IN THE COURT OF APPEALS OF IOWA

No. 2-033 / 91-711

FILED
MAR 2 1992
CLERK SUPREME COURT

IBP, INC.,

Appellant,

vs.

FRANK J. MERWALD & SONS, INC.,
a/k/a MERWALD SERVICE COMPANY,
a/k/a MERWALD, FRANK J. & SONS, INC.,
A Nebraska Corporation, and
INDEPENDENT ROOFERS, A Nebraska Corporation,

Appellees.

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Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

Plaintiff appeals, challenging the trial court's refusal to strike expert testimony. **AFFIRMED.**

Terrence E. Bishop and William A. Webster of Robins, Kaplan, Miller & Ciresi, Minneapolis, Minnesota, and Peter J. Peters, Council Bluffs, for appellant.

W. Curtis Hewett of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellee Independent Roofers.

G. William Smits of Smits Law Offices, Council Bluffs, for defendant Frank J. Merwald & Sons, Inc.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

On September 17, 1988, a fire started at IBP, Inc.'s pork processing facility located in Council Bluffs, Iowa. Independent Roofers had been spreading hot tar on the roof of the facility. Certain employees of Independent Roofers were smoking cigarettes while they were spreading the tar. An employee of Frank J. Merwald & Sons, Inc., had been welding east of the area where smoke was first observed.

Dr. Bruce Johnson testified as an expert on behalf of defendant Merwald. In Johnson's opinion, there were three possible sources of ignition: the hot tar applied to the roof, a discarded cigarette, or welding on the roof. Of these three possible sources of ignition, Johnson testified during his deposition the most probable was the hot tar.

IBP provided Johnson samples of the roofing material which were also introduced into evidence. Johnson noticed in some areas of the samples tar had not been applied. Between the time of Johnson's deposition and his trial testimony, he conducted some laboratory tests on the roofing samples. He tried to ignite the roofing material using hot tar, but it would not ignite. At trial his opinion was if the fire originated where tar had been placed, then the hot tar was the most probable source of ignition. But if the fire originated in an area where the roofing material had not been tarred, then the most probable source of ignition was a cigarette. Whether the roofing material had been tarred in the area where the fire

began is unknown because that portion of the roof was destroyed in the fire.

IBP moved to strike Johnson's testimony on the ground Johnson had changed his opinion between the time of his deposition and his trial testimony. The district court refused to strike Johnson's expert opinion. The jury returned a verdict for defendants.

IBP appeals. IBP first claims under Iowa Rule of Civil Procedure 125(d), it was error for the trial court to allow Johnson to give expert testimony at trial that was inconsistent with his deposition testimony.

We first note Johnson gave his entire direct testimony without objection from IBP. During his direct testimony Johnson explained he had been provided roof samples by IBP at the time of his deposition which he later took into his possession. He noticed on some of the samples the top layer of roofing material had not been tarred down. Johnson stated he was still of the opinion the hot tar was the most probable ignition source if the fire actually started in an area that had been tarred. He further stated if hot tar had not been applied to the area where the fire began, then there was a higher probability of the fire being started by a cigarette or welding. During Independent Roofers' cross-examination of Johnson a similar opinion was rendered by Johnson again without objection. Finally, as Johnson was being questioned by Independent Roofers on the subject of his postdeposition experiments,

IBP moved to strike Johnson's entire testimony claiming Johnson had changed his position since his deposition was taken.

Like an evidentiary objection, a motion to strike must be made at the earliest opportunity after the ground of objection becomes apparent. Kleve v. General Motors Corp., 210 N.W.2d 568, 574 (1973). Failure to do so waives the alleged error. State v. Rese, 259 N.W.2d 771, 775 (Iowa 1977). We also note IBP neither stated on the record what the alleged difference in testimony was nor did IBP offer any portion of Johnson's deposition from which the trial court could make a determination whether Johnson had changed his opinion. IBP failed to preserve error on this issue.

Even if error had been preserved, the trial court did not abuse its discretion in admitting Johnson's testimony. The opinions Johnson expressed at trial were not inconsistent with those expressed in his deposition. When Johnson was deposed, he indicated the most probable ignition source was hot tar applied to the roofing material. It is logical to infer if hot tar had not been applied to the area where the fire began, hot tar would not be a possible source of ignition or certainly a less probable source. This inference was implicit in Johnson's deposition testimony and not inconsistent with his trial testimony.

IBP next claims the trial court erred in allowing Johnson to testify to the tests he conducted after his deposition had been taken. IBP maintains the test conditions were not substantially similar to the conditions existing at the time of the fire. IBP's motion to strike Johnson's testimony was based on the ground Johnson changed his opinion. The motion was not based on the ground there was a lack of similarity between the conditions under which the fire occurred and the conditions under which Johnson conducted his tests. Objections to the admission of evidence on different grounds than those specifically urged in the trial court will not be considered on appeal. Luse v. Waco Community School District, 258 Iowa 1087, 1097, 141 N.W.2d 607, 613-14 (1966).

IBP also maintains Johnson should not have been allowed to testify to the postdeposition experiments because defendant Merwald failed to supplement Johnson's opinions before trial as required by Iowa Rule of Civil Procedure 125(c). As previously indicated, the experiments conducted by Johnson did not change his opinion. Although during the experiments Johnson was unable to cause the roofing material to ignite by applying hot tar, he maintained the opinion it was the most probable source of ignition if the fire began in an area where hot tar had been applied. We conclude there was no prejudicial error in the trial court's refusal to strike Johnson's testimony.

AFFIRMED.