18); see also *Sorensen v. Maski*, 361 N.W.2d 498 (Minn. App. 1985) (learned treatise properly excluded [*6] where neither party's expert established the treatise as authoritative).

John Carroll established Bulletin 51 as a reliable authority as allowed by Rule 803(18). The trial court erred by prohibiting the Damsgards from cross-examining Fust with Underwriters Laboratory Bulletin No. 51.

Carroll also testified that he relied on Yearance's book in reaching his conclusions regarding the Formaster fire. Since Carroll recognized this book as authoritative, the trial court erred in excluding it.

[HN4] Where the trial court erroneously excludes evidence, "[t]he omitted evidence must reasonably tend to change the result of the trial before the exclusion warrants a new trial." *Molkenbur v. Hart*, 411 N.W.2d 249, 253 (Minn. App. 1987) (citing *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 725 (Minn. 1983)). Although the trial court erred, we find no prejudice to the Damsgards. Carroll testified regarding his knowledge of cold-start fires. We do not believe the trial court's error affected the outcome of the two-week trial.

We affirm the bulk of the trial court's evidentiary rulings; therefore, no basis exists for disturbing the jury's finding that Harvey Damsgard intentionally set the fire. Accordingly, [*7] we need not decide whether the trial court properly submitted the amount of the Damsgards' loss to the jury.

Affirmed.