COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 19, 1995

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(1), 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. 95-0325

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

BARB COMPANY,
a Wisconsin General
Partnership Consisting
of RONALD S. ROG
and CAROLYN ANN HUSS,

Plaintiffs-Appellants,

v.

AMERICAN STATES
INSURANCE COMPANY,
an Indiana Insurance
Corporation,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Barb Company and its owners, Ronald Rog and Carolyn Huss, appeal a judgment dismissing their action to recover the proceeds of a fire insurance policy. The jury found that someone acting on behalf of Rog and Huss intentionally set the fire that destroyed their auto supply business equipment and inventory. They argue that the verdict is not supported by the evidence and that the trial court erroneously allowed hearsay evidence at trial. We conclude that the evidence supports the verdict and that the court erred when it allowed hearsay testimony, but the error was harmless.

Barb concedes that the evidence supports the jury's finding that the fire was intentionally started. The jury heard expert testimony that a liquid substance had burned on the floor near the front of the store and that a laboratory found gasoline in the flooring samples. The jury found that Rog and Huss did not personally start the fire, but that someone acting at their request or direction set the fire. Barb contends that the jury must have considered the substantial evidence of motive and engaged in speculation that the owners were somehow involved in starting the fire. Barb argues that no witness or exhibit provided a nexus between either of the owners and the arsonist.

Sufficient evidence supports the jury's findings. In addition to the evidence establishing that the fire was caused by arson and that the owners had a strong financial motive for destroying the business, the jury heard evidence that the owners had exclusive access to the premises at the time of the fire. Huss, her mother, and a customer left the store together at 7 p.m. They did not see or smell anything unusual at the time they exited and locked the building. They left the parking lot in separate cars at 7:05 p.m. The fire was first seen between 7:10 and 7:14. A neighbor phoned the fire department at 7:15. By that time, the area around the front window was aflame. By 7:19, when the fire department arrived, the building was locked and fully engulfed in flames. Rog, Huss and one employe had all of the keys to the building. In light of the short time in which the arsonist could spread the gasoline and start the fire, along with the testimony that the building was securely locked minutes before the fire, the jury could reasonably infer that only the owners or their employe had access to the building at the time the fire was started. We must sustain the jury's verdict because it is supported by evidence the jury had the right to believe and reasonable inferences that may be drawn from that evidence. *See* ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984).

The trial court erred when it allowed the testimony of Stephen Hoyle recounting an experiment performed at his request by an engineer in another city. Barb contended that the fire was started by a coffeemaker at the back of the store that the witnesses do not recall turning off. Hoyle called an unidentified engineer in Kenosha who set up a coffeemaker and put an empty glass pot on it. After one-half hour, the engineer told Hoyle that the temperature had reached only 240 degrees. The results of the experiment conducted by the Kenosha engineer are hearsay. The trial court allowed Hoyle to testify regarding this experiment citing § 907.03, STATS., which allows an expert to base his opinion on hearsay information. Although § 907.03 allows the admission of an expert's opinion even though it is based on hearsay, the hearsay itself is not admissible if offered to prove the truth of the matter. *See* ***State v. Weber***, 174 Wis.2d 98, 107, 496 N.W.2d 762, 766 (Ct. App. 1973).

Nonetheless, we conclude that the error in admitting Hoyle's testimony was harmless. This court must disregard an evidentiary error unless it affects a substantial right of a party. *See* §§ 805.18(1) and 901.03(1), STATS. The theory that the fire was accidentally caused by the coffeemaker was discredited without resort to the objectionable hearsay evidence. The fire was seen near the front of the store shortly after it started. An electrical engineer who examined the wiring in the store concluded that the coffeepot could not have been the cause of the fire because it was not energized at the time the fire got to it. The coffeepot theory does not account for the presence of gasoline in the carpet or the speed with which the fire spread. None of the witnesses reported observing the smell of burnt coffee before they left the building minutes before the fire. Finally, Hoyle's admissible testimony regarding the burn pattern refutes the suggestion that the fire originated near the coffee machine.

By the Court.—Judgment affirmed.

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