AUG 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOHN T. MORRIS,)

Appellant,) Filed August 31, 1978

vs.)

AID INSURANCE SERVICES, ALLIED MUTUAL INSURANCE COMPANY, DES MOINES, IOWA,) 545 2-60783

Appellee.)

Appeal from Fremont District Court - Leo F. Connolly, Judge.

Plaintiff-insured appeals jury verdict for defendant-insuror; he claims trial court erred in allowing a witness to testify whose address was not given in discovery response, in failing to strike hearsay statements and in failing to grant his motion for directed verdict on the defendant's counterclaim he burned or procured the burning of his building. - Affirmed.

Lyle W. Ditmars, of Peters, Campbell & Pearson, Council Bluffs, and Edwin A. Getscher, of Getscher, Reed & Getscher, Hamburg, for Appellant.

William F. Fanter, of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, and Howard Wenger, Hamburg, for Appellee.

Heard by Donielson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff-insured John T. Morris appeals the jury verdict upholding defendant Aid Insurance Services' denial of coverage on the ground Morris either burned or procured the burning of his property. Affirmed.

Morris first claims the failure of Aid to supply the address of one Merrill Lewis should have operated to bar Lewis's testimony for any purpose at trial. Sanctions for inadequate discovery responses are placed by the Rules of Civil Procedure within the discretion of the trial court. Rule 134(b), R.C.P. Further, the court in White v. Citizens National Bank of Boone, 262 N.W.2d 812, 816 (Iowa 1978) held that the trial court has inherent power to enforce discovery rules and has discretion to impose sanctions for a litigant's failure to obey them. We may overturn such a trial court ruling only when there is an abuse of discretion: that is, only when the trial court act is so palpably and grossly violative of fact and logic that it is an exercise of passion and bias. State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976).

Merrill Lewis's name, and the fact he had made a statement to the insuror, was included in the original Aid interrogatory answers. Eight months before trial, in the Aid response to an order that it more fully answer the interrogatories, Lewis's name appeared along with his statement that Morris had offered him $500 to burn the building. Two weeks before trial, Lewis's mother reluctantly provided Aid with an address for him and about a week before trial, Aid was able to locate him. Aid did not apprise Morris of Lewis's whereabouts before trial. Morris claims this failure should preclude Lewis's testimony at trial for any purpose. The trial court initially agreed and twice refused to allow Lewis to testify. Before these rulings the issue of whether Morris had ever contemplated destroying his lounge by fire was raised by another witness's testimony (Joe Hammons), and was catagorically denied by Morris. Ultimately, the trial court allowed the jury to hear Lewis's testimony for the limited purpose of impeaching Morris's denials. In so doing, we do not find the trial court abused its discretion.

Morris next claims that Lewis's testimony on rebuttal included hearsay

statements which upon his motion should have been stricken from the record. The court in State v. Frazer, 267 N.W.2d 34, 37 (Iowa 1978) reiterated that hearsay objections exclude out-of-court statements only when such evidence is offered to prove the truth of the matter asserted therein. Lewis's testimony that he had been told that Morris had made "passes" at his wife was not offered to prove Morris had so conducted himself. The challenged testimony revealed the possibility that Lewis harbored animosity toward Morris which could have motivated him to recount, or perhaps to concoct, the $500 offer. The evidence was introduced to show Lewis's state of mind toward Morris. It was not hearsay.

Finally, Morris claims he was entitled to a directed verdict on Aid's affirmative defense because there was insufficient evidence to connect him with the fire. Natalini v. Northwestern Fire & Marine Insurance Co., 219 Iowa 806, 259 N.W. 577, (1935) reversed a directed verdict in favor of an insured making such a claim. In the instant case, as in Natalini, there was credible evidence that the property was overinsured and that there was no breaking and entering to gain access to the premises. In Natalini the insured had all the keys to the building; in the instant case, Morris and his cook each had keys, by Morris's testimony. There was no testimony placing the cook on the restaurant premises during the day or evening prior to the fire or implicating her in any fashion. Morris testified while the restaurant was closed for business on Sunday, June 15, 1975, he was on the premises cleaning and filling the coolers and that he left the premises locked. Morris was at the fire, in the early morning hours of June 16, within moments of its discovery. At trial he asserted he was wakened by a mail carrier. No such witness was produced. Nor did Morris call his wife to corroborate his account of his whereabouts and activities on that Sunday night.

In contrast to Natalini, there was testimony from Joe Hammon that Morris had during the construction of the lounge vowed he would burn the place down if he did not get his liquor license. Hammon testified Morris said he would get some boys from Kansas City to do it. If the jury believed Hammon's testimony, it showed Morris predisposed to burning his restaurant. Natalini, in reversing the directed verdict observed:

> We are dealing with probabilities, and, while there is no direct evidence tending to connect appellee with the fire, the circumstances shown, when considered in connection with the incendiary character of the fire, are sufficient to take the question of his connection with it to the jury. 219 Iowa at 812, 259 N.W. at 579.

It was uncontroverted at trial that the fire destroying Morris's property was incendiary in nature. The whole record includes Hammon's testimony that Morris had talked of burning his restaurant, Morris's denial that he had ever engaged in such conversations with anyone, and the impeachment testimony of Lewis controverting this denial. The tendency of this evidence to connect Morris to the fire was sufficient under Natalini to submit the issue for jury determination. Accordingly, we affirm.

AFFIRMED.