

NO. A040615

State of Minnesota
In Supreme Court

KEVIN KELLY, as Trustee for the heirs and next-of-kin
of KELLY ANN KELLY, deceased,

Appellant,

v.

JASON ELLEFSON,

Respondent,

STEVE EIDEMILLER,

Defendant,

and

SUPREME TRANSPORT SERVICES, L.L.C., DAVID L. WHITE,
DIANA WHITE, and D.L. ENTERPRISES, INC.,

Respondents.

RESPONDENT ELLEFSON'S BRIEF

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LEGAL ISSUE

Did the trial court properly exclude Plaintiff's amended complaint and expert disclosures offered by a non-settling party as substantive evidence of the fault of the settling party?

The trial court refused to permit this evidence as substantive evidence of the settling party's fault. The court of appeals reversed and ordered a new trial.

STATEMENT OF THE CASE AND FACTS

Respondent Ellefson defers to Appellant's Brief, as Appellant has accurately set forth the Statement of Case and Facts. However, Respondent Ellefson seeks to add to Appellant's Facts concerning Supreme's attempt to establish fault on the part of Lidos by using Plaintiff's amended complaint and expert disclosures as substantive evidence that Lidos had served Ellefson while obviously intoxicated. In addition to using the proffered evidence to argue the fault of Lidos, Supreme would have used these documents as further support for their contention that Respondent Ellefson was negligent at the time of this accident. While Lidos may have been the intended target for having such evidence being admitted, it is Respondent Ellefson who would have suffered prejudice as a result of admission of this evidence. Since Lidos is no longer a party to this lawsuit, Supreme could also have used Dr. Richard Jensen's opinions that Jason Ellefson would have been exhibiting signs of obvious intoxication to argue Respondent Ellefson's negligence to the jury.

Interestingly, the appellate court reversed the district court's decision, though not in the context that Supreme had requested. Instead, as pointed out by Appellant, the court of appeals held that Plaintiff's pleadings, interrogatory responses and expert affidavit were

admissible under Minn.R.Evid. 801(d)(2) to prove the fault of the decedent Kelly Ann Kelly. *See* Appellant's Appendix 67. Supreme did not claim that the documents ought to have been admitted as admissions to prove the fault of Kelly Ann Kelly. While these documents cannot be claimed to be "admissions" against Respondent Ellefson, they can be used by Supreme as evidence of Mr. Ellefson's negligence, denying Mr. Ellefson his right of cross-examination and having a significant prejudicial effect on him.

LEGAL ARGUMENT

Respondent Ellefson joins in Appellant's position that the trial court correctly excluded the proffered evidence, which includes Plaintiff's amended complaint and expert disclosures. In addition to the reasons set forth by Appellant, those being that the evidence at issue is hearsay and does not qualify as an "admission" so as to fall under the exception to the hearsay rule, to allow such evidence would be to violate Respondent Ellefson's right of cross-examination. Further, the prejudicial effect upon Respondent Ellefson of allowing such evidence far outweighs any probative value it may have to Supreme as substantive proof of the fault of Lidos, who is no longer a party to this lawsuit.

I. STANDARD OF REVIEW

The decision whether to admit or exclude evidence rests within the discretion of the trial court and will not be disturbed unless based upon an erroneous view of the law or an abuse of discretion. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990).

II. THE TRIAL COURT PROPERLY EXCLUDED THE AMENDED COMPLAINT AND EXPERT DISCLOSURES ON THE GROUNDS THAT THEY ARE HEARSAY.

The evidence Supreme sought to introduce was intended to prove one of the threshold issues in this case: Whether Lidos had served Respondent Ellefson while he was “obviously intoxicated.” Supreme’s argument was that this documentation constituted prima facie evidence against Lidos. However, what Supreme has failed to assert, but what is another obviously intended result of these documents coming into evidence, is further proof of Respondent Ellefson’s negligence, in that it supports Supreme’s contention that this accident was caused solely by Respondent Ellefson and the fact that he was allegedly intoxicated at the time. Not only does allowing these documents into evidence violate Respondent Ellefson’s right of cross-examination, but it has a significant prejudicial effect on him, far outweighing any probative value it has in proving fault on Lidos, who is no longer a party to this lawsuit. Therefore, the court of appeals’ decision to allow these documents into evidence should be reversed and the trial court decision affirmed.

A. The admission of the proffered documents into evidence violates Respondent Ellefson’s right to cross-examination.

In *Hunt v. Regents of University of Minnesota*, 446 N.W.2d 400, 408-09 (Minn.App. 1989), the court discussed the merits of cross-examination. Cross-examination of an adverse witness is an inviolate right. *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931); *Klingbeil v. Truesdell*, 256 Minn. 360, 366, 98 N.W.2d 134, 140 (1959). It is basic to our judicial system and is an essential

element of a fair trial. *Alford*, 282 U.S. at 692, 51 S.Ct. at 219. The object of all witness examinations, both direct and cross, is to elicit facts to discover the truth. Cross-examination of a witness should not be restricted so long as it serves that purpose.

Mattfeld v. Nester, 226 Minn. 106, 126, 32 N.W.2d 291, 305 (1948).

The purpose of cross-examination is to test the truthfulness of the statements made by a witness on direct. It may be used to break down the testimony in chief or attack the credibility of the witness. *Wiley v. United States*, 257 F.2d 900, 910 (8th Cir.1958).

The law has long recognized the propriety of a litigant's attempt to elicit facts through cross-examination justifying an inference of partiality or bias of the witness.

State v. Blasus, 445 N.W.2d 535, 544 (Minn.1989) (Kelley, J., dissenting); *see also McCormick on Evidence*, ch. 5, § 40 (E. Cleary 3d ed. 1984).

Supportive of the fundamental right of cross-examination is the following statement by Justice Kelley in *Blasus*:

Since the earliest days of statehood, this court has consistently held in both criminal and civil cases that bias, state of mind, and inclinations of witnesses, upon whose testimony in part the issue is to be determined, are not collateral or immaterial matters; that cross-examination on the issue of bias or interest is a matter of right; and that its denial or undue circumscription is prejudicial error.

See, e.g., State v. Dee, 14 Minn. 35, 37 (Gil. 27, 30) (1869); *Alward v. Oakes*, 63 Minn. 190, 193, 65 N.W. 270, 271 (1895); [*State v.*] *Elijah*, 206 Minn. [619] at 625, 289 N.W. [575] at 579 [1940]. In the latter case the court quoted with approval the observation of the Supreme Court of the United States in *Alford v. United States*, 282 U.S. 687, 692 [51 S.Ct. 218, 219, 75 L.Ed. 624] (1931):

Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Elijah, 206 Minn. at 625, 289 N.W. at 579.

Here, one of the items Supreme seeks to admit into evidence are the expert opinions of Dr. Richard Jensen, the toxicologist Plaintiff retained in support of its dram shop claim against Lidos. Dr. Jensen opined that given the amount of alcohol he had consumed, Jason Ellefson would have been exhibiting signs of obvious intoxication. Implicit in this opinion that Lidos was negligent for continuing to serve Mr. Ellefson while he was "obviously intoxicated," is the opinion that Mr. Ellefson was in fact intoxicated. Admission of Mr. Jensen's expert opinions, for whatever reasons, violates Respondent Ellefson's right of cross-examination, as Dr. Jensen would not be present at trial for purposes of cross-examining him. Respondent Ellefson would have no means of testing the statements and opinions made by Dr. Jensen, a fundamental purpose of cross-examination. To deny Respondent Ellefson this right by allowing this evidence would be to deny him a right which the Supreme Court has determined to be "absolute" and "inviolable." This evidence must be excluded.

B. The prejudicial effect to Respondent Ellefson of admitting the proffered evidence far outweighs any probative value it has to Supreme.

Rule 403 of the Minnesota Rules of Evidence excludes relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." In this

case, Supreme seeks to admit the evidence at issue for purposes of proving its case against Lidos. However, in doing so, the ultimate conclusion to be reached, if such evidence is in fact admitted, is that Respondent Ellefson was “obviously intoxicated” at the time he left Lidos on the day of this accident, and lends support to Supreme’s contention that Mr. Ellefson was negligent in causing this automobile accident. While such a conclusion may not be Supreme’s initial reason for seeking to have this evidence admitted, it is in fact an ultimate conclusion if this evidence is to be admitted.

While Jason Ellefson is a third party to the dispute between Appellant and Respondent Supreme as to whether the evidence should be admitted or not, Mr. Ellefson is the most likely to be prejudiced by admission of this evidence. As noted, the stated target of this evidence, Lidos, is no longer a party to this lawsuit. After Appellant settled with Lidos, the district court concluded that whether Mr. Ellefson was “obviously intoxicated” when he was served at Lidos was no longer at issue. Thus, it appropriately excluded the amended complaint, answers to interrogatories and expert disclosures that Supreme sought to have admitted. While there is also the potential that such evidence could be used against the deceased, Kelly Ann Kelly, as the court of appeals held, no court has made any finding as to the prejudicial effect this evidence will have on Respondent Ellefson, if admitted. This evidence consists of contentions of a trustee in Plaintiff’s amended complaint, contentions by Appellant in his interrogatory responses, and opinions of Appellant’s expert contained in an Affidavit. None of these items was prepared as direct evidence of Respondent Ellefson’s negligence, but all of them could potentially be used

against him, if allowed into evidence. This would make Respondent Ellefson, a third party to this dispute, a direct target of Supreme's arguments. This effect is highly prejudicial to Jason Ellefson, and fars outweighs any probative value this information has with regard to the claimed purposes for its admission. The trial court correctly excluded this evidence.

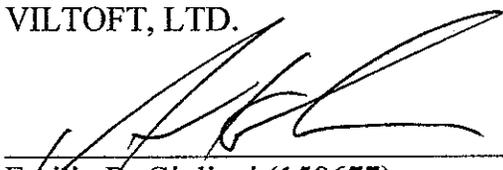
CONCLUSION

For all the reasons as set forth above, as well as those set forth in Appellant's Brief, Respondent Ellefson respectfully requests that this Court reverse the decision of the appellate court and affirm the trial court's decision.

Dated: 7/14/05

Respectfully submitted,

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