

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

12/8/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

S. Motzer

Deputy

FILED: 01/05/2021

In re: Hopi Reservation HSR
Contested Case No. 6417-203

In re: the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and Source

In re: Trial to Court

TRIAL TO COURT DAY 34

Courtroom: CCB 301

9:00 a.m. Trial to the Court continues from December 7, 2020.

The following attorneys and parties appear via GoToMeeting:

- Colin Campbell, Grace Rebling, Phillip Londen and Payslie Bowman for the Hopi Tribe
- Vanessa Boyd Willard, Cody McBride, Emmi Blades, and Rebecca Ross for the United States Department of Justice, Indian Resources Section
- Sarah Foley for the United States Department of the Interior
- Brian J. Heiserman, David A. Brown, Lauren J. Caster, Bradley J. Pew for LCR Coalition
- Mark A. McGinnis and Hannah Woner for the Salt River Project
- Carrie J. Brennan and Kevin Crestin for the Arizona State Land Department
- Lee A. Storey, Sara Ransom, Alexandra Arboleda, and Ethan B. Minkin for the City of Flagstaff
- Jeffrey S. Leonard, Judith M. Dworkin, Evan F. Hiller, and Kathryn Hoover for the Navajo Nation

Court Reporter, Marylynn LeMoine, is present. A record of the proceedings is also made digitally.

William Greenslade continues to testify.

Over the objection of counsel for City of Flagstaff and counsel for the Navajo Nation, Hopi exhibit 4413 and LCR exhibit 951 are received in evidence.

William Greenslade is excused.

Discussion is held regarding witnesses.

9:53 a.m. The Court stands at recess.

10:00 a.m. The Court reconvenes with the parties and counsel present.

Court reporter, Marylynne LeMoine, is present and a record of these proceedings is made digitally.

Shem Liechty is sworn and testifies.

Navajo exhibits 764, 765, 766, and 767 are received in evidence.

10:30 a.m. The Court stands at recess.

10:45 a.m. The Court reconvenes with the parties and counsel present.

Court reporter, Marylynne LeMoine, is present and a record of these proceedings is made digitally.

Shem Liechty continues to testify.

11:59 a.m. The Court stands at recess.

1:30 p.m. The Court reconvenes with the parties and counsel present.

Court reporter, Michele Kaley, is present and a record of these proceedings is made digitally.

The Court addresses the admission of demonstrative exhibits into evidence and states that, in general, and absent other objections, they will be admitted if they are relevant and their probative value outweighs the danger of unfair prejudice. *State v. King*, 226 Ariz. 253 (2011), *State v. Luzanilla*, 176 Ariz. 397, 405 (App. 1993), *vacated in part on other grounds*. According to 2 *McCormick on Evidence* §214, there appears to be no reason to deny admission and formal status to demonstrative exhibits. It also notes that on appeal, it is difficult for appellate courts to review the record without being able to see the documents referenced by the witnesses. The Court concludes that in this case, the record will be reviewed at least once if not multiple times so it is important to generate a clear record.

Discussion is held regarding the scope of expert cross-examination, and the objection of counsel for the Navajo Nation related to this subject is overruled.

Discussion is held regarding Hopi exhibits 4596 and 4598.

Hopi exhibits 4596 and 4598 are maps are admitted into evidence as demonstrative exhibits.

Shem Liechty continues to testify.

2:59 p.m. The Court stands at recess.

3:15 p.m. The Court reconvenes with the parties and counsel present.

Court reporter, Michele Kaley, is present and a record of these proceedings is made digitally.

Shem Liechty continues to testify.

Shem Liechty is excused.

3:33 p.m. Matter concludes.

LATER:

Scope of cross-examination of expert witness.

The Navajo Nation called Shem Liechty as an expert witness. Mr. Liechty is a civil engineer. According to his resume and testimony, he has provided technical oversight of and was actively involved in water planning and development projects along the southwestern boundary of the Navajo Reservation and areas on the Navajo Reservation south and east of the Hopi Reservation, including the Leupp wellfield. Navajo Nation Exhibit 764.

Mr. Liechty testified during the direct examination about his expert opinions concerning the Hopi Tribe's claims for domestic, commercial, municipal and industrial water uses. The expert opinions are set forth at length in a series of reports that were admitted into evidence. Navajo Nation Exhibits 765, 766, and 767. During cross-examination, counsel for the Hopi Tribe questioned Mr. Liechty about the development of water infrastructure in the Southwest Rural Water Appraisal Study Area on the Navajo Reservation located south and east of the Hopi Reservation, the Leupp well field located south of the Hopi Reservation, and, the availability of water in the aquifer and other hydrological characteristics of the aquifers that served as the source of water for the water projects on the Navajo Reservation. The Navajo Nation asserted a continuing objection to those questions.

Counsel for the Navajo Nation asserted three grounds for the objection. First, the questions are outside the scope of the expert report. Second, the Hopi Tribe is not permitted to cross-examine an expert on issues without disclosing those issues prior to trial and retaining and compensating the expert for his opinions. Third, the questions were not relevant to the issues about which Mr. Liechty was engaged to offer an expert opinion.

The scope of expert cross-examination is “expansive and free-ranging.” *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 512, 217 P.3d 1212, 1217 (App. 2009). “[A] party is entitled to discover the existence, nature, and scope of any motive, bias, or prejudice.” *Id.* The Navajo Nation recognizes this general rule, but contends that the cross-examination to which it objected exceeded the scope allowed by the rule. Under Arizona law, the right to cross-examine is not unlimited. *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 399, 949 P.2d 56, 59 (App. 1997). Cross-examination cannot be unduly intrusive or burdensome. *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. at 512, 217 P.3d at 1217; *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997); *Cervantes v. Rijlaarsdam*, 190 Ariz. at 401, 949 P.2d at 61. It cannot be used as to engage questioning that “increases the cost, length, and burden of litigation with little or no corresponding benefit.” *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. at 512, 217 P.3d at 1217. It also cannot be used to obtain legal conclusions from an otherwise unqualified witness. *United States v. Gonzales*, 52 Fed. Appx. 330, 333 (9th Cir. 2002). None of the questions asked on cross-examination that concerned projects listed on Mr. Liechty’s professional resume that occurred on geographical areas immediately adjacent to the Hopi Reservation can be considered intrusive, burdensome or call for legal opinions.

The Navajo Nation also objected to the cross-examination of its expert witness at an evidentiary hearing asserting a lack of disclosure and a failure to compensate. Under the Arizona Rules of Civil Procedure, a party has an obligation to disclose the anticipated subject area and substance of that party’s expert witness’ testimony. Ariz. R. Civ. P. 26.1(a). The purpose of the rule to give each party adequate notice of the arguments that will be made and the evidence that will be presented at trial by the opposing party. *Clark Equip. Co. v. Arizona Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 440, 943 P.2d 793, 800 (App. 1997). That rule, however, is not applicable here. It applies to discovery and not to cross-examination of a witness. The rule requires disclosure of the substance of the party’s expert witness during discovery so that the opposing side can prepare for trial. The motivation behind the rule does not impose a disclosure obligation on the opposing party prior to cross-examination to the party who has retained and called the expert witness.

The Navajo Nation’s objection based on a failure to compensate also arises out of the rules applicable to discovery. Pursuant to Ariz. R. Civ. P. 26(b)(4)(E), a party must

pay a testifying expert a reasonable fee for the time spent in connection with testifying in a deposition. The forum here is neither discovery in general nor a deposition in particular. Instead, the testimony occurred during cross-examination at the hearing. The courts have not expanded the opposing party's obligation to pay fees for expert testimony during court proceedings. In *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347 (5th Cir. 2007), the court rejected a claim for compensation from the opposing party for an expert who testified in a *Daubert* hearing. The court reasoned that a "*Daubert* hearing is not a discovery proceeding but an evidentiary hearing designed to screen expert testimony. *See Daubert*, 509 U.S. at 579, 113 S.Ct. 2786. Appellants fail to give any persuasive legal argument as to why FED. R. CIV. P. 26 should be extended outside the discovery context." *Id.* at 356. The following year, another federal court similarly refused to require the opposing party to pay fees for the time the expert spent testifying in an evidentiary hearing even though the opposing party had called the witness. *Bowling v. Hasbro, Inc.*, 582 F. Supp. 2d 192, 210–11 (D.R.I. 2008) (The defendant ultimately decided not to call his expert to testify, however, the plaintiff called him as a witness and the expert returned to testify. Court rejected defendants' argument that plaintiff is obligated to pay the expenses incurred as a result of the expert's attendance after being called by plaintiff.)

The third objection made by the Navajo Nation is based on a lack of relevance to the scope of the expert reports. Although the scope of the expert reports is not the defining test for permitted cross-examination, an objection based on relevance is appropriate. Under Arizona law, the scope of cross-examination is limited by relevance. Ariz. R. Evid. 611(b). Here, the issues concern uses of water on the Hopi Reservation, potential future uses and the infrastructure necessary to transport the requisite water. Mr. Liechty was asked questions about his involvement in the development of water plans on a reservation immediately adjoining the Hopi Reservation that would access, among other sources, water from the C aquifer, which is also one of the aquifer that would supply water under the Hopi Tribe's proposed plans. Under the broad test of relevancy mandated by Ariz. R. Evid. 401 and the court rulings, the questions subject to objection, which did not extend the trial beyond a half hour, did not violate the limitations imposed on cross-examination.

Accordingly, the objections are overruled and the implied motion to strike the testimony elicited by the questions is denied.

A copy of this minute entry is provided to all parties on the Court approved mailing list.

