UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-6061
Summary Calendar

JOE D. BANNING,

Plaintiff-Appellant,

VERSUS

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 88 2381)

(November 23, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Appellant Joe Banning ("Banning") appeals the district court jury verdict denying him recovery on his fire insurance policy with Appellee State Farm Fire and Casualty Company ("State Farm"). Finding no error, we affirm.

FACTS

Joe Banning purchased from State Farm a fire insurance policy insuring his home. Two months later his home was damaged by fire. Banning filed a claim with State Farm, seeking to recover under the

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

insurance policy. State Farm denied it, contending that either Banning, his wife, or both had intentionally set or conspired to set the fire, and that they had made misrepresentations to State Farm during its investigation of the loss.

The Bannings denied these allegations, and sued State Farm in Texas state court, alleging breach of contract. State Farm removed the suit to federal district court where a jury unanimously found that Joe Banning, his wife, or both had set or participated in setting the fire that damaged their home. Banning was denied recovery.

BASES FOR APPEAL

Banning alleges that the district court improperly excluded evidence, that State Farm perpetrated fraud on the court by tendering in evidence a false insurance application, and that State Farm's attorney misquoted witnesses in his closing argument.[2] Banning contends that each alleged error constitutes grounds for reversal.

1. Exclusion of Evidence

One witness who testified on behalf of State Farm was Ray

[2] Banning also argues that an examination of the depositions, interrogatories, and trial testimony of one of State Farm's witnesses, Ray Williams, demonstrates that Williams contradicted himself at least twenty times. Banning then states that these contradictions were false statements, that State Farm's attorney was aware that the contradictions were false statements, and that by knowingly using these false statements at trial, State Farm's attorney violated the State Bar Rules of Texas. Our examination of Banning's list of supposed contradictory statements reveals nothing more than immaterial, minor inconsistencies that could easily be made by any person who tells the same story numerous times. Banning's argument is meritless.

Williams, Banning's next door neighbor. Williams testified that repeated phone calls made during the investigation by a State Farm investigator did not "piss [him] off."[3] At this point, Banning's attorney approached the bench and claimed to possess a taped conversation between Williams and Banning in which Williams stated that the phone calls did indeed "piss [him] off." Banning's attorney stated that his tape demonstrated a prior inconsistent statement that would impeach Williams's testimony. State Farm's attorney objected on the grounds that it was hearsay, collateral, and surreptitiously recorded. He also complained that the tape should have been produced during discovery, but wasn't. The court sustained his objection, thereby excluding the tape from evidence.

Banning asserts that the trial court erred in this ruling. State Farm answers that at trial Banning never made an offer of the tape recording as an offer of proof required by Federal Rule of Evidence 103(a)(2). We agree with State Farm that no indication exists that Banning ever offered the tape or a certified transcript of the tape into evidence at trial. By failing to comply with Rule 103(a)(2), Banning has not preserved this issue for appeal.

Furthermore, even if Banning had offered the tape, the trial court's decision to exclude it is afforded great deference by this Court. "[A]s a general precept, we overturn an evidentiary ruling and, in consequence, reverse judgments and grant new trials, only if the ruling was so erroneous as to constitute an abuse of

[3] The relevance of this statement is derived from Banning's theory that the investigator's phone calls induced Williams to lie at trial.

discretion." Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989). We find no indication whatsoever that the trial court abused its discretion by excluding the tape from evidence.

2. False Insurance Application?

Banning next argues that State Farms defrauded the court by tendering into evidence a false application for insurance, purportedly executed by Banning. State Farm answers that the allegedly false application was never admitted into evidence or tendered to the jury, and therefore has no bearing on the validity of the unanimous jury verdict.

Banning failed to support his assertion with cites to the record.[4] More importantly, Banning does not indicate how he was harmed by the alleged introduction of the insurance application. Because consideration of this issue would require this Court to imagine the harm caused to Banning, and then to comb the entire record for support, we decline to address it. See Mitchel v. General Elec. Co., 689 F.2d 877, 879 (9th Cir. 1982) (dismissing Plaintiff's appeal for failure to cite to the record in support of allegations made against Defendant); see also United States v. Partin, 552 F.2d 621, 633 n.14 (5th Cir. 1977) (stating that it is unacceptable for an attorney in his brief to omit citations to the record, particularly when the record is voluminous).

[4] Federal Rule of Appellate Procedure 28(a)(4) states in part: "[t]he argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."(emphasis added)

3. Misquoting Witnesses During Jury Summation

In his third argument, Banning asserts that State Farm's attorney misquoted witnesses three times while addressing the jury on summation, constituting reversible error. In order to reverse the district court, the misquotes made by State Farm's attorney during jury summation must be such as to "gravely impair the calm and dispassionate consideration of the case by the jury." Dixon v. International Harvester Co., 754 F.2d 573, 585 (5th Cir. 1985). After close inspection of the closing argument in question, we find that the misquotes were minor, and that the jury's consideration of the case was not impaired.

Furthermore, when a closing argument is challenged for error, the "entire argument should be reviewed within the context of the court's rulings on objections, the jury charge, and any corrective measures taken by the trial court. Alleged improprieties may well be cured by an admonition or charge to the jury." Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985). In this case, each time State Farm's attorney allegedly misquoted a witness, Banning's attorney objected and the trial judge instructed the jury that it was their recollection of the trial testimony, not the attorneys' recollection, that counted.

The misquotes, when considered in light of the entire argument and the jury charges, do not constitute reversible error.

AFFIRMED.