IN THE COURT OF APPEALS OF IOWA

No. 2-1096 / 12-1012
Filed February 13, 2013

DONALD S. DOBKIN,
Plaintiff-Appellant,

vs.

THE UNIVERSITY OF IOWA,
By and through its COLLEGE
OF LAW,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Sean W. McPartland, Judge.

Plaintiff appeals from the denial of his motion for new trial following a jury verdict in favor of defendant. **AFFIRMED.**

Stephen T. Fieweger of Katz, Huntoon & Fieweger, P.C., Moline, Illinois, for appellant.

Thomas J. Miller, Attorney General, and George A. Carroll, Assistant Attorney General, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Donald Dobkin, an unsuccessful applicant for a teaching position at the University of Iowa College of Law, appeals from the denial of his motion for new trial following a jury verdict in favor of the university in his age discrimination suit. He contends the court erred in denying the motion for new trial because it improperly excluded an exhibit, an article written by one of his witnesses.

I. Background Facts and Proceedings

In 2008 the law school advertised openings in the placement bulletin of the Association of American Law Schools (AALS). Dobkin, then age fifty-five, submitted an application through the AALS process. Dobkin was not offered a position. The law school offered a position to a thirty-two-year-old candidate, who turned down the offer. Dobkin filed an age discrimination claim with the Iowa Civil Rights Commission in 2009 and received a right-to-sue letter.

In November 2009 Dobkin sued the law school, alleging age discrimination. The matter came to trial in February 2012. The court overruled the law school's motion in limine seeking to exclude the video deposition testimony of Nicholas Spaeth. The court then went through the objections made during the deposition and ruled on each of them. The court sustained the law school's objection to Exhibit 20, a two-page article from the National Law Journal newspaper entitled "At Law Schools, Age Bias Co-Exists With Outdated Practices," written by Spaeth. The court stated:

> The objection on page 27 to Exhibit 20, to the offer of Exhibit 20, is granted. I've read Exhibit 20. I think it contains hearsay within hearsay and contains a fair amount of speculation. It also contains basically opinions of this witness beyond the scope of what I understand to be the disclosure of opinions. So Exhibit 20 is

> not in evidence at this time. The motion in limine with respect to Exhibit 20 is sustained.

The court then allowed Dobson's trial attorney to make a record concerning the ruling.

> Judge, I believe this was an article written and recognized by the *National Law Journal* as an article that was researched, and while it does contain Mr. Spaeth's opinions, it is based on his empirical evidence that he had gathered. It is also based upon what the trends were in the national law educational process at the present time. I think it's relevant and material, and whether it has his opinions or conclusions only goes to the weight of its admissibility and not necessarily to its admissibility.
>
> The only objection contained therein was a hearsay objection. Mr. Spaeth was the author of this article, and obviously laid the foundation for that. If I had objections to particular parts of the article, I may have been able to address that, but to claim that the objection here is based solely on hearsay, when it's Mr. Spaeth's own ideas that he set forth in a published law journal article, is not a proper objection. And for that reason, I would still like to be able to tender Exhibit 20.

The court then stated:

> All right. I'm going to sustain the objection. And what we'll do, we'll make Plaintiff's Exhibit 20 a part of the record so you've certainly got that as a part of the record that can go forward. . . . You will have a copy—I should say what will be the original with the sticker on it of Exhibit 20 that will be tendered, it will be made a part of the court file.

The court then described the necessary edits to the video deposition to eliminate references to Exhibit 20.

Following a jury verdict for the law school, Dobkin filed a motion for new trial on three grounds. Concerning the exclusion of Exhibit 20, he alleged:

> In short, defense counsel opened the door to this Exhibit by his repeated arguments before the jury, and in his direct questioning of Mr. Spaeth on the video deposition, of the fact that not one of the 170+ AALS member law schools invited Mr. Spaeth for an interview. By opening the door to Mr. Spaeth's treatment nation-wide, defendant waived objection to Exhibit 20, and it was error for

> this Court to disallow the jury to see Mr. Spaeth's article accordingly.

The court denied Dobkin's motion for new trial. Concerning the exclusion of Exhibit 20, the court ruled:

> Plaintiff's third contention is that the Court committed error justifying a new trial based upon the Court sustaining Defendant's objection to Plaintiff's Exhibit 20, an article authored by one of Plaintiff's witnesses, Nicholas Spaeth. Defendant contends the exhibit was hearsay and was properly excluded.
>
> The testimony of Mr. Spaeth and the offer of Exhibit 20 were the subject of Defendant's motion in limine. Although the court overruled the motion in limine with respect to the testimony of Mr. Spaeth, the motion in limine with respect to Exhibit 20 was sustained. At the time of trial, the Court noted that the exhibit contained hearsay within hearsay and significant speculation by the author/witness, as well as opinions of the author/witness beyond the scope of the disclosure of expert opinions. At the time of trial, Plaintiff acknowledged that the article included opinions, but contended that such opinions were based upon empirical evidence Mr. Spaeth has gathered.
>
> The court continues to conclude that the exclusion of Exhibit 20 was appropriate, particularly in light of the fact that, through Mr. Spaeth's testimony, Plaintiff was able to elicit substantial information related to the subject of the article. Plaintiff's Motion for New Trial on the grounds of exclusion of Exhibit 20 is denied.

II. Scope and Standards of Review

Our review of a trial court's ruling on a motion for new trial depends on the grounds raised in the motion. *Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012). If the motion is based on a discretionary ground, we review it for an abuse of discretion. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). If the motion is based on a legal question, our review is on error. *Id.* Generally, a trial court's evidentiary and trial objection rulings are reviewed for an abuse of discretion. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa

2001). However, hearsay rulings generally are reviewed for errors at law. *Id.*; *see also State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

III. Merits

Dobkin contends the court erred in denying his motion for new trial, specifically in denying admission of Exhibit 20. He raises three arguments in his brief:

> [T]he trial court erred because: 1) the only objection, hearsay, was contrary to law because Spaeth was the author; 2) the article was totally relevant to the issue of pretext; and 3) defense counsel opened the door to this Exhibit by his repeated arguments before the jury, and in his direct questioning of Mr. Spaeth on the video deposition . . . .

As noted above, the sole ground raised concerning Exhibit 20 in the motion for new trial was the law school opened the door to the exhibit and thus waived objection. In its ruling on the motion, the court did not expressly address that ground, but affirmed its initial assessment the exhibit was hearsay, contained hearsay within hearsay, and contained significant speculation and opinions beyond the scope of disclosure of expert opinions. The court concluded exclusion of the exhibit was appropriate, noting much of the information in the article was admitted through Spaeth's testimony.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). An out-of-court statement offered at trial to prove the truth of the matter asserted is hearsay regardless of whether the declarant testifies at trial. Hearsay is not admissible unless it falls within one of several enumerated exceptions. Iowa Rs. Evid. 5.802-03.

The trial court properly denied admission of Exhibit 20 because it is hearsay and no exception applies. Because the exhibit is inadmissible hearsay, relevance makes no difference in its admissibility. A court does not consider relevance until after evidence clears the hearsay threshold. *See Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 508 (Iowa 2009) (noting non-hearsay "may still be excluded based on other rules of evidence" such as relevancy under rule 5.402 or undue prejudice under rule 5.403). Because the exhibit is inadmissible hearsay, it makes no difference if the law school "opened the door" to the exhibit. In oral arguments, Dobkin's attorney asserted Spaeth "authenticated" the exhibit. However, the exhibit is still inadmissible hearsay.

The court properly denied admission of the hearsay exhibit, so its exclusion cannot form the basis for granting a new trial.

AFFIRMED.