FILED
OCT 19 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY E. BROWN,

Appellee,

vs.

RICHARD STRATTON and RUTH A. STRATTON,

Appellant.

Filed October 19, 1978

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2-61119

Appeal from Linn District Court - Clinton E. Shaeffer, Judge.

Defendants appeal claiming error in the admission of blood test results in a motor vehicle collision case. - Affirmed.

Keith E. Stapleton, Cedar Rapids, for Appellants.

James W. Affeldt and Benjamin W. Blackstock, Cedar Rapids, for Appellee.

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

PER CURIAM

Defendants Richard and Ruth Stratton appeal an adverse jury verdict in favor of plaintiff Mary Brown on her claim for damages for injuries alleged to have been sustained in a motor vehicle collision. Only one issue is raised on appeal. Defendants allege the trial court committed reversible error by admitting blood test results over timely objection in the absence of proof of compliance with the protective standards prescribed by sections 321B.3 and 321B.4, The Code. We affirm.

The foundation requirements for introducing the results of a blood test into evidence in any civil or criminal action are contained in Lessenhop v. Norton, 261 Iowa 44, 52-3, 153 N.W.2d 107, 111 (1967). See Berding v. Thada, 243 N.W.2d 857, 861 (Iowa 1976). In the instant case, a proper foundation was not established before the results of the test were introduced. As such, the trial court committed error. See State v. Wallin, 195 N.W.2d 95, 98 (Iowa 1972); State v. Shelton, 176 N.W.2d 159, 160-61 (Iowa 1970). Further, the evidence of the test results are not independently admissible under the business records exception to the hearsay rule, § 622.28, The Code, because the foundation requirements found in State v. Fisher, 178 N.W.2d 380, 383 (Iowa 1970), were not satisfied. Thus, the introduction of the blood test results cannot be justified under this theory.

Plaintiff conceeds the trial court improperly admitted the blood test results but contends this error was at most harmless and that defendants were not prejudiced. Generally, where error appears, prejudice is presumed unless the contrary is affirmatively established. State v. Mattingly, 220 N.W.2d 865, 869 (Iowa 1974). However, error in the admission of evidence is not prejudicial error where substantially the same evidence is in the record without objection. State v. Jurgenson, 225 N.W.2d 310, 312 (Iowa 1975); Linge v. Iowa State Highway Comm., 260 Iowa 1226, 1236, 150 N.W.2d 642, 648 (1967); State v. McCollom, 260 Iowa 977, 983, 151 N.W.2d 519, 522 (1967).

In the instant case, there was testimony defendant Richard Stratton failed to pass a field sobriety test and the police officer stated that in his opinion, based upon his experience as a police officer, defendant was intoxicated at the time of the accident. No objection to this testimony was made. Defendant admitted having one beer and perhaps two. He was at the tavern approximately three hours during which time he fell

asleep at a table for some unexplained reason. He also had difficulty finding his driver's license when the officer requested it. Finally, there was evidence of and Richard Stratton admitted pleading guilty to a criminal charge of operating a motor vehicle while under the influence of an alcoholic beverage arising out of the same incident.

From a review of the evidence we find the error in admitting the results of defendant Richard Stratton's blood test was not prejudicial and is therefore, harmless. When he took the stand and admitted pleading guilty to the criminal charge, any error which may have resulted from the admission of the blood test results was rendered non-prejudicial. See Jurgenson, supra.

AFFIRMED.