COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2958

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

DeSHAWN PARKER, by his Guardian ad Litem, Joseph Doherty, and KAREN PARKER,

Plaintiffs-Appellants,

v.

ESTATE OF JONAS WALKER, ESTATE OF SADIE WALKER, WILL H. WALKER, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, PRIMECARE HEALTH PLAN, INC., STATE OF WISCONSIN, and MILWAUKEE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants,

BIC CORPORATION,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. DeShawn Parker and his mother, Karen Parker, appeal from a judgment dismissing their product liability case following the jury's conclusion that DeShawn did not use a red Bic lighter to start a fire. The Parkers argue that the trial court improperly restricted the scope of a fire investigator's testimony. The Parkers also argue that the trial court improperly refused to allow into evidence a triple hearsay statement. We affirm.

On October 12, 1990, DeShawn, three years and ten months old, started a fire at the home of Jonas, Sadie and Will Walker. In his deposition, which the parties stipulated to use instead of DeShawn's live testimony at trial, DeShawn testified that he used a green lighter to start the fire. He stated that he got the lighter off of a table near the couch. DeShawn also stated that he had thrown the lighter he used to start the fire into the fire. Investigating the fire, a police detective found a red Bic lighter and packs of cigarettes under a loveseat in the room where DeShawn started the fire, but the lighter was away from the couch that DeShawn ignited. No green lighter was found at the scene. According to the testimony of other witnesses, however, DeShawn also stated that the lighter he used to start the fire was red.

Bic argued throughout trial that, based on DeShawn's deposition, DeShawn started the fire with a "green" lighter, which he may have thrown in the fire because no green lighter had been found. Bic further argued that because the red lighter was found under the loveseat, the red lighter could not have started the fire.

The special verdict contained the following question, "On October 12, 1990 did DeShawn Parker start a fire using a red Bic lighter?" The jury answered "no."

The Parkers called fire insurance investigator William Tingue to rebut Bic's argument that the green lighter probably had been thrown into the fire. The Parkers had not named Tingue as an expert witness. Nevertheless, plaintiffs' counsel questioned Tingue about his education and experience, including his position as a senior special investigator responsible for investigating fires for the claims department of a major insurance company and his prior position as a City of Milwaukee detective assigned to fire investigations. Plaintiffs' counsel also elicited from Tingue that he was "actively involved in teaching fire investigation."

Tingue testified that he had searched the debris with a shovel and a fine tooth rake looking for the cause of ignition but did not find any evidence establishing the ignition source. Tingue testified about what he did and did not find at the scene. Arguing that Tingue was a "superqualified" fact witness, the Parkers wanted to examine him further to elicit testimony that if the fire had been caused by a lighter thrown into and consumed by the fire, metal remnants of the lighter would have been found. The trial court, however, refused to allow Tingue to testify regarding what he looked for and did not find because such testimony would have contained opinions based on Tingue's expertise.

"A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made '"in accordance with accepted legal standards and in accordance with the facts of record."'" ***Hunzinger Constr. Co. v. Granite Resources Corp.***, 196 Wis.2d 327, 332, 538 N.W.2d 804, 806 (Ct. App. 1995).

Rule 907.01, STATS., provides:

> **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 907.02, STATS., provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 907.01, STATS., is not an avenue by which to introduce evidence under Rule 907.02, STATS. *See* ***Simplex, Inc. v. Diversified Energy Systems, Inc.***, 847 F.2d 1290, 1291-1292 (7th Cir. 1988).

The trial court did not erroneously exercise its discretion in limiting Tingue's testimony. Plaintiffs' counsel attempted to question Tingue based upon his expertise. Counsel's protests that he was not seeking to use Tingue as an expert but merely as a "superqualified" lay witness recalls the riddle credited to Abraham Lincoln that asks: "How many legs does a dog have if you call a tail a leg?" The answer: "Four, because calling a tail a leg does not make it so." Tingue was not named as an expert witness and, therefore, his testimony was limited to that of a lay witness.

The Parkers also contend that the trial court improperly excluded from evidence the statement by Jonas Walker to Jonas's son, Will Walker, contained in the report of a police detective who interviewed Will Walker and testified at the trial. Will Walker told the police that he had a red lighter and on the morning of the fire "on the way out to the hospital he asked his father for the cigarette lighter and the father replied, 'I left it on the table.'" The statement was significant because in his deposition DeShawn testified that he had picked up a lighter from the table by the couch. Thus, the Parkers wanted Jonas Walker's statement to establish that DeShawn had used the red lighter from the table and had merely confused the color during his deposition. The trial court admitted the report of the Will Walker interview but redacted Will's and Jonas's references to leaving the lighter.

The trial court rejected the Parkers' numerous arguments to get Jonas's statement admitted into evidence under various hearsay exceptions. We need not address each of the Parkers' individual evidentiary arguments, however, because we conclude that even if we were to assume error (which we do not), the Parkers' substantial rights were not affected by the exclusion of Jonas's statement.

If a trial court makes an evidentiary error, an appellate court will reverse or remand for a new trial only where the improper admission or exclusion of evidence has affected the substantial rights of the appellant. *See* ***Heggy v. Grutzner***, 156 Wis.2d 186, 196, 456 N.W.2d 845, 850 (Ct. App. 1990); § 805.18(2), STATS. We will only reverse where there is a reasonable possibility that the error contributed to the final result. ***Id.*** at 197, 456 N.W.2d at 850 (citing ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985)).

Review of the record reveals no reasonable possibility that the exclusion of Jonas's statement contributed to the jury's verdict. Evidence admitted at the trial included: (1) the testimony of City of Milwaukee Police Detective James Henner that he found the red Bic lighter under the loveseat and did not find any other incendiary materials or remnants in the room; (2) Mr. Tingue's testimony regarding what he found at the scene; (3) Karen Parker's testimony about where Jonas Walker always kept his smoking materials, conveying essentially the same information as Jonas's statement; and (4) the balance of Will Walker's statement from which the jury could infer that Jonas had left Will's red lighter at the house. Additionally, we note that in his opening statement plaintiffs' counsel did tell the jury of Jonas's statement and, during closing argument, he argued that: Jonas borrowed Will's red lighter the morning of the fire; both men had used a match to light cigarettes on the way to the hospital; and there was no lighter in the car. Thus, even without Jonas's statement the jury considered evidence and argument consistent with the statement and, therefore, we conclude that there is no reasonable possibility that its exclusion somehow contributed to the final result. Accordingly, we affirm.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.