UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7748
Summary Calendar

AUDUBON INSURANCE COMPANY,

Plaintiff-Appellee,
Cross-Appellant,

VERSUS

JAMES M. LOWERY and CAROL KNIGHT LOWERY,

Defendants,

JAMES M. LOWERY,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA J90-0518-B)

(November 19, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Audubon Insurance Company ("Audubon") paid $110,000 to its insured E.D. Lange after his farmhouse was destroyed by fire. Audubon as subrogee, then sued James Lowery, Lange's tenant in the farmhouse, for the amount of its payment alleging arson. A jury returned a verdict in favor of Audubon. Lowery appeals on 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

following grounds: (1) the court erred by allowing the expert testimony of Richard Eley and limiting the expert testimony of Robert Bell; (2) there was insufficient evidence to support the jury finding that the fire was deliberately set; and (3) the court erred in instructing the jury that it could make negative inferences about missing evidence. Audubon cross-appeals the trial court's denial of its motion for prejudgment interest.

DISCUSSION

A. Admission and Exclusion of Expert Testimony

Lowery contends that the court erred by allowing the testimony of Audubon's expert, Richard Eley, and limiting the testimony of Lowery's expert, Robert Bell. A trial court has broad discretion to admit or exclude expert testimony. Edmonds v. Illinois Cent. Gulf R.R., 910 F.2d 1284, 1287 (5th Cir. 1990). Accordingly, we review challenges to rulings on expert testimony under the "manifestly erroneous" standard. Id. Even when an error is shown, a party is not entitled to relief unless the error is substantially prejudicial. Id.

Lowery complains that Eley was not qualified to testify, his testimony was fabricated, his opinion was not supported by generally recognized methodology or by the facts, and the court did not apply the proper analysis in determining whether to allow Eley's testimony. We disagree. The record indicates that Eley had extensive experience in determining the cause and origin of fires, which was the purpose of his testimony. Other than his assertions and mischaracterizations of Eley's testimony, Lowery offers no

evidence to support his allegation that Eley fabricated facts. Although Lowery and his expert disagree with Eley's conclusions, we find that Eley's methodology was valid, and we are not convinced that it was "impossible" to apply his methodology to the facts in this case. Furthermore, if the trial court applied the wrong analysis in determining whether Eley's testimony should be allowed, this error was not substantially prejudicial.

Lowery also argues that the court erred by not allowing Robert Bell to give opinions relating to the cause and origin of house fires. We find that the trial court's ruling was not manifestly erroneous because Bell had limited experience in fire investigation and his testimony in this area would have been cumulative.

B. Sufficiency of Evidence

Lowery's next contention is that there was insufficient evidence to support the jury finding that Audubon proved, by clear and convincing evidence, that arson was the cause of the fire. The standard of review for sufficiency of the evidence is "whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict."[2] Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

The crux of Lowery's sufficiency challenge is that the only evidence offered by Audubon to prove that the fire was caused by

[2] We use this standard because Lowery properly preserved his sufficiency challenge on this issue by moving for judgment as a matter of law before the case was submitted to the jury and after the verdict was returned. Crist v. Dickerson Welding, Inc., 957 F.2d 1281, 1285 (5th Cir.), cert. denied, 113 S.Ct. 187 (1992).

arson was Eley's allegedly inadmissible testimony. Our review of the record reveals that Audubon proved that the fire was deliberately set through the testimony of Eley and two other witnesses and through considerable circumstantial evidence which Appellant, somewhat disingenuously chooses to ignore. Moreover, as explained in the previous section, the trial court did not err in allowing Eley's testimony. Therefore, we find that there was sufficient evidence to support the jury verdict.

C. Instruction Regarding Missing Evidence

Lowery's final contention is that there was no evidence to support the charge instructing the jury that it could make a negative inference about missing evidence.[3] Lowery failed to properly preserve his argument for our review. The record reveals that Lowery's only objection to the instruction was, "We object to P-22 in its entirety. It is a comment on the evidence."[4] "A party

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[3] The trial judge gave the following instruction:

> [I]f you determine by a preponderance of the evidence that the defendant Jimmy Lowery caused some of the fire samples taken by Jimmy Lowery to become either destroyed, misplaced, or unavailable, then you may infer or conclude that such samples that are unavailable would be unfavorable to defendant Lowery, and you may give such evidence whatever weight, worth, and credibility you determine it is entitled. Defendant Jimmy Lowery may overcome this inference or conclusion if you find that he has proven by a preponderance of evidence that he did not destroy or misplace the samples.

[4] Lowery argues that he preserved his argument by objecting at the charge conference. There is, however, nothing in the record to reflect that an objection was made. We can only review the record and do not take evidence to supplement or contradict it. See Doucet v. Gulf Oil Corp., 788 F.2d 250, 252 (5th Cir.), cert. denied, 470 U.S. 883 (1986).

may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal." United States v. Heath, 970 F.2d 1397, 1407 (5th Cir. 1992), cert. denied, 113 S.Ct. 1643 (1993). Our review, therefore, is limited to plain error. Id.

The record reveals that there was evidence to support the instruction. Lowery testified that, the day after the fire, he and his private investigator collected eighty samples and placed them in glass jars. Lowery produced only thirty-five jars and a box of material which supposedly came from some broken jars. When asked why he had not produced all of the samples, Lowery responded that his investigator did not need the samples after they tested negative. Since there was evidence to support the jury instruction, there was no plain error.

D. Prejudgment Interest

On cross-appeal, Audubon argues that the trial court erred by not granting prejudgment interest. In diversity cases, issues of prejudgment interest are governed by state law. Canal Ins. Co. v. First Gen. Ins. Co., 901 F.2d 45, 47 (5th Cir. 1990). Under Mississippi law, an award of prejudgment interest rests within the discretion of the judge. Warwick v. Matheney, 603 So. 2d 330, 342 (Miss. 1992). The district court denied prejudgment interest because it determined that Mississippi law prohibits an insurance company from collecting prejudgment interest on a subrogated claim. See Employers Ins. of Wausau v. Dunaway, 626 F. Supp. 1144, 1145 (S.D. Miss. 1986). In making this determination, the district

court focused on the following language from Oxford Production Credit Association v. Bank of Oxford, 16 So. 2d 384, 388 (Miss. 1944):

> It is generally conceded that, subject to statute, an insurer, on payment of a loss, acquires the right to be subrogated pro tanto to any and all rights which the insured may have against, not only the principal, but also third persons whose wrongful act or neglect caused the loss.

The court interpreted the phrase "pro tanto" as limiting the insurer's right of subrogation to the amount of its payment. See Dunaway, 626 F. Supp. at 1145. We are not as persuaded by this argument as we are by Lowery's next argument in support of the district court's decision.

Lowery argues that when subrogation is expressly provided for in an insurance policy, the insurer's right to subrogation "must be measured by and depends solely on the terms of the clause of the policy" dealing with subrogation. Home Ins. Co. v. Hartshorn, 91 So. 1, 2 (Miss. 1922); see also Dunaway, 626 F. Supp. at 1145. Audubon's insurance argreement with E. D. Lange reads:

> If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us to the extent of our payment.

Moreover, the full release and subrogation agreement signed by E.D. Lange provides:

> [T]o the extent of the above listed payment [110,000], the undersigned ... subrogate[s] Audubon Insurance Company to all of the rights, claims and interest which the undersigned ... may have against any person or corporation liable for the loss mentioned above.

We find that the phrase "to the extent of payment" in the agreements quoted above, limits the scope of the subrogation to the

amount paid by Audubon, and thus, it was not error for the trial court to deny recovery of prejudgment interest.

CONCLUSION

For the foregoing reasons, the decision of the district court is

AFFIRMED.