FILED
MAR 31 1980
CLERK SUPREME COURT

VICTORIA JOAN WAGNER and DAVID K. WAGNER,

Plaintiffs-Appellees,

vs.

LEONA DORTHEA KABRICK and WILLARD W. KABRICK,

Defendants-Appellants,

DEANNA SLOAN and ROBERT L. SLOAN,

Plaintiffs-Appellees,

vs.

LEONA DORTHEA KABRICK and WILLARD W. KABRICK,

Defendants-Appellants.

Filed March 31, 1980

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2-63057 & 2-63058

Appeal from Hancock District Court - John F. Stone, Judge.

Defendants appeal jury verdict awarding damages to plaintiffs in consolidated negligence actions arising out of an automobile collision alleging trial court erred in admitting into evidence the investigating officer's accident report. AFFIRMED.

Warren L. DeVries of Mason City for defendants-appellants.

Earl W. Buck of Buck & Hill, Britt, Iowa, for defendants-appellants.

Leo E. Fitzgibbons and Richard J. Meyer of Fitzgibbons Brothers Law Firm, Estherville, Iowa, for plaintiffs-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendants, Leona D. and Willard W. Kabrick, appeal jury verdict awarding damages to plaintiffs, Victoria J. and David K. Wagner, and Deanna C. and Robert L. Sloan, in consolidated negligence actions arising out of an automobile collision. Defendants allege trial court erred in admitting into evidence the investigating officer's accident report. We affirm.

The collision occurred on February 2, 1977, at approximately 5:00 p.m. at the intersection of U.S. Highway No. 18 and Ninth Avenue in Britt, Hancock County, Iowa. Defendant, Leona Kabrick, was operating a 1974 Lincoln automobile owned by her husband, Willard Kabrick, in a northerly direction on Ninth Avenue. At the same time, plaintiff, Victoria Wagner, was westbound on U.S. Highway No. 18 in a 1974 Gremlin automobile owned by her husband, David Wagner. Deanna Sloan was a front seat passenger in the Wagner vehicle. While passing through the intersection, the Wagner vehicle struck the front right side of the Kabrick vehicle as it was crossing Highway No. 18.

As a result of this collision, plaintiffs Wagners and Sloans filed separate negligence actions on July 15, 1977. Each couple sought compensatory damages of $125,000, punitive damages of $50,000, and loss of consortium damages of $10,000. At the November 14, 1978 joint trial, plaintiffs offered the investigating officer's accident report into evidence. The defendants objected to its admissibility into evidence because the report contained (1) opinions and conclusions for which no proper foundation was laid, (2) hearsay statements, and (3) opinions on matters involving mixed questions of fact and law. Plaintiffs asserted Grocer's Wholesale Cooperative, Inc. v. Nussberger Truck Company, 192 N.W.2d 752 (Iowa 1971), permits admissibility of the entire report, subject to possible specific hearsay objections. Trial court sustained defendants' objection to the provisions of the report referring to blood test results on the grounds of hearsay but overruled the remainder of defendants' objections. On November 17, 1978, the jury returned a verdict awarding $35,000 to Victoria Wagner, $700 to David Wagner, $20,000 to Deanna Sloan, and $700 to Robert Sloan. Defendants appeal from this judgment.

On appeal, defendants allege trial court erred in admitting the investigating officer's report which included references to the parties' non-use of seat belts, direction of the vehicles prior to impact, the point of impact of the two vehicles, the position of the vehicles subsequent to the collision, and driver-related contributing circumstances.

We cannot accept the assertion that Nussberger is authority for per se admissibility of the report of an investigating officer in its entirety. The issue in Nussberger was whether a statement made by one of the parties in a discovery deposition was admissible to impeach that party's trial testimony. This deposition testimony referred to what the witness had told a state trooper at the scene of the accident. The offer of the deposition was objected to, in part, on the ground it was privileged under section 321.266 and 321.271, The Code 1971. In concluding the objection was without merit, the supreme court held:

> . . . The section [321.271] itself no longer makes the reports of investigating officers inadmissible. Nor does the section render inadmissible statements made by drivers to investigating officers to enable the officers to make their reports.

192 N.W.2d at 756.

The fact that the statute itself does not render the report inadmissible certainly does not permit the introduction in bulk of an officer's investigating report over objections the report contains hearsay and legal opinions and conclusions.

At trial defendants made the following objections:

> Your Honor, in the first place, on the front, number-front sheet, about one-third of the way down on the right-hand area there is a test result figure there. Now, obviously that's the—or I assume it's the OMVUI, which obviously has—no proper foundation has been laid for that and that obviously is hearsay.
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> And then, Your Honor, it also contains facts on page 2 where the officer sets out his opinions and conclusions about stopping, not stopping and all those things there and point of impact, and every bit there are opinion and conclusion for which no proper foundation has been laid, and that also is based in part on hearsay.
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> It further contains comments on Page 3 about seat belts installed and so forth, which we understand in Iowa is not admissible and not relevant testimony. And on the back side, Your Honor, there are a number of places where the officer sets forth opinions as to violations of law and so forth and so on and those very obviously are mixed questions of law and fact and they call for an application of fact to domestic law, and for all of those

> reasons the entire report is objected to and we urge the Court to maintain its posture and overrule (Tr. p. 24, ll. 1-25) the offer and sustain the objection and not admit the proffered exhibit.

We must determine the effect of defendants' objections.

I. LACK OF FOUNDATION AND HEARSAY. The record shows the investigating officer who prepared the report did not witness the accident. As a result, some of the contents were based upon hearsay or otherwise beyond the personal knowledge of the officer.[1] Trial court recognized the hearsay implications of the report by excluding the portion referring to blood test results.

In this case, the officer did determine from the physical evidence defendants' car went into the path of the plaintiffs' car, the direction the vehicles were traveling prior to impact, and the point of impact of the two vehicles. He could not determine from his personal observations whether defendants' vehicle had in fact stopped for the stop sign before attempting to cross U.S. No. 18 and the narrative of the report so reflects. Trial court did not err in admitting those portions of the accident report into evidence.

II. NON-USE OF SEAT BELTS. Defendants also assert trial court erred in admitting the officer's report into evidence because it contained statements regarding the parties' non-use of seat belts in violation of section 321.445, The Code 1977. While defendants correctly urge admission of statements regarding non-use of the seat belts violated Iowa law,[2] this error likewise was not prejudicial.

The purpose of the statute is to prevent a defendant from utilizing evidence of a plaintiff's non-use of seat belts as a means of offsetting damages "where failure to wear an available seat belt has demonstrably enhanced the plaintiff's injuries." Comment, 58

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[1] We note Federal Rule of Evidence 803(8) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . .
>
> (8) Public records and reports. Records, reports, statements, or data compiliations, in any form, of public offices or agencies, setting forth . . .(C) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

A police report is a "public record and report" admissible under the federal rule. Baker v. Elcona Homes Corp., 588 F.2d 551, 556 (6th Cir. 1978).

[2] Section 321.445, The Code 1977, provides in relevant part:

> The fact of use, or nonuse, of seatbelts by a person shall not be admissible or material as evidence in civil actions brought for damages.

Iowa L. Rev. 730, 734 (1973). See also Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1372 (E.D. Va. 1978). Consequently, any evidence in the case at bar regarding plaintiffs' non-use of seat belts would have been helpful rather than detrimental to defendants' case. Defendants cannot complain on appeal of evidence admitted by trial court which was favorable to them. Bashaw Joy Co. v. Walsh, 187 Iowa 574, 579, 174 N.W. 399, 401 (1919); Tero Petroff & Co. v. Equity Fire Insurance Co., 183 Iowa 906, 913, 167 N.W. 660, 662 (1918).

III. OPINIONS ON QUESTIONS OF MIXED FACT AND LAW. Finally, defendants contend the report was inadmissible due to the following section, appearing on page 4.

> DRIVER/VEHICLE RELATED CONTRIBUTING CIRCUMSTANCES
>
> (For each vehicle indicate up to two circumstances which caused or contributed to the accident)

The report listed "non-apparent" with reference to plaintiff driver, but indicated "FTYROW, [Failure to Yield Right-of-Way] From Stop Sign" and "Driver Drinking Condition" with respect to defendant driver.

A question that calls for an opinion on domestic law, or that involves a mixed question of law or fact is objectionable. Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978). Plaintiffs, however, assert defendants' objections at trial lacked the necessary specificity to alert trial court to the exact portion of the report they deemed objectionable. Defendants' objection called attention to the "backside" of the report "where the officer sets forth opinions as to violations of law. . .and those very obviously are mixed questions of law and fact."

The objection, held to be sufficient in Schlichte, arose during plaintiff's attorney's examination of the state trooper as a witness.

> Q. (Plaintiff's Attorney) Officer Keast, was there any evidence, whatsoever, at that scene to indicate violation of the speed law by the Schlichte car that would make you want to go look at the tires?
>
> Mr. Feilmeyer: I object to that questions, Your Honor, as calling for the opinion and conclusion of the witness; no sufficient foundation laid from which he could express such an opinion.
>
> The Court: Sustained.
>
> Q. Did you have any reason to even think that the Schlichte car was speeding from what you could see of that scene there?
>
> Mr. Feilmeyer: [Objection]
>
> * * *
>
> The Court: Sustained

> Q. The skid marks, did they indicate any violation of the law by the Schlichte car?
>
> Mr. Feilmeyer: That is objected to as calling for the opinion and conclusion of this witness; it is asking for a legal conclusion which is strictly within the finding of fact; and defendants further object for all the reasons previously stated.
>
> The Court: Overruled, you may answer.

Schlichte, 265 N.W.2d at 729. In light of this objection, where the pleadings and instructions directly involved the speed law, the supreme court reversed for a new trial.[3]

We believe defendants' objection in the instant case lacks the specificity found in the record in Schlichte. The only portion of the officer's report that refers to "violations of law" is found on page 2 and indicates a violation of section 321.281, The Code 1977 (OMVUI). The defendant, Leona Kabrick, entered a guilty plea to the charge which was filed by the officer after his investigation of the accident. This evidence was before the jury from Leona Kabrick's own testimony and the certified plea. There are no violations of law indicated on the "backside" of the report and, only on appeal, does defendant specifically argue "the Trooper indicates on page 3, [sic] ['] Failed to Yield the Right-of-Way[']--clearly a conclusion, an application of facts to domestic law and a mixed statement of law and fact."[4] We conclude this language amplifies an objection which was not sufficiently specific to call trial court's attention to the inadmissible portion of the report.

Further even if we were to find defendants' objection to be sufficient, under the unique facts of this case, we conclude admission of the report was nonprejudicial. The evidence shows plaintiffs legally traversing a through highway. There is no dispute that impact occurred in plaintiffs' lane of traffic or that defendant Leona Kabrick entered plaintiffs' lane of traffic from an intersection marked with a stop sign. Plaintiffs were not violating any traffic laws. Defendants did not allege plaintiffs were contributorily negligent. The investigating officer's statements regarding point of impact were made from his observation of the scene. Defendants presented no evidence, relying instead upon cross-examination of plaintiffs' witnesses. The overwhelming weight of the evidence shows that, irrespective of whether defendant Leona Kabrick stopped at the stop sign, she did not yield to a vehicle not obligated to stop as required by section 321.321, The Code 1977.

Judgment of trial court is affirmed.

AFFIRMED.

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[3] The court also reversed the judgment in Schlichte due to an erroneous submission of a damage item for pain and suffering.

[4] Appellants' Brief at 3.