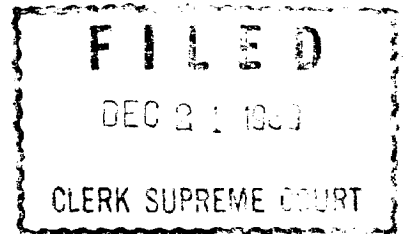


IN THE COURT OF APPEALS OF IOWA

No. 9-479 / 89-285



JEFFREY F. ZOUBEK,

Appellant,

364

vs.

GREGG ALLEN MEHLBERGER and RAYMOND J. MEHLBERGER,

Appellees.

Appeal from the Iowa District Court for Linn County,
Thomas L. Koehler, Judge.

In this personal injury action the plaintiff appeals from judgment upon a verdict for the defendants. The plaintiff challenges the admission into evidence of a police officer's accident report, when the officer was unavailable for cross-examination due to illness.

AFFIRMED.

Linda H. Robbins of Irvine & Robbins, Cedar Rapids, for appellants.

Richard C. Garberson and Susan M. Pence of Shuttleworth & Ingersoll, Cedar Rapids, for appellees.

Considered by Oxberger, C.J., and Donielson and Hayden,
JJ.

DONIELSON, J.

Jeff Zoubek was injured when he fell from the hood of a moving car driven by Gregg Mehlberger. Zoubek later filed this personal injury suit against Gregg Mehlberger and his father Raymond Mehlberger, owner of the car. The issue at trial was how the accident occurred. A piece of evidence relevant to this issue was the accident report prepared by the investigating police officer. This report basically recounted Gregg Mehlberger's version of the events.

Prior to trial both sides stipulated to the admissibility of, and waived the requirement of further foundational evidence for, the investigating officer's report. Defendants' pretrial statement had listed the investigating officer as a witness to be called at trial. However, at the time of trial the officer was unavailable to testify due to illness. Upon learning this, the plaintiff objected to the admission of the officer's written report, complaining the author of the report would be unavailable for cross-examination. The district court overruled the plaintiff's objection and admitted the exhibit into evidence.

The jury later returned a verdict in favor of the defendants. The plaintiff has appealed from the resulting adverse judgment. He contends the district court erred by admitting the officer's report into evidence in light of the officer's unavailability for cross-examination.

An order reciting the action taken at a pretrial conference shall control the subsequent course of the proceedings unless modified by a subsequent order. Iowa R. Civ. P. 138; Brunson v. Winter, 443 N.W.2d 717, 719 (Iowa 1989); Maschino v. Geo. A. Hormel & Co., 372 N.W.2d 256, 259 (Iowa 1985); Kester v. Bruns, 326 N.W.2d 279, 284 (Iowa 1982); City of Marion v. Weitenhagen, 361 N.W.2d 323, 326 (Iowa App. 1984). An important purpose of the pretrial conference and order is to eliminate surprise and assist the parties in preparing for trial. Kester, 326 N.W.2d at 284. A final pretrial order shall be modified only to prevent manifest injustice. Iowa R. Civ. P. 138.

The plaintiff contends the trial court erred in allowing admission of the investigating officer's report. He claims it was highly prejudicial to submit the officer's report to the jury when the officer was not available for cross-examination. Plaintiff argues cross-examination would have revealed the officer's report was not thorough in that it did not reflect the observations of the plaintiff or Michael Null, a bystander who witnessed the accident. Plaintiff claims the pretrial order should not be binding with regard to Exhibit H, the officer's report, because the original stipulation to admission of the report was predicated on his assumption the investigating officer would be available either for the purpose of cross-examination or as a rebuttal witness.

The defendants assert the admissibility of accident reports is supported by Iowa Code section 321.271 and Grocers Wholesale Coop. v. Nussberger Trucking Co., 192 N.W.2d 753, 756 (Iowa 1971). However, we do not have to go so far as to say police reports are absolutely admissible despite the reporting officer's absence from the trial. Cf. Iowa R. Evid. 803(8)(B)(i). In this case plaintiff stipulated, without objection, to the admissibility of the report. Nothing in the pretrial conference report indicated the stipulation was contingent upon the officer's presence at trial. If plaintiff had reservations about the accuracy or thoroughness of the officer's report, and he wished to examine the officer in this regard, he should not have stipulated to admission of the report without qualifying that stipulation to require the officer's presence at trial.

This court recognizes that defendants listed the investigating officer as a witness they intended to call at trial, and plaintiff may have relied on this position. However, it is without question that the officer was absent from the trial because he was undergoing surgery; his absence was not in any part due to bad faith or deception by defendants. Had plaintiff wished to ensure himself the opportunity to question the officer, he should have deposed him before trial. A deposition is admissible when the deposed is absent due to illness. Iowa R. Civ. P. 144(c).

Here plaintiff stipulated to the unqualified admission of the report and did not even take the precaution of deposing the officer to protect his claims with regard to the thoroughness of the report.

Our standard of review in this action is for abuse of discretion. Rowen v. LeMars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 646 (Iowa 1979), appeal after remand 347 N.W.2d 630 (Iowa 1984), appeal after remand 357 N.W.2d 579 (Iowa 1984); Gray v. Schlegel, 265 N.W.2d 156, 159 (Iowa 1978). From our review of the record, it appears the trial court did not abuse its discretion in adhering to the pretrial order and admitting the report despite the officer's absence from the trial.

AFFIRMED.