

FILED
United States Court of Appeals
Tenth Circuit

MAR 06 1989

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT L. HOECKER
Clerk

DONALD ANDERSON,

Plaintiff-Appellant,

V.

RALSTON-PURINA, d/b/a
KEYSTONE INTERNATIONAL,

Defendant-Appellee.

No. 87-2061
(D.C. No. 85-F-2494
(D. Colo.)

ORDER AND JUDGMENT

Before SEYMOUR and SETH, Circuit Judges, and SEAY,* District Judge.

Plaintiff Donald Anderson, a quadriplegic as a result of traumatic injuries sustained in a skiing accident, brought this negligence action against Ralston-Purina d/b/a Keystone International (Keystone). He alleged that Keystone's negligence in creating a pile of man-made snow and allowing it to remain ungroomed on the ski slope caused his skiing accident. The jury found in favor of Keystone after a four-day trial, and Anderson filed a motion for a new trial. The district court denied his motion, and he appealed. We affirm the district court.

*Honorable Frank H. Seay, United States District Judge, Eastern District of Oklahoma, sitting by designation.

Anderson's sole claim on appeal is that the trial court erred in excluding evidence of certain prior consistent statements he sought to introduce in order to rehabilitate himself as a witness. He advances his claim by way of three separate arguments. First, Anderson asserts that the court completely failed to apply Federal Rule of Evidence 801(d)(1)(B), which classifies prior consistent statements of a declarant testifying at trial and subject to cross-examination as nonhearsay when offered "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive"¹ He next argues that the court improperly applied Federal Rule of Evidence 106, which permits an adverse party to require the introduction of such portions of a writing or recorded statement as "ought in fairness to be considered contemporaneously" at the time a writing or recorded statement is introduced, because the court applied it to the exclusion of Rule 801(d)(1)(B). Finally, Anderson contends that the court improperly applied Rule 106 when it excluded the

¹ Fed. R. Evid. 801(d)(1)(B) reads in relevant part:

"(d) A statement is not hearsay if --

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive"

introduction of some deposition statements during the redirect examination of Anderson.

Anderson argues extensively in his brief that the prior statements he sought to have admitted were prior consistent statements within the meaning of the rule. We agree. Contrary to Anderson's assertion on appeal, however, we are convinced by our review of the record that the trial court did apply Rule 801(d)(1)(B) to permit the introduction of prior consistent statements, but chose to limit the amount of evidence admitted pursuant to the rule.² We therefore find it unnecessary to

² We find particularly illuminating in this regard the colloquy that occurred when Anderson's counsel attempted to introduce portions of Anderson's deposition during redirect:

"THE COURT [in response to an objection by Keystone's counsel]: I think he can ask if a consistent statement is perhaps not in variance with what he has said right now.

"[ANDERSON'S COUNSEL]: That's the purpose, your Honor.

"THE COURT: If it's a question of completeness, if there is a question and answer on both sides of the question asked by counsel to give us a complete sequential approach, the Court will allow it, but to take various questions as to consistency, what he said now, the court won't allow that procedure."

Rec., vol. III, at 172. A fair reading of this interchange is that the trial court recognized Anderson's right both to require the introduction of relevant portions of the deposition pursuant to the "completeness rule" and to offer prior consistent statements from the deposition for purposes of rehabilitating Anderson pursuant to Fed. R. Evid. 801(d)(1)(B). The court, however, decided to limit the introduction of rehabilitating prior consistent statement evidence, which Anderson's counsel acknowledged to be the goal.

address Anderson's claim that the district court erroneously applied Rule 106 to the exclusion of Rule 801(d)(1)(B). Nor do we find it necessary to address his contention that the trial court incorrectly applied Rule 106 in limiting his reference to the deposition on redirect. Instead, we focus our analysis on whether the trial court erred in limiting the extent of prior consistent statements Anderson sought to introduce for rehabilitative purposes pursuant to Rule 801(d)(1)(B).

Before turning to the merits of Anderson's claim, we note that evidentiary rulings are committed to the sound discretion of the trial court and will not be disturbed absent a prejudicial abuse of discretion. United States v. Zamora, 784 F.2d 1025, 1028 (10th Cir. 1986). This general principle encompasses rulings on the extent of prior consistent statement evidence admissible for purposes of rehabilitating a witness under Rule 801(d)(1)(B). See e.g. United States v. Andrade, 788 F.2d 521, 532 (8th Cir. 1986); United States v. Blankinship, 784 F.2d 317, 320 (8th Cir. 1986); United States v. Mock, 640 F.2d 629, 632 (5th Cir. 1981).

The trial court stated in its order dismissing Anderson's motion for a new trial that it had limited the amount of deposition testimony Anderson could introduce because it was cumulative within the meaning of Federal Rule of Evidence 403.³

³ Rule 403 provides:

See Mock, 640 F.2d at 632 (exclusion of "essentially cumulative evidence"); cf. K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1155 (10th Cir. 1985) (decision to admit or exclude cumulative evidence under Rule 403 within sound discretion of trial court and will not be reversed absent clear abuse of discretion). To determine whether the court abused its discretion in so ruling, we have considered the specific instances of impeachment and whether any rebuttal testimony was admitted. The first and third impeachments concerned, respectively, the general issue of whether Anderson always knew why he fell, and the specific question of whether he knew why he fell in this particular case. The second impeachment concerned the condition of the snow and whether Anderson had modified his skiing style to accommodate the conditions.

At the time of the first impeachment, Anderson's counsel requested the judge to require that an additional question and answer from the deposition be read in conjunction with the impeaching deposition testimony. This additional material indicated Anderson's belief that he would not have fallen if the conditions had been normal. Although the judge apparently granted this request under Rule 106, the question and answer served to rebut the implication raised by Keystone's use of the deposition

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

that Anderson fell without knowing why, and so fulfilled the purpose of Rule 801(d)(1)(B). On redirect, Anderson's counsel was permitted to refer to three separate statements in the deposition. The first concerned the existence of some abnormality as the source of his fall. The second focused on the specific characteristics of the pile of man-made snow and whether they played "a part" in causing his fall. Finally, after the point at which the judge instructed Anderson's counsel that he would not permit repetitive references to the deposition, counsel framed another question based on the deposition regarding whether the same specific factors referred to in the second reference had "played a significant part" in causing his fall. The question and answer were as follows:

"Q Do you remember, Don, telling us at your deposition that the condition of the whale, combination of the size, the height, and the hard-packed icy nature, the ungrooved, ungraded nature of the manmade snow played a significant part in causing both your fall and your injury?

"A Yes."

Rec., vol. III, at 172.

Anderson now urges that "at least twelve different statements" are consistent with his trial testimony and that he should have been permitted to introduce them. Appellant's Opening Brief at 19-20. All of these statements attest to Anderson's perception as to the condition of the snow, the condition (size, etc.) of the

pile of man-made snow, or some abnormality in the slope or snow that contributed to his fall. Nothing in these statements adds anything to the statements that the trial court did admit into evidence. The court's exercise of its discretion to deal with evidentiary matters is especially appropriate when faced with "essentially cumulative evidence," or "evidence adding only a minor incremental probity." Mock, 640 F.2d at 632. We cannot find an abuse of discretion in the trial court's decision to limit the admission of prior consistent statements in this case.

The order of the district court is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Circuit Judge