

IN THE COURT OF APPEALS OF IOWA

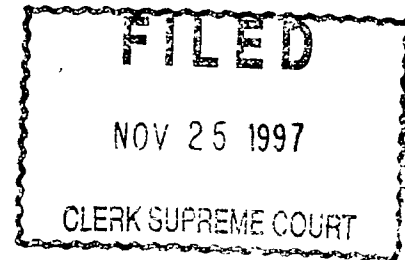
No. 7-299 / 96-1100

000265

DAVID SHINKER,
Appellee,

vs.

SHIRLEY LUKAN, Executor of the
Estate of Dale Tauke, Deceased,
Appellant.



Appeal from the Iowa District Court for Dubuque County, Lawrence H.
Fautsch, Judge.

The defendant appeals the district court's entry of judgment, following a jury trial, awarding plaintiff \$158,566.66 in plaintiff's action against the estate of Dale Tauke for damages sustained as a result of a shooting. **AFFIRMED.**

Dave Hughes, Cascade, for appellant.

Thomas J. Miller, Attorney General, and James F. Christenson, Assistant
Attorney General, for appellee.

Heard by Sackett, P.J., and Streit, J., and Habhab, S.J.*, but decided by Cady,
C.J., Sackett, Huitink, Streit, Vogel, and Mahan, JJ.

STREIT, J.

Lukan, executor of the estate of Dale Tauke, the defendant, appeals the district court's rulings (1) granting a protective order of a DCI report; (2) denying Lukan's summary judgment motion based on the fact that the state court had no jurisdiction over a case in which the State was a plaintiff; (3) granting the State's motions in limine; (4) on hearsay issues during trial; and (5) denying of Lukan's motion for mistrial. After the court's ruling denying Lukan's motion for mistrial, Lukan quit her case and for the rest of the trial she and counsel remained in the courtroom only as spectators. We affirm the trial court on all issues.

I. Background & Facts.

On August 1, 1994, Dale Tauke fired several shots into his mother and girlfriend's cars as they left his property. Tauke had a history of alcoholism and violence. Mrs. Tauke called the Dubuque County Sheriff and four deputies went to the Tauke farm. Fearing Tauke may injure or kill someone, the sheriff's department set up a perimeter around the farm to observe Tauke. The officers made numerous attempts to contact Tauke by telephone, public address system, and bullhorn, to no avail. Tauke ordered the officers off the premises and refused an officer's command to put down his weapons. State troopers were called in.

Troopers David Shinker and Don McGlaughlin went to the Tauke house. McGlaughlin positioned himself south of the house. Shinker placed himself to the north. Armed with a pistol and a rifle, Tauke left his home heading northwest. A

shootout developed and Tauke was killed. Tauke shot Shinker—severely wounding his hand.

Over the next six months surgeons operated six times to repair Shinker's wounded hand. Shinker did not work until April 1996. Shinker suffered a permanent loss of grip strength and range of motion to his right hand, limiting most of his daily activities. Shinker collected workers' compensation for his injuries from his employer, the State of Iowa. Shinker sued Tauke's estate for damages from the blast. Shinker assigned all his rights and interest in the action to the State of Iowa.

Tauke's estate claimed Tauke's actions were in self-defense and protection of his property. Through discovery, the executor of Tauke's estate requested investigative documents prepared by the Division of Criminal Investigation. The State sought a protective order, asking the court to deny discovery of the DCI report on the basis of confidentiality. The district court granted the motion.

The Tauke Estate filed a motion for summary judgment on the ground the State had no power to proceed in its own civil courts against one of its own citizens as assignee in a tort action of its employee. The motion was denied.

At trial, the court granted Shinker's motion in limine preventing the Tauke Estate from commenting, arguing, or giving evidence that Shinker's injury was covered by workers' compensation or that Tauke shot Shinker in self defense and defense of his of property. Further, the estate was not allowed to call witnesses not listed in its answers to interrogatories (Lukan did not file a list of expert witnesses).

On sixth day of trial, before plaintiff had rested, counsel for the estate filed a motion for mistrial. The district court denied the motion. The estate's counsel told the court the estate was ending all further participation in the trial. Defendant did no more to participate in the trial. The jury returned a verdict in favor of Shinker and the State in the amount of \$158,566.66. Tauke's estate appeals.

I. Discovery of DCI Report.

Lukan contends the district court erred in granting the State's motion for protective order preventing Lukan from discovery of the DCI report regarding the shooting. The Assistant Attorney General litigating the case had access to the report.

Review of a trial court's discovery ruling is for abuse of discretion.¹ *See e.g. In re the Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995); *State ex rel. Shanahan v. Iowa Dist. Court for Iowa County*, 356 N.W.2d 523, 526 (Iowa 1984). The trial court has wide discretion on ruling upon whether information is discoverable. *Shook v. City of Davenport*, 497 N.W.2d 883, 885 (Iowa 1993). Reversal is only warranted when the district court's ruling rests on grounds untenable or unreasonable. *Id.*

Parties can discover any matter which is relevant to the subject matter, as long as it is not privileged. Iowa R. Civ. P. 122(a).

¹ This is not a de novo review, as in the mandamus action in *Hawk Eye v. Jackson*, 521 N.W.2d 750, 752 (Iowa 1994).

Every person has the right to examine and copy public records. Iowa Code § 22.2(1) (1995). Certain public records are privileged, kept confidential by statute, and are not to be released to the public. Among the records which are deemed confidential by statute are the investigative reports of peace officers. *Id.* § 22.7(5). A qualified privilege exists in regard to investigative reports under Iowa Code section 622.11.² Sections 22.7(5) and 622.11 are two expressions of the same legislative purpose with regard to DCI files. *Shanahan*, 356 N.W.2d at 528. Both sections assure persons upon whom law enforcement officers rely for information, as well as the officers, that their conversations are confidential from the public. *Id.*

Because governmental privilege in the statutes is a qualified one, it is not absolute. If the interest of the party, in this case a private litigant, outweighs the State's interest in keeping the public records confidential, the privilege will not protect the records. *See Shanahan*, 356 N.W.2d at 529. In determining whether Lukan's interest in obtaining the DCI report outweighs the state's interest in keeping the information confidential, we assess: (1) the State's interest in keeping the information confidential; (2) whether the information in the DCI file is critical to a complete factual presentation in the civil lawsuit; and (3) whether the litigants make

² The statute provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure." The statute is designed to protect "matters affecting the affairs of the state, as state secrets, and communications by informers." *Shanahan v. Iowa District Court*, 356 N.W.2d 523, 529 (Iowa 1984). The interest at stake is public safety. *Id.*

a sufficient showing they cannot gain access to essentially the same information from other sources. *Id.*

The State's interest is allowing criminal investigation to be conducted in relative secrecy. *See id.* This is an important public purpose. Although seemingly unfair to allow the attorney for the State to use the DCI report in a civil action for damages to its employee, Lukan cannot prove that her interest outweighs the State's. Lukan had access to the names of every person involved with or contacted by the State as a witness to the shooting at the Tauke residence. Lukan took depositions of the officers and DCI criminalists involved in the shootings and used all the negatives of photos taken by the DCI. She was allowed to examine all physical evidence gathered by the DCI. The information was accessible from other sources.³ With access to this information, the DCI report was not critical to Lukan's presentation of the factual circumstances in the case.

Because Lukan did not prove the estate's interest in obtaining the DCI report outweighed the State's interest in keeping the report confidential, the court did not abuse its discretion in granting the state's motion for protective order.

³ The analysis in determining if a DCI report should be accessible to a civil litigant is similar to the analysis undertaken when determining if a party should be able to discover documents prepared in anticipation of litigation or for trial pursuant to I. R.C.P. 122(c). Under that rule, a party seeking to discover trial preparation materials of an opposing party must show substantial need of the materials in the preparation of his case and that she is unable without undue hardship to obtain equivalent materials by other means.

II. State's Right to Pursue Third Party Action Against Tauke's Estate Under Iowa Law.

Lukan argues the State does not have the capacity to pursue a tort action in its own courts on behalf of a private citizen and because the state has no capacity to sue, there is no justicable controversy, and the court lacks jurisdiction.⁴ Lukan offered no case law or statutory law to support this contention, other than general references to the due process and equal protection clauses of the Iowa and United States constitutions. We will not consider constitutional questions unless it is necessary for the disposition of the case. *State v. Iowa Dist Ct.*, 247 N.W.2d 236, 241 (Iowa 1976). Because we can decide the issue of whether the State, as an assignee has the capacity to bring an action against Lukan, we need not address Lukan's constitutional arguments.

The State of Iowa was Shriner's employer. The State paid in excess of \$112,000 to the trooper in worker's compensation benefits. An employer can bring a third-party action in the name of an employee to recover damages to the same extent the employee might. *See Sourbier v. State*, 498 N.W.2d 720, 723 (Iowa 1993); Iowa

⁴ Lukan's argument essentially raises an issue of real party in interest rather than jurisdiction. If Lukan intended to argue the State was not the real party in interest she could have filed either a motion to strike or motion to dismiss. Even if differently framed, however, the argument is without merit. Although it is true that "... an intervening workers' compensation carrier should not participate in an action brought by an injured employee against a third-party tortfeasor," *Bride v. Heckart*, 556 N.W.2d 449, 455 (Iowa 1996), that is not the case where the carrier is an assignee rather than an intervenor.

Code §§ 85.22(1)(2) (1995). “When the State of Iowa has paid any [workers’] compensation . . . the word ‘employer’ . . . shall mean and include the State of Iowa.”

Lukan argues that the statute only allows the State to become involved in a lawsuit to recover damages paid to its employee because of a worked related injury if the employee fails to bring a cause of action. The statute is not so narrow. Here, Shriner originally brought his cause of action and then assigned his rights to the State. In effect, the same situation would have resulted if Shriner had not pursued his action—the State would be pursuing the action. No prejudice resulted to Lukan from the State acquiring the action by assignment rather than bringing the action on its own.

III. Motions in Limine.

Lukan contends the court erred in sustaining several of the Plaintiff’s motions in limine. The court sustained the State’s motions in limine requesting: (1) defendant not be allowed to comment in opening statement upon the issue of whether Tauke acted in self-defense and defense of his property; (2) defendant’s exhibits and witnesses not disclosed during discovery be excluded; and (3) evidence that Shriner’s injury is covered by the Iowa Workers’ Compensation Act or that Shriner received monthly benefits under the Act.

A ruling sustaining a motion in limine is not a ruling on the evidence; the ruling merely adds a procedural step to the offer of evidence. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 317 (Iowa 1992). If the evidence is not offered, there

is nothing preserved to review on appeal. *Id.* Error not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707 (Iowa 1994). The court sustained the State's motions in limine seeking to limit the disputed evidence. At the close of plaintiff's case in chief counsel for Lukan stated "we're quitting in this procedure." Lukan did not present her case, or any evidence supporting a claim of self defense and of property, and did not offer the disputed evidence at trial. Doing so was the only way the issues of whether the disputed evidence was improperly limited could be preserved for appeal.

Even if Lukan would have preserved these issues, the trial court did not err. Trial court rulings on the propriety of jury arguments will be reversed only if there is a clear abuse of discretion. *Rasmussen v. Thilges*, 174 N.W.2d 384, 391 (Iowa 1970). Limiting Lukan's opening remarks to defenses supported by the evidence is not unreasonable or untenable. The court did not abuse its discretion in limiting Lukan's opening statement.

The trial court has wide discretion to impose sanctions it deems appropriate for failure to adequately follow discovery procedures. Lukan did not disclose all of her witnesses and exhibits before trial, as required by the discovery requests. It was well within the trial court's discretion to exclude these witnesses and exhibits. *See Starlin v. State*, 450 N.W.2d 257, 259 (Iowa App. 1989).

It was not error to exclude evidence of worker's compensation insurance benefits paid to a plaintiff in a personal injury action. Iowa's statutes and case law

state clearly such evidence is to be excluded. Iowa Code § 668.14(1)⁵; *Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990). Under Iowa's Comparative Fault Act, specifically Iowa Code section 668.14, evidence of payment of medical bills and other workers' compensation benefits is inadmissible provided the indemnification requirements of section 85.22 are satisfied. *Schonberger*, 456 N.W.2d at 203. The only conceivable purpose of informing the jury of such benefits is to invite the jury to reduce plaintiff's recovery because of them. *Id.*

IV. Hearsay.

Lukan argues the district court erred in allowing hearsay testimony to be introduced. An appellate court will interfere with a trial court's evidentiary rulings at trial only if an abuse of discretion has occurred. *Beachel v. Long*, 420 N.W.2d 482, 485 (Iowa App.1988). Appellate courts will affirm a district court ruling on the admissibility of hearsay on any permissible ground in the record, whether urged at trial or not. *State v. Murphy*, 462 N.W.2d 715, 717 (Iowa App. 1990).

Lukan argues the following testimony was hearsay: (1) Deputy Feldman's testimony of what Tauke's mother and girlfriend told him Tauke said to them before they fled Tauke's residence; (2) Deputy Sawvel's testimony Tauke threatened a co-

⁵ The statute states in part: "In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment . . . [paid to the plaintiff] as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program" Iowa Code § 668.14(1) (1997).

worker with a gun, Tauke rode a horse into a tavern and shot a gun, Tauke wanted to die in a gun battle; and that Sawvel learned Tauke shot Shriner after racing to the Tauke farm after the shootout; and (3) Shriner's testimony he had heard Tauke was a bad person.

Some of the testimony was hearsay. Some of the evidence Lucan claims is hearsay is not hearsay but is opinion testimony or statements to prove the state of mind of the declarant. The statements the court admitted that were hearsay fit under exceptions to the hearsay rule. For example, hearsay testimony by Deputy Sawvel was admitted. His testimony included statements made by Tauke, who was unavailable at trial due to death. *See* Iowa R. Evid. 804(b)(3).

Sawvel's testimony of what Tauke's sister told him was an excited utterance. There should be an element of spontaneity in an excited utterance that can be met even though the declaration is made in response to a specific question. *State v. Paulsen*, 265 N.W.2d 581, 586 (Iowa 1978). Whether a statement would have been volunteered absent questioning is not controlling; it is merely one of several factors in determining if a statement is an excited utterance. *State v. Mateer* 383 N.W.2d 533, 535-36 (Iowa 1986). The sister's statement was uttered shortly after she had been shot at and while she was under the stress of having a stakeout positioned around Tauke's farm. *See* Iowa R. Evid. 803(2).

Sawvel's testimony that he learned Tauke shot Shriner after he raced out to the Tauke farm explained Sawvel's existing state of mind or emotion at that time.

Understandably, he was shocked and worried because he heard this and explained his conduct later.

Even if hearsay statements were erroneously admitted by the trial court, any error was harmless because no prejudice resulted to Lukan. Erroneously admitted hearsay testimony will not be cause for reversal unless prejudice results from admission of the testimony. *Miller v. Bonar*, 337 N.W.2d 523, 528 (Iowa 1983). There was abundant clearly admissible evidence which established Tauke's history of alcoholism, violence, and the factual background of the shooting.

It is possible to waive the right to assert error on appeal. *e.g. see Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9,14 (Iowa 1990)(failure to timely object to jury instructions, right or wrong, waives the right to object to those instructions). The attorney for defendant did not pursue the normal trial tactics. An attorney does not ordinarily abandon or quit his case after his or her objections or motions are denied. When a party abruptly quits participating in the trial and becomes a spectator, such tactics are disruptive to the ordinary course of the trial. If it is appropriate to preclude a party from asserting error on appeal for failure to timely object, it is certainly proper to hold a party has waived the right to assert error on appeal in this instance.

V. Motion for Mistrial.

Lukan unsuccessfully moved for a mistrial because the Shriner did not fully respond to Lukan's requests for production.⁶ The court denied the motion and Lukan contends it was error. A trial court has broad discretion in ruling on a motion for mistrial, and we will not overturn a ruling denying such a motion absent a showing that the court abused its discretion in doing so. *State v. Washington*, 308 N.W.2d 422, 424 (Iowa 1981). Further the imposition of discovery sanctions by a trial court is discretionary and will not be reversed unless there has been an abuse of discretion. *Renze Hybrids*, 418 N.W.2d 634, 640 (Iowa 1988).

The court made numerous attempts to insure no prejudice resulted to the defendant from the plaintiff's failure to fully comply with defendant's requests for production. The court offered defendant's counsel the opportunity to have the gloves brought to court and examined by the DCI agent. Defendant's counsel refused. The court offered to have the gloves brought to an expert of defendant's choice for inspection. Defendant's counsel refused. A trial judge is always in the best position to determine whether a mistrial is necessary to prevent prejudice. The trial court assessed that any prejudice that may result to the merits of the defendant's case from the gloves not being produced could be remedied at trial. *See State v. Staker*, 220

⁶ One of defendant's requests was defendant's counsel be allowed to inspect any tangible items which related to the Tauke shootout. Shriner responded he had no physical evidence from the shootout. At trial plaintiff testified he had retained the gloves he was wearing when his hand was shot. Plaintiff's counsel did not know the gloves still existed.

N.W.2d 613, 617 (Iowa 1974). The defendant chose not to remedy any prejudice, but rather to motion for mistrial and quit his case. The trial court did not err in denying the defendant's motion under these circumstances.

AFFIRMED.

All judges concur, except Sackett, J., who dissents.

SACKETT, P.J. (dissenting)

I disagree with the majority's conclusion that the district court did not abuse its discretion in refusing defendant executor the right to discover the Department of Criminal Investigation reports of the events that led to David Shinker's being shot and Dale Tauke's death.

In a bizarre series of events following a request by decedent's family for help with decedent, he was killed and Shinker was injured. Plaintiff and defendant have different theories concerning what happened and where the blame fell. Decedent's heirs have been publicly critical of the way law enforcement officers handled the situation.

After suit was filed, defendant estate sought to obtain state law enforcement records, including DCI reports. The State asked for a protective order contending they not be required to produce the reports. The trial court granted the order finding defendant failed to show the information could not be obtained from other sources and the DCI report was not critical to defendant's case.

The majority has correctly analyzed the issue as one of weighing the need for confidentiality of the reports of the DCI with the rights established for review of public records under Iowa Code section 22.2(1) (1995). My disagreement with the majority is (1) with its finding defendant's interest in obtaining the report did not outweigh the State's interest in keeping the report confidential and (2) with its failing to consider the application of *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994), to the facts of this case.

The privilege provided peace officers' investigative reports under Iowa statutory and case law is qualified, not absolute. See Iowa Code sections 22.7 and 622.11; *Hawk Eye*, 521 N.W.2d at 753; *State ex rel. Shanahan v. Iowa Dist. Court*, 356 N.W.2d 523, 528 (Iowa 1984). Iowa Code chapter 22 establishes a liberal policy of access, and departures are to be made only under discrete circumstances. *Northeast Council on Substance Abuse, Inc. v. Iowa Dep't of Public Health*, 513 N.W.2d 757, 759 (Iowa 1994). The statute establishes a liberal policy of access from which departures are to be made only under discrete circumstances. *Id.*; *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 526 (Iowa 1980). There is a presumption in favor of disclosure. *Northeast Council*, 513 N.W.2d at 759. Open access to public records demands a liberal reading of chapter 22 and a narrow construction of statutory exemptions from disclosure. *Greater Community Hosp. v. Public Employment Relations Bd.*, 553 N.W.2d 869, 873 (Iowa 1996).

An official claiming the privilege must satisfy a three-part test: (1) a public officer is being examined; (2) the communication was made in official confidence; and (3) the public interest would suffer by disclosure. *Hawk Eye*, 521 N.W.2d at 753; *Shanahan*, 356 N.W.2d at 527. The focus should be on the third prong of the test.

I find no evidence that supports a finding the public interest would suffer by disclosure. The State, apparently on the basis of the investigation, seeks in this civil action to recover worker's compensation it paid Shinker. There is no evidence the reports were made to solve a crime or need to remain confidential to allow law

enforcement to discuss findings and theories of a crime under investigation. *See Hawk Eye*, 521 N.W.2d at 753. There was no need for witness confidentiality and the request came after the investigation was over. *See id.*

The majority, as did the trial court, rested its decision primarily on the premise defendant could obtain the information elsewhere.¹ The existence of an alternate means of access is a factor to be weighed in determining if disclosure is warranted. *Id.* at 754. It is not dispositive of the issue.

A factor is defendant's claim there was a cover up and the information in the report may contradict testimony in depositions, and failure to see the report precludes defendant from assessing the conclusion the State reached as to responsibility. The purpose of the Iowa freedom of information statute was to open government doors to public scrutiny and prevent the government to keep decision-making activities from the public. *Shanahan*, 356 N.W.2d at 528; *Head v. Colloton*, 331 N.W.2d 870, 873 (Iowa 1983); *Wings v. Dunlap*, 527 N.W.2d 407, 409 (Iowa App. 1994).

There is no valid reason advanced to keep the record confidential. There was a showing the information sought will not necessarily be available to defendant through other means. I would reverse and order disclosure of the records.

¹ The majority, by footnote, has suggested this analysis is similar to one taken to determine whether a civil litigant can obtain documents prepared in anticipation of litigation or for trial under Iowa Rule of Civil Procedure 122(c). While there are some similarities between the two analyses, the burden on the litigant under rule 122(c) should be higher where the information was not prepared with public funds.