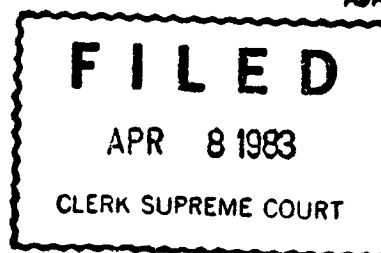


## IN THE COURT OF APPEALS OF IOWA



**WILLIAM McLAUGHLIN and ELSIE** )  
**McLAUGHLIN,** )

Plaintiffs-Appellants, )

vs. )

**LUVERNE FIRE APPARATUS COMPANY,** )  
 A Corporation, )

Defendant-Appellee. )

Filed April 8, 1983

**LUVERNE FIRE APPARATUS COMPANY,** )  
 A Corporation, )

Third Party Plaintiff- )  
 Appellee, )

vs. )

**BLACKSTONE MANUFACTURING** )  
**COMPANY and TELEDYNE WISCONSIN** )  
**MOTOR,** )

Third Party Defendants- )  
 Appellees. )

2-420  
2-67937

Appeal from Calhoun District Court - Albert L. Habhab, Judge.

Plaintiffs appeal from the judgment entered upon the jury verdict for defendants in this products liability lawsuit. REVERSED AND REMANDED.

Jerry Foxhoven of Critelli & Foxhoven, Des Moines, for plaintiffs-appellants.

Claire Carlson and Greg Knoploh of Kersten, Opheim, Carlson, and Trevino, Fort Dodge, for defendant-appellee Luverne.

Steven L. Udelhofen of Jones, Hoffman & Davison, Des Moines, for third party defendant-appellee Blackstone.

James Lorentzen and Jeffrey Boehlert of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, for third party defendant-appellee Teledyne.

Heard en banc.

**DONIELSON, J.**

Plaintiffs appeal from the judgment entered upon the jury verdict for defendants in this products liability lawsuit. On appeal the plaintiffs challenge three evidentiary rulings concerning (1) non-expert opinion testimony; (2) the excited utterance exception to the hearsay rule; and (3) the scope of cross examinations. The plaintiffs contend that, pursuant to these rulings, the court erroneously excluded evidence which prejudiced the plaintiffs' case. We reverse and remand.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4; Kurtenbach v. TeKippe, 260 N.W.2d 53, 54 (Iowa 1977).

**I.**

In May, 1976, a fire broke out in a building on the farm of plaintiffs, William and Elsie McLaughlin. The Manson fire department was called. The fire department was using equipment manufactured by defendant Luverne Fire and Apparatus Company. While the fire department was fighting the fire, its water-pumping engine failed. Thereafter the fire spread out of control and caused serious damage.

The McLaughlins later filed the present product liability lawsuit against Luverne Fire, the manufacturer of the engine which failed. The McLaughlins alleged that the fire was very small at the time of the engine's failure and could easily have been contained and limited but for the engine's failure; they alleged that the engine's failure was the proximate cause of almost all of their fire losses.

Luverne then filed a third-party petition, naming as third-party defendants two manufacturers of components of the engine, Blackstone Manufacturing Company and Teledyne Wisconsin Motors. The third-party petition asked that Blackstone and Teledyne be required to indemnify Luverne and against the McLaughlins. The McLaughlins have appealed from the resulting judgment,

challenging three evidentiary rulings made by the trial court excluding plaintiffs' evidence.

## II.

One ruling of which plaintiffs complain concerns the proper scope of cross-examination. An issue which became relevant to this case was whether the fire engine failure was due to improper maintenance by a failure to drain gasoline from the gas pump during times when the engine was not in use. Rudy Poppen, a Manson firefighter, was called by one of the third-party defendants, Blackstone Manufacturing Company, to testify about whether the engine had been properly maintained by draining gasoline from the engine. Mr. Poppen testified that there was no regular draining of the engine. Mr. Poppen was then cross-examined by plaintiffs, the other third-party defendant, Teledyne Company, and by Luverne Fire. On redirect third-party defendant, Blackstone, questioned Mr. Poppen further "[i]n response to [plaintiffs'] line of questioning" on cross-examination. Specifically, his questioning concerned Mr. Poppen's "assumption that it was the fuel pump had either failed or something had interfered with its effective operation . . . ." On recross-examination, plaintiffs asked the following question: "Was there any placard or warning or any writing on that engine or close to the fuel tank or on the fuel tank that told you, as the fireman operating that unit, that you were supposed to change that gas periodically?" Mr. Poppen answered, "I don't think so." The trial court later ordered the testimony related to warnings stricken on the ground that it exceeded the scope of cross-examination.

Whether a line of questioning is within the proper scope of cross-examination is a matter within the trial court's discretion. Avery v. Harms Implement Company, 270 N.W.2d 646, 649 (Iowa 1978). We will reverse such a ruling only when the court committed "error in restricting cross-examination such as to constitute an abuse of discretion and, secondly, if so, was it prejudicial." Id.

The rules recognizing a party's right to cross-examination are reviewed in the Avery case cited above. Id. at 650. The language most pertinent to the situation before us is as follows:

Under our rules, cross-examination is limited to matters testified to in chief. Uhlenhopp v. Steege, 233 Iowa 368, 372, 7 N.W.2d 195, 197 (1942). However, this does not mean counsel is restricted to a categorical review of those matters testified to on direct examination. It may extend to any subject within the fair purview of direct examination. State v. Monroe, 236 N.W.2d 24, 29 (Iowa 1975); State v. Jensen, 189 N.W.2d 919, 924 (Iowa 1971). We have said cross-examination may be used to rebut not only the direct testimony but the presumptions or inferences which such testimony reasonably raises. Dioptron Co. v. Dimmitt, 245 Iowa at 456, 62 N.W.2d at 752; Wheatley v. Heideman, 251 Iowa at 710, 102 N.W.2d at 353.

Id., (emphasis added).

We believe plaintiffs' question regarding whether there was any notice posted on or near the fuel tank to inform the operator that the gas was to be drained or changed was within the fair purview of direct and redirect examination. The engine and fuel pump operations were extensively discussed and we believe plaintiffs had an absolute right to the line of inquiry regarding notice of the proper fuel pump operations. The denial of that right was an abuse of discretion. Due to the importance of the issue to which this evidence would be relevant—the failure to provide adequate warnings in the use of the fuel pump—we hold plaintiffs were prejudiced by the trial court's ruling and are, therefore, entitled to a new trial. To facilitate retrial of this matter we address the two additional evidentiary rulings challenged by plaintiffs in this appeal.

### III.

The plaintiffs claim that the court erred in excluding the testimony of a news photographer who was present at the scene of the fire. Photographs he had taken were introduced into evidence. In addition, plaintiffs asked the photographer various questions in an attempt to show that the fire was initially a

small one. In response to these questions, the photographer attempted to testify that the fire "appeared to be out" or "didn't appear to be too much of a fire" immediately before the engine failure. The trial court ordered the witness' comments to this effect stricken from the record on the ground the witness was drawing an opinion or conclusion rather than merely reporting factual observations.

The plaintiffs contend the trial court erred by failing to recognize that the testimony was merely a "shorthand rendering" of factual observations too numerous and complicated to be placed into evidence otherwise. The kind of testimony which constitutes a "shorthand" rendering of facts is that which is "not really an opinion, but at most a conclusion drawn from facts of common observation." Meeker v. City of Clinton, 259 N.W.2d 822, 831 (Iowa 1977)(quoting Waterloo Savings Bank v. Waterloo, C. F. & N.R., 244 Iowa 1364, 1374, 60 N.W.2d 572, 578 (1953)). The Meeker court went on to explain that

[t]his type of testimony was succinctly explained in McCormick, Opinion Evidence in Iowa, 19 Drake L.R. (245) 248:

Certain observations of witnesses which are really based upon inference may nevertheless be expressed in evidence by reason of necessity [expediency and convenience]. Thus, a witness, having made observations but unable to orally produce the details sufficiently to give a jury a precise understanding of what was observed, may give his conclusion to express his impression of such composite facts. This has been best described as permissible shorthand rendering of the facts. The expressed inference is proper if it necessarily implies the existence of the observed but unstated facts and if within the range of common knowledge. It includes testimony to ordinary cause and effect. (Later emphasis supplied).

Meeker, 259 N.W.2d at 831. The witness testifying in this regard must base his testimony upon "personal knowledge."

We do not believe the photographer's testimony in the instant case falls within these definitional requirements for a shorthand rendering of facts. The

witness appropriately testified as to the physical conditions of the fire which he observed—whether he saw flames or smoke and, if so, from which buildings. But the inference that the fire appeared to be out does not follow from these stated observations; just because there is little smoke or few flames does not mean that a fire is under control. A fire may persist deep in the walls of a structure, undetectable to the naked eye. The conclusion that the fire was out could not, therefore, be based on the observed facts presented here; it is not a conclusion "within the range of common knowledge." Accordingly, the testimony that the fire was out or small was a mere guess and properly stricken by the trial court as not constituting a shorthand rendering of facts.

In the alternative, the plaintiffs argue that the photographer's testimony was opinion evidence and that foundational requirements for admitting non-expert opinions were satisfied. We disagree.

Non-expert witnesses are allowed to testify as to their opinions, conclusions, or impressions when he has observed facts and has "acquired sufficient knowledge to form an opinion that can reasonably be expected to be reliable and trustworthy." Meeker, 259 N.W.2d at 830 (quoting Ruby v. Easton, 207 N.W.2d 10, 20 (Iowa 1973)). The foundational requirements were enumerated in Meeker as follows:

- (1) the witness has made observations of specific events or conditions; (2) he has sufficient intelligence to draw proper inferences from such observations; and (3) such opinions from special knowledge will assist the jury more than if the witness were limited to the specific detail.

Id. at 831 (quoting McCormick, Opinion Evidence in Iowa, 19 Drake L.R. at 252). As previously noted, we do not believe the photographer has been shown to have the specific intelligence necessary to conclude that the fire appeared to be a small one, or appeared to be out. We agree with the trial court that the photographer could not give a non-expert opinion in this matter.

IV.

Finally, plaintiffs claim that the court erroneously excluded hearsay statements of a fireman. Plaintiff William McLaughlin had attempted to testify that, while firefighters were trying to restart the pump engine, he overheard an unidentified firefighter say that "if we had had two more minutes water, it would have been a three hundred dollar fire." The trial court excluded this testimony as hearsay; the court concluded that the "excited utterance" exception to the hearsay rule could not apply because the declarant was not specifically identified, and because the proffered statement was one of opinion, not fact. We agree with the trial court that this testimony is inadmissible.

Plaintiffs argue that such statement was admissible under the present sense impression or excited utterance exceptions to the hearsay rule, as defined in the Federal Rules of Evidence 803(1) and (2). See State v. Flesher, 286 N.W.2d 215, 218 (Iowa 1979); State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981)(rejecting use of the res gestae terminology and adopting Federal Rules of Evidence 803(1) and (2)). These exceptions are defined as follows:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

It is within the trial court's discretion "to determine whether a statement is induced by stress of excitement caused by the startling event or condition." Ogilvie, 310 N.W.2d at 196. In the instant case the foundational elements were not met; there is no showing that the declarant was under the stress or excitement caused by the fire. Moreover, while the event likely caused the plaintiff himself to experience stress or excitement, we cannot assume that a trained firefighter would react similarly.

In holding that the trial court did not abuse its discretion in excluding the proffered testimony, we need not decide whether the fact that the declarant is unidentified is, alone, a sufficient reason to exclude such hearsay. We only hold that there is an insufficient showing that the declarant was under the stress or excitement of the event to bring the statements within the exception. We also find the present sense impression exception to be inapplicable. Plaintiffs did not urge this ground at trial and, in addition, the proffered statements did not describe or explain the event or condition as contemplated by the exception. Moreover, there is no showing that such statements were made "while the declarant was perceiving the event or condition, or immediately thereafter." We therefore conclude that the unidentified fireman's hearsay statements were properly excluded.

We therefore reverse the judgment and remand for a new trial in a manner consistent with the above principles.

REVERSED AND REMANDED.

All judges concur, except Snell, and Schlegel, JJ., who concur in part and dissent in part.

**SNELL, J.**, (concurring in part, dissenting in part).

I concur in the majority opinion except with respect to its conclusion, in Part IV, that the fireman's statement, "if we had had two more minutes of water, it would have been a three hundred dollar fire," was properly excluded by the trial court. I believe that this statement should have been admitted under the present sense impression exception to the hearsay rule. See Fed. R. Evid. 803(1); Iowa R. Evid. 803(1)(proposed November 1982).

It is apparent from the plaintiff's testimony that the fireman's statement (1) described the condition of the fire, and (2) was made while the fireman was perceiving the fire, or immediately thereafter. These are the only two requirements mandated by rule 803(1). It is not necessary that the declarant be identified by name. See United States v. Boyd, 620 F.2d 129, 132 (6th Cir. 1980), cert. denied, 449 U.S. 855, 101 S. Ct. 151, 66 L. Ed. 2d 69 (1980)(police witness' description of unidentified persons pointing out co-defendant's apartment admissible under excited utterance exception of hearsay rule). See also Slough, "Spontaneous Statements and Statement of Mind" 46 Iowa L. Rev. 224, 242 (1961)("fact that a declarant remains unidentified is not reason enough to justify exclusion of his statements. . .") At trial plaintiff urged that the statement should have been admitted as an exception to the hearsay rule, and provided the trial court with a copy of State v. Flesher, 286 N.W.2d 215 (Iowa 1979), in support of this argument. This case stands for the additional proposition that corroboration is not a requisite element of the present sense impression exception. Id. at 218.

I would hold the testimony admissible under the present sense impression to the hearsay rule.

Schlegel, J., joins this dissent.