IN THE COURT OF APPEALS OF IOWA

No. 9-395 / 88-1522

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CLERK SUPREME COURT

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SALLY A. EPPERSON,

Appellant,

vs.

JEAN DEFENBAUGH,

Appellee.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge.

Plaintiff appeals the denial of her motion for a new trial after an adverse jury verdict. ***AFFIRMED.***

William J. Bribriesco of Bribriesco & Bribriesco, Bettendorf, for appellant.

Therese M. Sizer of Betty, Neuman & McMahon, Davenport, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

On January 23, 1986, Sally A. Epperson (Epperson) was stopped at a red light when her car was hit in the rear-end by a car driven by Jean Defenbaugh (Defenbaugh). The accident allegedly caused Epperson neck injuries for which she was treated by two chiropractors who later testified at trial. The jury returned a verdict in favor of the defendant. Our scope of review is for correction of errors at law. Iowa R. App. P. 4. We affirm.

On appeal from the denial of her subsequent motion for a new trial, Epperson first contends that she was denied a fair trial because of the presiding judge's display of bias against chiropractors. She asserts that during the chiropractors' testimony the judge "continually made purposeful exclamations, gestures, facial expressions, moved his chair back and forth, groaned and sighed, and just generally showed displeasure of the chiropractors' testimony in front of the jury."

"A fair trial in a fair tribunal is a basic requirement of constitutional due process." State v. Larmond, 244 N.W.2d 233, 235 (Iowa 1976). A presiding judge should not only be fair and impartial, he must conduct himself in the trial to constantly manifest those qualities. Wilson v. Caretti, 210 N.W.2d 643, 645 (Iowa 1973).

Epperson complains about judicial conduct at trial, but she failed to object and make record regarding such prejudicial conduct. While in the judge's chambers, Epperson states in her brief, she "brought to the Court's attention its conduct in the courtroom." However, no objection to judicial conduct appears in the record. Ordinarily error is not preserved unless a timely objection is made. "[E]ven important constitutional rights may be waived by [a party's] . . . failure to object to trial irregularities as soon as possible." Larmond, 244 N.W.2d at 237. "A proper procedure in these circumstances would have been for counsel promptly to have made a record in chambers of the offending conduct coupled with an objection." Id.

In State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976), the Iowa Supreme Court discussed the error preservation issue. In Larmond the claim of bias was made for the first time in defendant's motion for new trial. The court found that the oppressiveness of the trial judge deterred the inexperienced defense attorney from making a proper record and that the judge's conduct had irretrievably demolished the defendant's chance for a fair trial before defense counsel could have been expected to object. In these circumstances, the court held that the belated raising of the issue in the new trial motion was sufficient to preserve error. Id.

In the present case, there was no record made regarding the judicial conduct complained about. As noted, Epperson states that she brought the judge's conduct to the attention of the court. Further, there was no objection raising the issue of judicial bias at any time in the trial court and no circumstances like those in Larmond existed. No excuse for failing to make a proper record at trial has been established. "[I]t is sound law and logic that a party may not sit by and permit the court to commit inadvertent error without protest, and then complain for the first time in [its] . . . motion for a new trial or in the appellate court." State v. Jewett, 219 N.W.2d 559, 560 (Iowa 1974). There are at least two reasons for requiring a timely objection to alleged judicial bias; (1) to give the judge an opportunity to correct or explain his or her conduct before the party is denied a fair trial, (2) it precludes the party from delaying an objection in order to gamble on a favorable verdict. State v. Windsor, 316 N.W.2d 684, 687 (Iowa 1982).

In the circumstances of this case, Epperson's failure to raise the issue of judicial bias in the trial court bars our consideration of the issue.

Second, Epperson contends that the trial court erred by admitting into evidence a radiology report prepared by a doctor who did not testify. Epperson filed a motion in limine designed to exclude the radiology report attached to

the narrative report that Dr. Byron William Rovine prepared after examining her. She urges that a proper foundation was not laid and that no hearsay exception applied.

After a hearing out of the presence of the jury, the trial court overruled Epperson's motion in limine to exclude the radiology report prior to trial. At the hearing Epperson's counsel stated:

> The second portion of my motion is the report of Dr. E. L. Johnson, M.D., who is a radiologist, and I would make an objection -- or I would make a motion to exclude and a motion in limine to prevent any testimony as far as the x-ray report piece of paper. I do not -- I do not have any objection to Dr. Rovine speaking as to x-rays that were taken, of Dr. Rovine speaking as to what he read from the x-ray report letter from Dr. Johnson, as an expert such as himself relies upon the interpretation of the x-ray report. I have no objection to that.
>
> The objection that I have is to the piece of paper styled "X-ray Report" as it was authored by Dr. Johnson. Dr. Johnson is not going to testify. I don't have the opportunity to cross-examine Dr. Johnson as far as this x-ray report, and I do note an objection. I would state for the Court that at the time of Dr. Rovine's evidentiary deposition, this was presented and no objection was made. However, Dr. Rovine is here today in person, he's going to testify, and this document will be handed to him, and I will be objecting based on foundation grounds, based on hearsay grounds, based upon an inability to cross-examine Dr. Johnson, and I guess that's the basis for my objection.

After the court ruled that the "X-Ray Report" was admissible, the court asked Epperson's counsel if his objection would be renewed in open court? Epperson's counsel stated: "Judge, based upon the Court's ruling, I probably will not voice an objection in front of the

Jury." At trial when the x-ray report was offered into evidence, Epperson's counsel specifically stated "I have no objection, your Honor."

In the trial court's ruling denying Epperson's motion for new trial, the trial court stated:

> It appears to this Court that the fact the attorney for the plaintiff did not object to the admission of the report at the time of the taking of the videotaped deposition and the taking of testimony from Dr. Rovine live, that the plaintiff waived the objection.

A motion in limine serves to alert the trial court to any evidentiary problems which may arise during trial and to obtain a ruling on the issue in advance. Allbee & Kincaid, Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner, 35 Drake L. Rev. 1, 12 (1985-86). "Frequently, the purpose of the moving party is to avert the disclosure of inadmissible or unduly prejudicial matters to the jury by either a reference of counsel or through the offer of evidence." Id.

Ordinarily the granting or rejecting of a motion in limine is not reversible error. The error comes, if at all, when the matter is presented at trial and the evidence is then admitted or refused. An objection should then be made in order to preserve error. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). An exception to this rule exists where parties "need not renew their objections at trial if the prior ruling amounts to an unequivocal holding concerning the issue raised." Id.

We find the circumstances of this case brings it within the exception to the general rule. A hearing outside the jury was held, counsel presented legal arguments, and the trial court ruled the evidence would be received. We find there was no necessity of further objection to preserve error. The trial court erred in ruling that Epperson waived her hearsay and foundation objection and admitting the radiology report.

We find the error was without prejudice. Epperson's counsel stated in the motion in limine:

> I do not have any objection to Dr. Rovine speaking as to x-rays that were taken, of Dr. Rovine speaking as to what he read from the x-ray report letter from Dr. Johnson, as an expert such as himself relies upon the interpretation of the x-ray report. I have no objection to that.

Dr. Rovine completed a physical examination of Epperson on July 3, 1987 which included x-rays of her cervical and lumbar spine. At trial, Dr. Rovine testified extensively regarding Epperson's examination and the results of the radiology report. Dr. Rovine completed a narrative report at the conclusion of the her examination and his review of the radiology report. One of the purposes of Dr. Rovine's examination and narrative report was to determine whether Epperson suffered any residual injury as a result of the January 23, 1986 automobile accident. Dr. Rovine testified that he and Dr. Johnson came to the same conclusion regarding the interpretation of Epperson's x-rays. He stated that they both agreed Epperson's x-rays were

normal. There was no objection to Dr. Rovine's testimony at trial. We find the error in admitting the radiology report was without prejudice since Dr. Rovine's testimony and cross-examination addressed the contents of the radiology report.

Finally, Epperson contends that the verdict was not supported by sufficient evidence.

Motions for new trials may be granted when a jury verdict fails to effectuate substantial justice. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa App. 1983); Iowa R. Civ. P. 244(f). The trial court has broad discretion in passing on motions for new trials, and we will interfere with a ruling only when there is a clear abuse of that discretion. Thompson v. Rozeboom, 272 N.W.2d 444, 446 (Iowa 1978).

"A jury's findings of fact in a law action are binding on appeal if supported by substantial evidence. Nadler v. City of Mason City, 387 N.W.2d 587, 591 (Iowa 1986). The jury is not bound to believe evidence and has no obligation to do so merely because the evidence is uncontroverted. Id. When facts are susceptible to more than one inference or are such that reasonable minds may reach different conclusions therefrom, the question is one of fact which only the jury can decide. Otto v. Stork, 159 N.W.2d 528, 531 (Iowa 1968). "'Generally questions of negligence, contributory negligence and proximate cause are for the

jury; it is only in exceptional cases that they may be decided as matters of law.'" Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980) (quoting Iowa R. App. P. 14(f)(10)).

Epperson asserts that the evidence was undisputed that she sustained an injury as a proximate cause of the accident on January 23, 1986. We disagree. The question of whether Defenbaugh's conduct proximately caused damages to Epperson was specifically submitted to the jury. The jury responded to the verdict form as follows:

> Question No. 1: Was the fault of the defendant a proximate cause of damage to the plaintiff?
>
> Answer: No.

The jury heard the testimony of three health professionals. At trial, Epperson called her treating chiropractor, Dr. Herbert Wood, and the chiropractor, Dr. Larry Lee Swank, who evaluated her on one occasion. Defenbaugh called Dr. Rovine who performed an independent medical evaluation of Epperson. The court accordingly instructed the jury to weight the credibility of each witness.

We do not agree with Epperson's assertion that Defenbaugh's expert medical witness, Dr. Rovine, agreed that she was injured as a result of the January 23, 1986 accident. Dr. Rovine testified that he was "willing to assume that there probably had been some injury to the muscles and ligaments and such injuries would produce pain." Additionally, he stated:

Q. Doctor, did you or did you not just state, and I tried to write it all down, that you assumed that there had been injury to the muscles and to the ligaments?

Ms. BOTTS [DEFENSE COUNSEL]: I'm going to object to the misstatement. I think it's "willing to assume." We can have her read it back.

Mr. BRIBRIESCO [PLAINTIFF'S COUNSEL]: Let's put it "wiling to assume."

A. Much of a doctor's opinion concerning things that have happened to a patient, that he can have no direct knowledge of because he didn't see the patient, didn't examine the patient at the time of the occurrence, are accepted as a matter of faith because the patient says so. The patient is the person who gives the doctor the information and the doctor makes certain conclusions based on that information, which I would have to admit under certain circumstances such as this is a second-hand judgment.

Q. And is that a "Yes" or "No," Doctor?

A. I don't think it's either a "Yes" or "No."

Upon our review of the record we find it reasonable for the jury to have returned a verdict for Defenbaugh. The jury weighed the reliability and credibility of the witnesses and all of the evidence. We believe there was substantial evidence to justify the jury verdict for Defenbaugh. We cannot say the court abused its discretion in overruling Epperson's new trial motion. We affirm the trial court's order overruling Epperson's motion for a new trial.

AFFIRMED.