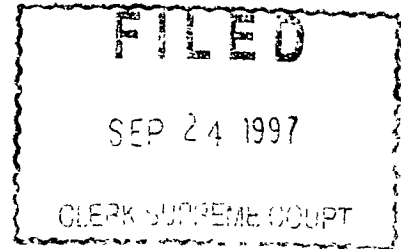


IN THE COURT OF APPEALS OF IOWA

000207

No. 7-260 / 96-0059
Filed September 24, 1997



KARRI LEE LOCKE,
Appellant,

vs.

**WEST BEND MUTUAL
INSURANCE COMPANY,**
Appellee.

Appeal from the Iowa District Court for Wapello County, Richard J. Vogel, Judge.

Karri Locke appeals the district court's ruling admitting the video-taped deposition of West Bend's expert witness. **AFFIRMED.**

Theodore F. Sporer of Sporer Law Firm, P.C., West Des Moines, for appellant.

Timothy J. McKay of McKay, Moreland & Webber, P.C., Ottumwa, for appellee.

Considered by Cady, P.J., Streit, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

STREIT, J. 000208

Karri Locke appeals the district court's ruling admitting a video-taped deposition of an expert witness, even though West Bend did not supplement its disclosure regarding expert testimony. We affirm the district court's ruling admitting the testimony of West Bend's expert.

Locke was injured when Stanley Allman collided with her car on October 4, 1991. Locke filed a personal injury claim against Allman and later amended her complaint to include an underinsured motorist claim against her insurance carrier, West Bend. Locke settled her claim against Allman for his insurance coverage, \$20,000, and dismissed suit against him. The claim for underinsured motorist coverage against West Bend went to trial.

Locke served interrogatories on West Bend on September 6, 1995. On November 9, 1995, Dr. Brenton, West Bend's doctor, examined Locke. West Bend faxed Dr. Brenton's report to Locke's counsel on November 13, 1995. West Bend answered the interrogatories on November 15, 1995. West Bend took Dr. Brenton's deposition November 22, 1995. Trial commenced November 28, 1995.

At trial, Locke presented the expert testimony of Dr. Michael Pogel that Locke suffered from chronic myofacial pain syndrome secondary to cervical whiplash. In Dr. Pogel's opinion, Locke would not recover. He testified to the amount of Locke's past and future damages, including medical expenses. He identified the cause of her condition as the October 4, 1991 accident. West Bend introduced the deposition of

Dr. Brenton. In Dr. Brenton's opinion, Locke had no permanent injuries caused by the October 4, 1991 accident.

The jury returned a verdict of \$30,000 for past medical expenses; loss of function of the mind and body; and pain and suffering. The jury did not find any future damages. The verdict was reduced by the amount of Locke's settlement with Allman. Locke appeals.

I. Preservation of Error.

West Bend asserts Locke has not preserved for appellate review the issue of whether the court abused its discretion in admitting the deposition testimony of Dr. Brenton. West Bend argues the issue is not preserved because Locke waived her objection to Dr. Brenton's testimony and Locke's brief does not comply with Iowa Rule of Appellate Procedure 14(a)(5) because it does not contain a citation to the record showing the issue was preserved.

On appeal we consider only grounds for objections specified at trial. *Shepherd Components v. Brice Petrides, et al.*, 473 N.W.2d 612, 618 (Iowa 1991). An appellant cannot amplify her objection on appeal. *Moser v. Stallings*, 387 N.W.2d 599, 604 (Iowa 1986). Rule of Iowa Appellate Procedure 14(a)(5) requires an appellant's brief "state how the issue was preserved for review" and provide "references to the places in the record where the issue was raised and decided." Iowa R. App. P. 14(a)(5) (West 1997).

At trial Locke objected to introduction of Dr. Brenton's testimony arguing West Bend neither formally supplemented its answer to interrogatory number six nor provided a signed answer to that interrogatory as required by the rule. Locke's trial objection adequately preserved the issue of whether the court erred in admitting the testimony of Dr. Brenton. Locke met the requirements of Rule 14(a)(5) by citation to her objection in her brief.

II. Scope of Review.

The district court "has considerable discretion over the admission of all or part of expert testimony that is disclosed late or not at all." *Security Mut. Ins. v. Board of Review*, 467 N.W.2d 301, 306 (Iowa App. 1991). We will not disturb a district court's decision under Rule 125 unless the court abused its discretion. *Mills v. Iowa Dept. of Transp.*, 462 N.W.2d 300, 302 (Iowa App. 1990).

III. Expert Witness Testimony.

Locke contends the district court erred in admitting the testimony of West Bend's expert because West Bend did not supplement its disclosure regarding expert testimony in accordance with Rule 125. The purpose of Rule 125 is to avoid surprise to the litigants and allow the parties to formulate their positions on as much evidence as available. *Golden Circle Air, Inc. v. Sperry*, 543 N.W.2d 629, 632 (Iowa App. 1995).

Rule 125 requires a party to disclose the identity of experts and information about the expert's testimony upon inquiry and to supplement the disclosure "as soon

as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court.” *Security Mut. Ins.Co.*, 467 N.W.2d at 306; Iowa R. Civ. P. 125(a),(c). Further, the rule requires the written disclosure regarding the expert and his testimony be signed by the designated expert. Iowa R. Civ. P. 125(a)(1)(C). If a party fails to comply with the rule, the court *may choose* to exclude the testimony of the expert. *Security Mut. Ins.Co.*, 467 N.W.2d at 306. Exclusion of expert testimony is the most severe sanction. *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417, 421 (Iowa 1985). Thus, “exclusion of testimony is justified only when prejudice would result.” *Id.*

Locke’s interrogatory number six requested West Bend provide the information outlined in Rule 125(1)(a)-(c) regarding experts. West Bend’s response to interrogatory number six was: “Dr. Brenton is the only expert witness. He is a board-certified medical doctor in the specialty of neurology. The substance of his testimony will not be known until he examines Mrs. Locke and issues his written report.” Even though West Bend never formally supplemented its disclosure to interrogatory number six, it faxed Dr. Brenton’s report to Locke’s counsel.

The mere designation of the name of the expert does not satisfy the disclosure requirement of Rule 125. *Mills*, 462 N.W.2d at 302. West Bend’s answer to interrogatory number six was inadequate. The failure to supplement the answer placed West Bend in violation of Rule 125. *Id.* The question is whether the district court abused its discretion by admitting the testimony in light of the rule violation. *Id.*

To assess if the district court abused its discretion an appellate court looks at whether the district court's ruling was exercised on untenable grounds or to an extent clearly unreasonable. *Kilker v. Mulry*, 437 N.W.2d 1, 4 (Iowa App. 1988). It also assesses if prejudice occurred to the appellant as a result of the ruling. *Lambert*, 369 N.W.2d at 421.

The district court did not abuse its discretion in admitting the testimony of Dr. Brenton. Rule 125 does not require the court sanction a party by excluding expert testimony when the party violates Rule 125: "[T]he court *in its discretion may exclude*" expert testimony as a sanction for violation of Rule 125. Iowa R. Civ. P. 125(c)(West 1997)(emphasis added). The district court admitted Dr. Brenton's testimony because appellant's counsel attended the deposition of Dr. Brenton. This ground is not untenable under the circumstances. Nor do we find the ruling a clearly unreasonable abuse of discretion.

Locke cross-examined Dr. Brenton at his deposition. Locke contends attending the deposition of and cross-examining Dr. Brenton did not alleviate the prejudice caused by West Bend's violation of Rule 125 and only exclusion will remedy the prejudice.

Locke claims the admission of Dr. Brenton's testimony prejudiced her chance of obtaining future damages because the testimony was West Bend's only evidence challenging the permanence and cause of her injuries. Further, Locke contends she wanted to obtain records documenting how many times Dr. Brenton's opinion

deviated from the position of the litigant retaining him, but, because of West Bend's delays, she was unable to obtain the reports.

Locke was not prejudiced to the extent she asserts. Although West Bend failed to supplement its response to interrogatory number six, as required by the rule, it provided a copy of Dr. Brenton's report to Locke's counsel prior to the deposition. Thus, Locke cannot claim Dr. Brenton's testimony was a surprise. *See Lambert*, 369 N.W.2d at 422. Dr. Pogel, Locke's expert, countered Dr. Brenton's testimony regarding causation and permanency of her injuries. Locke was under a time constraint to prepare for cross-examination of Dr. Brenton because of West Bend's discovery violation. Even so, Locke could have questioned Dr. Brenton about whether he ever deviated from the opinion of the litigants employing him on cross examination.

Locke did not waive her right to object to the deposition by not doing so at the time of the deposition. However, the timing of Locke's objection influences our decision the trial court's exercise of discretion was reasonable. Locke knew the day the deposition was taken its purpose was for introduction at trial. She knew West Bend was in violation of Rule 125. Her Rule 125 objection should have been brought to the court's attention then, or at least, before trial. Locke could have filed a motion to quash the deposition, a motion in limine to exclude the deposition, or even asked for a continuance of the trial. Rather, Locke waited to object on the third day of trial. Locke's own action limited the trial court's remedy for the violation.

Because the objection was made mid-trial, the court had two choices: to exclude or admit the testimony. The court chose not to impose the harsh remedy of exclusion. If the plaintiff had alerted the court in a more timely manner, the court could have fashioned an appropriate remedy responsive to the objection. Under these circumstances, the district court's ruling was not based on untenable grounds nor was it clearly unreasonable.

We affirm the ruling of the district court.

AFFIRMED.