IN THE COURT OF APPEALS OF IOWA

No. 8-689 / 97-1305
Filed April 30, 1999

MARIE I. DECK,

Plaintiff-Appellant,

vs.

TERRY L. BURNS,

Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Plaintiff appeals from the judgment entered upon a jury verdict finding her 60% at fault and defendant 40% at fault in an automobile accident. **AFFIRMED.**

Robert B. Deck, Sioux City, for appellant.

Steven D. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Plaintiff Marie Deck appeals from the judgment entered upon a jury verdict finding her sixty percent at fault and defendant Terry Burns forty percent at fault in an automobile collision. Deck contends the district court erred in admitting the testimony of Dr. John Ramsell, Deck's hospital record, and the testimony of Dr. Raymond Sherman. Deck maintains the district court erred in submitting jury instructions regarding seat belt use, and the verdict is not sustained by sufficient evidence and was contrary to law.[1] We affirm.

At approximately 12:15 p.m. on December 16, 1993, Deck was southbound on Hamilton Boulevard and attempting to turn left onto Stone Park Boulevard when her vehicle collided with a vehicle northbound on Hamilton driven by Burns. Deck lost consciousness and sustained personal injuries. Deck and Burns each sustained property damage. Deck filed this lawsuit alleging Burns' negligence had caused the collision. Burns filed counterclaims and alleged comparative negligence. Jury trial commenced May 7, 1997.

Evidence was presented on the traffic signals at the intersection of Hamilton and Stone Park. If north-and-southbound traffic have a green light when a driver enters the southbound left turn lane, that driver will not receive a green arrow until the traffic signals cycle through. That is, a southbound driver in the left turn lane would receive a green arrow following east-and-westbound traffic having had a turn

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[1] Deck briefed ten issues on appeal. At oral argument, Deck agreed to focus on the most important ones.

but before northbound traffic received a green light. Following the green arrow, all north-and-southbound traffic would have a green light and drivers in the left turn lane would be permitted to make a left turn if they yield to oncoming traffic.

Deck and Burns disagree about which party had the right-of-way at the time of the collision. Deck claims she had a green arrow, had put her turn signal on, and could see Burns 217 feet away when she commenced her left turn. Burns claims he had a green light, was traveling between twenty-five and thirty-five miles per hour, and did not see Deck until she had turned in front of him and it was too late to avoid the collision.

Two eyewitnesses testified at trial. George Miller, a seventy-year-old retired postal worker, was walking on Stone Park near Hamilton at the time of the collision. He testified he had observed north-and-southbound traffic. He heard the collision and saw "this car coming at a 90-degree angle and a lady flying through the -- in the air in the front seat and hit her -- the windshield or the dash and dropped down on the right side." He apparently was the first person to reach Deck's vehicle after the collision. Paula Jochum, a thirty-one-year-old juvenile court officer, was stopped at a red light in the westbound left turn lane on Stone Park waiting to turn south. She testified there was steady traffic traveling north and south on Hamilton. She saw the collision, called 911 on her car phone, and went to check on Deck. Deck was unconscious in the front seat and not wearing a seat belt when Jochum arrived at the vehicle.

Testimony was also received by deposition from two of Deck's physicians: Dr. Ramsell, an ophthalmologist, and Dr. Sherman, an orthopedic surgeon. Dr. Ramsell has been treating Deck since 1988. He testified Deck has normal peripheral vision, macular degeneration, cataracts, and vision correctable to 20/70 in each eye.[2] This qualified Deck for a restricted Iowa driver's license permitting daylight driving at speeds up to thirty-five miles per hour.

Dr. Sherman treated Deck for a soft tissue injury to her neck and thoracic spine caused by the collision. On direct examination Dr. Sherman testified his records show Deck had been wearing a seat belt at the time of the collision. On cross-examination, Dr. Sherman testified in part:

> Q. If she were not wearing [a three point restraint], do you have an opinion whether the non-use of a seat belt would enhance her injuries or make them worse? A. We usually suggest that without the use of a restraint, their injuries would be worse.

On re-direct examination, Deck pursued the seat belt issue:

> Q. Okay. Fine. And as far as the seat belt is concerned in this case . . . your history shows that she did have a seat belt on. A. That was what she told me.
>
> Q. All right. And if she had not had her seat belt on, however, in this particular case, not knowing the force of the impact or movements within the vehicle and those sorts of things, you could not express an opinion based upon reasonable medical certainty, can you, regarding what effect would have been on her injuries by not wearing the seat belt . . . ? A. My assumption would be if she had injury to her neck and shoulders when she was wearing the seat belt, I can't help but believe that if she wasn't, it would have been worse . . . not knowing

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[2] Macular degeneration affects the central vision causing a dark or empty area in the center of vision. The degree of darkness or distortion varies.

> the details of it, I can't say specifically, but my impression is that in all high energy motor vehicle accidents their injuries would have been greater had they not been wearing their seat belt.
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> Q. In this specific case here though, you cannot tell us specifically to what extent? . . . . A. I don't know the specific angles that the car struck or how that would have contributed, but my assumption is that she would have.
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> Q. Would you or would you not be merely speculating if you were to make an opinion in this case regarding any -- the extent of any increase in severity of injuries as a result of not wearing a seat belt? A. I guess I would say that based on my experience as an orthopedic surgeon and dealing with trauma patients, it would be my medical opinion that it would be highly likely that she would have more injuries having not worn a seat belt.
>
> Q. Okay. And what I'm trying to get at here is not that she would, but the extent of it. You would only be able to speculate because of the other factors you said -- A. Correct.

The case was submitted to the jury with a special verdict form which instructed on the seat belt issue as follows:

> Question No. 7: Do you find failure to wear a safety belt contributed to Marie I. Deck's injuries?
>
> Answer "yes" or "no."
>
> ANSWER: [jury answered yes]
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> (If you have answered "yes" to Question No. 7 you will also answer the following question.)
>
> Question No. 8: What percent, if any, (not more than 5%) do you find the recovery of plaintiff Marie I. Deck should be reduced?
>
> ANSWER: [jury answered 5%]

Question five instructed the jury to assign fault and to skip question six (on plaintiff's damages) if they found Deck to be more than fifty percent at fault. However, the jury was not instructed to skip questions seven and eight in any event.

The jury assigned Deck sixty percent of the fault, Burns forty percent at fault, and returned a verdict in Burns' favor for property damage of $7360.63. Deck appeals.

I. TESTIMONY OF DR. RAMSELL. Deck contends the district court erred in permitting Burns to depose Dr. Ramsell and in admitting Dr. Ramsell's testimony. Deck argues testimony regarding her vision is irrelevant because she made no claim for eye injury and there was no showing her vision was a proximate cause of the collision because she was driving within the restrictions of her driver's license. She also claims Dr. Ramsell's testimony is protected by the physician-patient privilege. We disagree.

The district court has discretion to determine relevancy pursuant to the rules of evidence and will not be reversed unless the discretion has been abused and a substantial right of a party has been affected. *In re Estate of Bayer*, 574 N.W.2d 667, 675 (Iowa 1998). Further, with respect to the physician-patient privilege, we review a district court's interpretation of Iowa Code section 622.10 for errors of law. *State v. Rieflin*, 558 N.W.2d 149, 152 (Iowa 1996).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 544 (Iowa 1997). In the case at bar, a major fact in dispute is which party had the right-of-way. Deck claims she had a green arrow and Burns claims he had a green light. Evidence regarding Deck's vision is probative of determining

which party had the right-of-way. *See, e.g., Slagle v. Superior Court*, 260 Cal. Rptr. 122 (Ct. App. 1989) (where answer alleged contributory negligence on part of plaintiff and defendants showed good cause to believe that history of treatment of plaintiff's pre-existing eye condition was relevant to cause of accident). Deck complains even if the evidence has a minimum probative value, it should not have been admitted because it is prejudicial. However, the relevancy of evidence and the comparative effect of any prejudice weighed against the probative value are matters within the sound discretion of the trial court. *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 289 (Iowa 1998). We find no abuse of that discretion.

The evidence, although relevant, should not have been admitted if it is protected by the physician-patient privilege. Iowa Code § 622.10 (1997). This privilege may be waived through voluntary acts of disclosure. *See Rieflin*, 558 N.W.2d at 152 (giving notice of intent to rely on defense of insanity and diminished responsibility waived privilege with respect to testimony at his competency hearing of mental health professionals); *State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974) (waived privilege to statements made to doctor in presence of police officers who had interrogated accused a short time earlier); *State v. Mayhew*, 170 N.W.2d 608, 616 (Iowa 1969) (waived privilege by calling doctor as witness and directly examining him); *State v. Randle*, 484 N.W.2d 220, 221-22 (Iowa App. 1992) (authorizing doctor or hospital to release any information or documents to DCI waived privilege). Failure of a party to assert privilege constitutes a waiver, *Harter v.* State, 260 Iowa 605, 610,

149 N.W.2d 827, 830 (1967); *Shepherd v. McGinnis*, 257 Iowa 35, 47, 131 N.W.2d 475, 482 (1964), except waiver does not result from answering questions on cross-examination without objection as to privileged communications. *See, e.g., Sprague v. Brodus*, 245 Iowa 90, 97, 60 N.W.2d 850, 855 (1953).

Burns filed a motion to compel production of Dr. Ramsell's records regarding his treatment of Deck for her macular degeneration condition. These records were voluntarily disclosed to Burns without objection; Deck did not assert physician-patient privilege at that time and Burns did not obtain a court order compelling production. The physician-patient privilege extends to medical records that contain information which would be inadmissible at trial as oral testimony from the physician. *State v. Eldrenkamp*, 541 N.W.2d 877, 881 (Iowa 1995); *Newman v. Blom*, 249 Iowa 836, 844, 89 N.W.2d 349, 355 (1958). Thus, Deck's voluntary disclosure of her medical records regarding Dr. Ramsell's treatment of her eye condition waived the privilege and she could not object to Dr. Ramsell testifying about that condition. *See Barnard v. Cedar Rapids City Cab Co.*, 257 Iowa 734, 750, 133 N.W.2d 884, 895 (1965). We conclude the district court did not err in finding Deck had waived the privilege and there was no error in permitting the deposition and admitting the testimony of Dr. Ramsell.

II. DECK'S HOSPITAL RECORD. Deck contends the district court erred in admitting her hospital record into evidence. She argues there was insufficient

foundation to admit the record under the business records exception of the hearsay rule. We disagree.

The admission or exclusion of evidence rests within the trial court's discretion, and we will interfere with its evidentiary rulings only if an abuse of discretion has occurred. *Beachel v. Long*, 420 N.W.2d 482, 485 (Iowa App. 1988).

The foundation elements which must be proved prior to admission of the evidence under the business records exception are as follows:

> (1) That it is a business record;
> (2) That it was made at or near the time of an act;
> (3) That it was made by, or from information transmitted by, a person with knowledge;
> (4) That it was kept in the course of a regularly conducted business activity;
> (5) That it was the regular practice of that business activity to make such a business record.

Id. at 484. Deck specifically claims there was not sufficient foundation to prove the entries were made by a person with knowledge of events as recorded. We have reviewed the testimony of Carol Stevenson, a correspondence clerk at Marian Health Center medical records department, and conclude there was no abuse of discretion in admitting Deck's hospital record.

III. SEAT BELT ISSUES. Deck maintains the district court erred in permitting testimony by Dr. Sherman concerning his opinion on seat belt use and in submitting instructions regarding the use of a seat belt to the jury. We disagree.

The trial court has considerable discretion in the admission of expert testimony. *Brunner v. Brown*, 480 N.W.2d 33, 37 (Iowa 1992). To establish an abuse of that

discretion, it must be shown it was exercised on untenable grounds or was clearly erroneous. *Id.*

An expert may testify from three possible sources: (1) the firsthand observation by the witness; (2) information obtained at trial through hypothetical questions or the testimony of other witnesses; and (3) the presentation of data to the expert outside of court and other than by his own perception. *Id.* at 34. The hypothesis upon which the expert witness is asked to rely must be established by the facts in the record or by facts later introduced into the record. *State v. Moses*, 320 N.W.2d 581, 583 (Iowa 1982). The facts, however, need not be shown by direct testimony but may arise as a fair inference from either direct or circumstantial evidence. *Id.*

In the case at bar, Dr. Sherman had firsthand knowledge of Deck's injuries from his treatment of her, as well as firsthand knowledge of injuries to trauma patients based on his experience as an orthopedic surgeon. The hypothetical questions about whether Deck's injuries would have been greater if she had not been wearing a seat belt at the time of the collision were supported by Miller's testimony describing Deck's movements in the vehicle and Jochum's testimony that Deck was not wearing a seat belt when she reached the vehicle. We conclude there was no abuse of discretion in admitting Dr. Sherman's testimony concerning the use of seat belts.

Litigants are entitled to have their legal theories submitted to the jury if they are supported by the pleadings and substantial evidence in the record. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). Evidence is substantial when

reasonable minds would accept it as adequate to reach the conclusion. *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 165 (Iowa App. 1996). If the trial court errs in submitting an instruction, we will reverse only when the error has caused prejudice. *See Coker v. Abell-Howe, Co.*, 491 N.W.2d 143, 143 (Iowa 1992).

In the case at bar, we find there was substantial evidence in the record to support submitting the seat belt instructions to the jury. Furthermore, we find even if there was an error, Deck was not prejudiced. The jury's assignment of sixty percent of the fault to her precluded recovery.

IV. SUFFICIENCY OF THE EVIDENCE. Deck contends the verdict is not sustained by sufficient evidence and was contrary to law. She maintains the verdict fails to effectuate substantial justice between the parties, and the district court should have granted her motion for a new trial. We disagree.

We review for an abuse of discretion. *Pratt v. Piper*, 500 N.W.2d 716 (Iowa App. 1993). In ruling upon motions for new trial, the court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. *Neumann v. Service Parts Headquarters*, 572 N.W.2d 175, 177 (Iowa App. 1997). A verdict will not be set aside or altered unless it is (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice, or other ulterior motives; or (4) is lacking in evidential support. *Id.* Courts have no right to set aside a jury verdict through mere caprice or whim, or to reweigh the evidence

submitted, or to sit in judgment on the credibility of witnesses. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996). We are obligated to view the evidence in the light most favorable to the jury verdict. *Id.*

In the case at bar, our review of the record shows there is sufficient evidence to support the jury verdict. We agree that *Pratt*, cited by Deck, is not persuasive; the fact situation in *Pratt* differs significantly to the facts of this case. We conclude the district court did not abuse its discretion in denying Deck's motion for a new trial.

We have considered all of the other issues raised by Deck but conclude they are either subsumed in issues previously discussed or are clearly without merit.

For these reasons, we affirm the judgment on the jury verdict as entered.

AFFIRMED.

No. 97-1305. [8-689] DECK v. BURNS

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Huitink and Mahan, JJ. Opinion by Mahan, J. (12 pages $4.80)

Plaintiff Marie Deck appeals the judgment entered upon a jury verdict finding her sixty percent at fault and defendant Terry Burns forty percent at fault in an automobile collision. **OPINION HOLDS: I.** ***Testimony of Dr. Ramsell.*** Ramsell, Deck's eye doctor, testified at trial. Deck contends testimony regarding her vision is irrelevant and protected by the physician-patient privilege. In the case at bar, a major fact in dispute is which party had the right-of-way; evidence regarding Deck's vision is probative in determining this issue. Deck waived the physician-patient privilege by voluntarily disclosing Ramsell's records to opposing counsel without objection, asserting the privilege, and without a court order compelling production. **II.** ***Deck's Hospital Record.*** Deck argues there was insufficient foundation to admit her hospital record under the business records exception of the hearsay rule. We have reviewed the testimony of a correspondence clerk at the medical records department of the hospital and conclude there was no abuse of discretion in admitting Deck's hospital record. **III.** ***Seat Belt Issues.*** Deck maintains it was error to permit testimony by Dr. Sherman concerning his opinion on seat belt use and in submitting instructions regarding the use of a seat belt to the jury. Sherman had firsthand knowledge of Deck's injuries from his treatment of her, as well as firsthand knowledge of injuries to trauma patients based on his experience as an orthopedic surgeon. The hypothetical questions about whether Deck's injuries would have been greater if she had not been wearing a seat belt are supported by eyewitness testimony. We conclude there was no abuse of discretion in admitting Sherman's testimony on this issue. We find there was substantial evidence in the record to support submitting the seat belt instructions to the jury; furthermore, Deck was not prejudiced because the assignment of sixty percent of the fault to her precluded recovery. **IV.** ***Sufficiency of the Evidence.*** Our review of the record shows there is sufficient evidence to support the jury verdict.