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DISTRICT II

September 30, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1065-FT

Rob Placke v. Jerry's Grading and Excavating, LLC
(L.C. # 2012CV2237)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Rob and Natalie Placke appeal a circuit court order dismissing their suit against Jerry's Grading & Excavating, LLC. Pursuant to a presubmission conference and this court's order of July 7, 2015, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2013-14).¹ Upon review of those memoranda and the record, we affirm.

In September 2012, the Plackes filed suit against Jerry's Grading for negligence related to the installation of an outdoor swimming pool. Eventually, the case was tried to the circuit court.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

During adverse examination at trial, the Plackes attempted to introduce a manual from the pool's manufacturer. Counsel for Jerry's Grading objected due to a lack of foundation. In an effort to lay the necessary foundation, the Plackes attempted to introduce the deposition testimony of an out-of-state witness from the pool's manufacturer pursuant to WIS. STAT. § 804.07(1)(c)1.b. Again, counsel for Jerry's Grading objected.

After hearing arguments from the parties, the circuit court excluded the deposition testimony because (1) the Plackes had not shown that the witness was unavailable for trial; and (2) they had not brought a pretrial motion seeking admission of the deposition testimony. Accordingly, the Plackes were unable to lay the necessary foundation for admission of the manual.

At the conclusion of trial, the circuit court dismissed the Plackes' case for failing to meet their burden of proof. This appeal follows.

On appeal, the Plackes contend that they are entitled to a new trial because the circuit court erroneously excluded evidence—ultimately, the manual—based on a misinterpretation of WIS. STAT. § 804.07(1)(c)1.b.

WISCONSIN STAT. § 804.07(1)(c)1.b. provides that the deposition of a witness, other than a medical expert, may be used at trial if the circuit court finds:

That the witness is at a greater distance than 30 miles from the place of trial or hearing, or is out of the state, and will not return before the termination of the trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition.

Here, the circuit court interpreted the above language to require a showing of unavailability. This was erroneous, as a deposition may be admissible under WIS. STAT.

§ 804.07 regardless of a declarant's unavailability. *See Voith v. Buser*, 83 Wis. 2d 540, 548, 266 N.W.2d 304 (1978); Daniel D. Blinka, 7 Wisconsin Practice Series, Wisconsin Evidence § 802.04 at 728 n.2 (3d ed. 2008). It was also erroneous for the court to insist upon a pretrial motion when there is no requirement for one and the deposition testimony was offered against the other party.

Despite these errors in the circuit court's ruling, we are unable to grant the Plackes a new trial. That is because their offer of proof is so lacking that we are unable to determine whether the exclusion of evidence was prejudicial. *See Hales Corners Sav. & Loan Ass'n v. Kohlmetz*, 36 Wis. 2d 627, 633-34, 154 N.W.2d 329 (1967). In other words, without the manual or a sufficient offer of proof as to the manual's significance, there is no showing that the court's erroneous ruling affected the substantial rights of the Plackes. *See WIS. STAT. § 901.03(1)*. The appeal fails on this basis.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals