

# Bowers v. Fibreboard Corp.

1992

SEINFELD, J.

Elbert Eldredge and Richard Williams died following exposure to asbestos-containing products. . . . The jury found all defendants liable and awarded damages to the plaintiffs.

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[T]he defendants assign error to the trial court's decision to admit excerpts from the United States Navy publication, *Dictionary of American Naval Fighting Ships*, under the "ancient document" exception to the hearsay rule, ER 803(a)(16). . . [O]ur review is for abuse of discretion and we find no such abuse. *Brouillet v. Cowles Pub'g Co., supra*.

Bowers sought to admit the excerpts to establish that the ships on which Williams served were in specific ports at a time when defendants' products were used on ships in those ports. One such excerpt, which the court admitted as an exhibit, stated that the *Manchester* was "laid down" in the Fore River Shipyard in Quincy, Massachusetts, in 1944 and launched in March 1946. Another excerpt, read into the record but not admitted as an exhibit, stated that the *Iowa* departed from Yokosuka, Japan 19 October 1952 for overhaul at Norfolk." The deposition testimony of certain shipyard workers put defendants' products in the Fore River Shipyard at the time the *Manchester* was built, 1944, and at the Norfolk Naval Shipyard between 1942 and 1975. A worker at Norfolk stated that he worked on the *Iowa* during this time period.

Defendants contend that these excerpts do not fit under the hearsay rule's ancient document exception. They argue, rather, that the *Dictionary of American Naval Fighting Ships (Dictionary)* is more like a "learned treatise" that might be admissible under ER 803(a)(18) if called to the attention of a testifying expert, but that no such expert was presented in this case. We find, however, that the "ancient document" exception is broad enough to encompass these particular excerpts and that this ruling meets the purpose of the hearsay rule and the policies underlying the "ancient document" exception.

ER 803(a)(16) states:

- The following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:
- ....
- (16) ... Statements in a document in existence 20 years or more whose authenticity is established.

Evidence is authentic if it is in fact what its proponent claims. ER 901(a), (b) (8). The defendants do not argue that the *Dictionary* is not authentic or that the portions admitted are less than 20 years old. In any event, the *Dictionary* in question is self-authenticating. ER 902. The rule does not require extrinsic evidence of authenticity as a condition precedent to admissibility for books, pamphlets, or other publications purporting to be issued by a public authority. ER 902(e). The title page of the *Dictionary* announces that its source is the Navy Department, Office of the Chief of Naval Operations.

The purpose of the rule prohibiting the use of hearsay testimony, except in limited circumstance, is to increase the probability that evidence shall be trustworthy and reliable. *Chmela v. Department of Motor Vehicles*, 88 Wn.2d 385, 392-93, 561 P.2d 1085, (1977). Certain categories of statements, including ancient document evidence, contain independent indicia of reliability and, thus, are excepted from the hearsay prohibition. E. Cleary, *McCormick on Evidence* § 253 (3d ed. 1984); ER 803(a)(1)-(23).

The requirement that an "ancient document" be at least 20 years old when offered enhances the probability that it will be trustworthy. First, the lengthy time period between preparation of the document and litigation provides assurance that the work was not fabricated in anticipation of litigation. In addition, in a case such as this, the 20 years between publication and the use of the *Dictionary* at trial provided readers an extended opportunity to point out any errors and suggest corrections to the information.

Necessity is the second policy reason for admitting certain hearsay evidence. 5 J. Wigmore, *Evidence* § 1420 (1974). As living witnesses to historical events are difficult to find, the trier of fact likely will lose the benefit of such evidence entirely if not admissible under an exception to the hearsay rule. 5 J. Wigmore § 1421. Furthermore, we recognize that the difficulty of assembling the pieces necessary to tell the entire story about an incident that occurred more than 20 years ago may be so great that the evidence is practically, though perhaps not technically, unavailable.

In support of their contention that ER 803(a)(18), the "learned treatise" exception, rather than the ER 803(a)(16) "ancient document" exception, should apply, defendants cite *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 381 P.2d 130, cert. denied, 375 U.S. 945 (1963). However, *Prince Hall Lodge* is distinguishable. The evidence at issue there involved several books introduced by both parties on the history of what was then called "colored Masonry". The trial court admitted all but one of the books into evidence, apparently under a then existing exception to the hearsay rule for treatises dealing with events of general history. Appellants challenged the trial court's exclusion of the one book: a supplement to a treatise written by a person other than the author of the treatise. The reviewing court noted that, in contrast to the works that the trial court admitted, in this 464\*464 one case the proponent did not qualify the book's author or provide any other basis for considering the work an authoritative history. Therefore, it was not an abuse of discretion to refuse to admit it. *Prince Hall Lodge*, 62 Wn.2d at 42.

Defendants argue that Bowers, likewise, offered no testimony in support of the *Dictionary* excerpts. However, a testimonial foundation, although required for admission of evidence from learned treatises, ER 803(a)(18), is not demanded by the rule excepting ancient documents. ER 803(a)(16). We need not decide the remaining question, whether the trial court must exclude a properly authenticated 20-year-old document absent additional evidence of its reliability, because here we do have such evidence. In deciding whether to admit the *Dictionary*, the trial court properly considered a letter offered by plaintiff from the head of the Ships' Histories Branch of the Department of the Navy. (The trial court must make the preliminary determination as to the admissibility of challenged evidence. ER 104(a). In doing so, the trial court is not bound by the Rules of Evidence. ER 104(a)). The letter stated that the *Dictionary*, an official publication, is contained in many reference libraries and that it has been "well-received" and "favorably reviewed" and that its primary sources are documents in the Naval Historical Center and National Archives.

In contrast to the treatise supplement by an unrecognized author in *Prince Hall Lodge*, the *Dictionary* is a government publication, compiled from data contained in government archives, maintained in numerous libraries, and reviewed by several journals. This combination of facts increases its probability of reliability and supports the admission of the *Dictionary* as an authoritative history.

Furthermore, there is no reason to exclude compilations of data such as those contained in the *Dictionary* from the term "ancient document". One commentator, referring to the "ancient document" exception to the hearsay rule, ER 803(a)(16), states:

- Nothing in the rule restricts its application to dispositive instruments such as deeds. The text of the rule is broad enough to include other documents, apparently including newspapers and treatises. Nothing in the rule requires that the author of the document be established as an expert.

(Footnotes omitted.) 5B K. Tegland, Wash. Prac., *Evidence* § 382 (3d ed. 1989).

Finally, defendants suggest that it is arbitrary to eliminate the additional foundational requirements for admission of a learned treatise merely because the document has reached the age of 20. We recognize that the selection of a specific time period for the general application of ER 803(a)(16) involved some subjective judgment. However, the fundamental reasons for the rule, necessity and high degree of reliability, encompass the inclusion of the *Dictionary* in this case. Further, the trier of fact can understand and utilize the *Dictionary*, a compilation of facts rather than a treatise of analysis, opinion, and theory, without expert interpretation. The testimony of an expert witness regarding his or her use of this text would add little.

The court acted within its discretion in admitting these *Dictionary* excerpts as "ancient documents".

We affirm the trial court except with regard to those issues pertaining only to Celotex Corporation, which issues await resolution at such time as the bankruptcy court lifts the stay of appeal.