IN THE COURT OF APPEALS OF IOWA

No. 0-627 / 09-1849
Filed November 10, 2010

TERESA MYERS,
Plaintiff-Appellant,

vs.

CRAWFORD HEATING & COOLING,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Teresa Myers appeals an adverse jury verdict in her personal injury action. **AFFIRMED.**

Anthony J. Bribriesco and William J. Bribriesco of William J. Bribriesco & Associates, Bettendorf, for appellant.

Craig A. Levien, Peter J. Thill and Michael R. Bousselot of Betty, Neuman & McMahon, P.L.C., Davenport, for appellee.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

We are asked to decide two claims of trial error raised by Teresa Myers's appeal from an adverse jury verdict in her personal injury action. She first contends the district court should have instructed jurors they could draw a negative inference against Crawford Heating & Cooling (Crawford) from its employee's act of discarding the tool bag that fell on her head. Because the district court correctly determined the employee did not intentionally destroy relevant evidence, we affirm the decision not to give a spoliation instruction.

Myers also alleges that she was entitled to a mistrial when Crawford's attorney asked prospective jurors about workers' compensation benefits and told the jury during opening statements that Myers had been injured at work. Because counsel's alleged misconduct was not so prejudicial that a different verdict was probable absent these references, we also affirm the district court's denial of a mistrial.

I. Background Facts and Procedures

On May 20, 2004, a twenty-five pound tool bag fell seventeen feet and landed on Myers's head, causing her injury. At the time of this incident, Myers was working as an assistant manager at Marshalls, a retail clothing store, which was hosting its grand opening. Marshalls experienced problems with its air conditioning units and called Crawford to fix them. Crawford assigned Tom Perkins to repair the units, which were located on the building's roof.

To reach the air conditioning units, Perkins climbed a ladder mounted on a wall in Marshalls's back stock room and unlocked a padlocked roof hatch.

Several totes of merchandise initially blocked his access to the ladder and he asked Myers to help move the merchandise. Perkins then grabbed his tool bag and ascended the ladder. He testified that the shoulder strap on his tool bag broke as he reached to open the roof hatch. He denied that his tool bag slipped off his shoulder and denied that he rested the bag on an adjacent I-beam and the bag fell from there. The tool bag struck Myers on the head and, as a result, she underwent cervical spinal fusion surgery. Her neck surgery required the surgeon to implant a bone graft and a titanium plate with screws into her cervical spine.

The next day, Perkins reported the incident to his service manager, Todd Luppen. Luppen gave Perkins an incident form to fill out, which he did at a workbench in Crawford's service department. In response to a question on the form asking how the accident happened, Perkins wrote: "As I was climbing ladder tool bag strap broke—causing bag to fall." Both men then walked to Perkins's service van where Perkins pointed at the tool bag, which struck Myers. Luppen looked at the bag briefly. Perkins kept the tool bag in his company van after the incident. He bought a new tool bag a few weeks later and eventually disposed of the bag that had fallen on and injured Myers.

Myers filed a petition with Iowa Workers' Compensation Commissioner and was awarded benefits after an arbitration hearing. On May 3, 2006, she also brought a personal injury action against Crawford, invoking two theories to support her allegation that Crawford was negligent and that she suffered injuries as a result: respondeat superior and res ipsa loquitur.

Before trial on her personal injury action, Myers filed a motion in limine requesting that the court bar any mention of her receipt of workers' compensation benefits. Specifically, she requested: "That the Defendant not mention any workers' compensation benefits in terms of medical expenses or temporary healing benefits Plaintiff Teresa Myers may have received as such evidence is not permitted under Iowa case law." The district court granted her motion regarding workers' compensation benefits.

During trial, Myers moved for a mistrial several times. She alleged that Crawford's counsel engaged in prejudicial misconduct and violated her motion in limine by asking potential jurors whether they had ever received workers' compensation benefits and by emphasizing in his opening statement that Myers was injured at work, thereby impermissibly suggesting that she received workers' compensation benefits.

At the jury instruction conference, Myers proposed that the district court present the jury with a spoliation of evidence instruction—specifically, the model Iowa Civil Jury Instruction 100.22.[1] Myers argued that Perkins intentionally

---

[1] Iowa Civil Jury Instruction 100.22 states:

> **Spoliation of Evidence.** (Name of party asserting the conclusion) claims that (name of party) has intentionally destroyed evidence consisting of (describe evidence). You may, but are not required to, conclude that such evidence would be unfavorable to (name of party).
>
> Before you can reach this conclusion, (name of party asserting the conclusion) must prove all of the following:
>
> 1. The evidence previously existed.
> 2. The evidence was within the possession or control of (name of party).
> 3. (Name of party)'s interests would call for production of the evidence if favorable to that party.
> 4. (Name of party) has intentionally destroyed the evidence without satisfactory explanation.

destroyed the tool bag—relevant evidence in this case—and that Crawford failed to proffer a satisfactory explanation for the evidence's destruction. The district court declined to give the spoliation instruction noting that such instructions are to be used "prudently and sparingly" and stating that "[t]here is no indication in this record that at the time . . . the bag was thrown away . . . it was anything other than routine and that it had any relation to any intent to destroy any relevant evidence in the case."

The jury found that Crawford was not at fault and the district court entered judgment in Crawford's favor. Myers filed a motion for a new trial. She argued, among other things, that the district court erred in denying her motions for mistrial because defense counsel engaged in prejudicial misconduct and that the district court erred in refusing to give a spoliation instruction. The district court denied her motion for new trial on all grounds.

Myers appeals the court's refusal to give the spoliation instruction and the court's denial of her requests for mistrial.

II. Standard of Review

We review the district court's refusal to instruct on the spoliation inference for the correction of errors at law. *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004). The party seeking the instruction must generate a jury question on the following four factors to receive the spoliation instruction: (1) the evidence was in

---

> For you to reach this conclusion, more than the mere destruction of the evidence must be shown. It is not sufficient to show that a third person destroyed the evidence without the authorization or consent of (name of party).

existence; (2) the evidence was in the possession of or under control of the party charged with its destruction; (3) the evidence would have been admissible at trial; and (4) the party destroyed the evidence intentionally. *Id.*; *see also* Iowa Civil Jury Instruction 100.22.

"When weighing sufficiency of evidence to support a requested instruction, we construe the evidence in a light most favorable to the party seeking submission." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). "[E]rror in refusing to give a requested instruction does not warrant reversal unless it is prejudicial to the party." *Id.*

We review the district court's denial of a mistrial for abuse of discretion. *Rosenberger Enters., Inc. v. Ins. Serv. Corp.*, 541 N.W.2d 904, 906 (Iowa Ct. App. 1995). "[T]o show an abuse of discretion, one generally must show that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* at 906-07.

III. Analysis

A. Spoliation of Evidence

At the jury instruction conference, Myers requested a spoliation instruction arguing that Crawford's employee intentionally destroyed the tool bag that had fallen and injured her. She sought this instruction because it would allow the jury to infer that Crawford's employee actually dropped the tool bag and that it did not fall as the result of a broken strap. She contends that the jury would excuse Crawford for an equipment malfunction but would not do so if the employee dropped the bag on her. The district court declined to give the instruction

reasoning that disposing of the bag was routine and that no evidence suggested an intent to destroy relevant evidence.

Myers argues the district court applied an incorrect standard when determining whether to give the requested jury instruction. She contends the substantial evidence standard should drive the determination and the district court improperly considered whether it was using a spoliation inference "prudently and sparingly."[2] She argues, moreover, the record demonstrates substantial evidence to support her proposed spoliation instruction and that she was prejudiced by the district court's refusal to instruct the jury on spoliation.

Crawford claims that Myers failed to preserve error on the issue or, in the alternative, that the district court correctly applied the prudently and sparingly standard. Crawford also contends Myers failed to present substantial evidence to support a spoliation instruction and failed to show any prejudice from the absence of the instruction.

1. Preservation of Error

Crawford alleges that Myers failed to object to the court's refusal to give the jury instruction and did not alert the district court to the grounds sustaining her objection. Specifically, Crawford contends Myers raised the following issues on appeal without first presenting them to the district court:

---

[2] Myers posits the following inquiry to demonstrate her concern about the "prudently and sparingly" language:

> Is a district court instructed to give a spoliation instruction one out of five times when an instruction is proposed by a party at trial? Or is a district court instructed to give a spoliation instruction two out of five times when proposed by a party at trial? How does a district court know that it is giving a spoliation instruction prudently and sparingly?

> (1) The district court applied an incorrect standard of jury instructions when it considered whether it was utilizing a spoliation inference "prudently and sparingly"[; and]
> (2) There was substantial evidence in the record to support Plaintiff's Proposed Spoliation Instruction.

Myers counters that she alerted the district court to the jury-instruction issue no less than three times, at points when the district court could have taken corrective action: (1) when she initially urged the district court to give the spoliation instruction, (2) when she asked the district court to reconsider, and (3) when she moved for a new trial. As explained below, Myers failed to preserve the first issue concerning the "prudently and sparingly" language, but successfully preserved the second issue concerning substantial evidence.

Iowa Rule of Civil Procedure 1.924 sets forth our error preservation rule for requested jury instructions as follows:

> [A]ll objections to giving or failing to give any instruction must be made in writing or dictated into the record . . . specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

To preserve error for the purpose of appellate review, a party must alert the district court to the issue appealed at a time when the district court can take corrective action. *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006). An objection must be "'sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist, the court may correct it.'" *Boham v. City of Sioux City*, 567 N.W.2d 431, 438 (Iowa 1997) (citation omitted). "[S]o long as the nature of the error has been timely brought to the attention of the district court," error preservation will not turn on the party's thoroughness of research or briefing. *Summy*, 708 N.W.2d at 338.

Myers failed to preserve her argument that the district court applied an incorrect standard when it considered whether it was using the spoliation inference "prudently and sparingly" because she did not present that argument to the district court during the jury instruction conference or in her motion for a new trial. Myers presents the argument for the first time on appeal and, consequently, she did not properly preserve this issue. *See State v. Bingham*, 715 N.W.2d 267, 271 (Iowa Ct. App. 2006) ("'It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.'" (citation omitted)). We, therefore, decline to review the merits of this argument.

Myers did preserve her argument that substantial evidence exists to support her proposed jury instruction because she argued this point before the district court in both the jury instruction conference and her motion for new trial—alerting the district court to the issue she now appeals and providing the district court the opportunity to take corrective action. *See State v. Reese*, 259 N.W.2d 771, 777 (Iowa 1977) ("[W]e are disposed to observe that error was preserved since a request for an instruction was made and the motion for a new trial based in part on the refusal to submit such an instruction was overruled.").

2. Substantial Evidence Does Not Exist to Support a Spoliation Instruction

Spoliation refers to the intentional destruction of evidence. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 491 (Iowa 2000). A spoliation instruction allows the jury to make an inference adverse to the party accused of destroying evidence: the jury may infer that the missing evidence would have

been adverse to that party. *Hartsfield*, 681 N.W.2d at 630. We impose the spoliation instruction and attendant adverse inference for punitive, deterrent, and evidentiary purposes. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718–720 (Iowa 2001) (explaining that the "inference serves to deter parties from destroying relevant evidence" and that the spoliation inference is grounded, in part, on "the need to punish" parties who destroy evidence). The evidentiary rationale is premised on our recognition that intentionally destroying evidence "amounts to an admission by conduct of the weakness of one's case." *See Hendricks*, 609 N.W.2d at 491.

A court will grant a spoliation instruction when there is substantial evidence to support the following four facts: (1) the evidence was in existence, (2) the evidence was in the possession of or under control of the party charged with its destruction, (3) the evidence would have been admissible at trial, and (4) the party destroyed the evidence intentionally. *Hartsfield*, 681 N.W.2d at 630; *see also* Iowa Civil Jury Instruction 100.22. The spoliation inference is not warranted if the disappearance of the evidence is unintentional, "due to mere negligence, or if the evidence was destroyed during a routine procedure." *Phillips*, 625 N.W.2d at 719; *Hendricks*, 609 N.W.2d at 491. We must resolve whether Myers offered adequate evidentiary support for her requested instruction.

A trial court should instruct on spoliation when a party who reasonably anticipates litigation destroys an item that may be relevant to that litigation. *See, e.g.*, *Hartsfield*, 681 N.W.2d at 632–33 (finding error in not giving spoliation

instruction when jail destroyed videotape recording requested by inmate and his attorney following notice of disciplinary proceedings and pending criminal prosecution); *Prudential Ins. Co*. v. *Lawnsdail*, 235 Iowa 125, 130, 15 N.W.2d 880, 883 (1944) (allowing an adverse inference against insurer who destroyed a life insurance policy after it "refused payment on the policy," brought an action to cancel the policy, "and presumably was prepared to litigate the question of its liability"); *Warren v. Crew*, 22 Iowa 315, 322 (1867) (allowing an adverse inference against the party who destroyed a contract after that party "knew there was to be a difficulty about it"). Where the record is unclear whether the party destroyed the evidence with knowledge it was relevant to future litigation, no spoliation instruction is required. *See, e.g.*, *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003) (denying a spoliation instruction and explaining the facts before the court did not demonstrate city employees intentionally destroyed helicopter parts with knowledge they were relevant to the litigation); *Phillips*, 625 N.W.2d at 720 (finding spoliation instruction was not proper where record showed no motive by the clinic or its doctors to intentionally purge themselves of patient's medical records to prevent their production during any subsequent litigation). These cases demonstrate that Iowa courts predicate a spoliation instruction on a closer nexus between a party's intentional destruction of evidence and that party's anticipation of future litigation than Myers has shown in this case.

Here, Myers demonstrated that Crawford retained control over the tool bag by virtue of the doctrine of respondeat superior: Crawford's agent, Perkins, retained the bag within the scope of his employment. Nevertheless, Myers has

not demonstrated by substantial evidence that she is entitled to a spoliation instruction because she has not shown a reasonable person in Perkins's position would have anticipated—or that Perkins himself did anticipate—the need to save the broken bag for potential litigation. Perkins testified that he would have kept the bag had he expected it would be relevant in future litigation and that he threw the bag away only because it was broken and he "had no further use for it." He was forthcoming with his supervisor about the accident and filled out a report form the morning following the incident. There is also no evidence that the bag was destroyed in contravention of a company policy to retain such items. Myers offered no evidence demonstrating evasive conduct on the part of the employer or the employee which would support an inference that Crawford attempted to conceal the bag because its production would have been adverse to their position.

By leaving the tool bag in Perkins's possession, Crawford may have negligently facilitated the disposal of the tool bag, but negligence does not support a spoliation instruction. *See Phillips*, 625 N.W.2d at 719. Further, the motive of the employee in disposing of a broken tool bag for which he "had no further use" does not show a motive by the company to "intentionally purge [itself] of any [evidence] to prevent . . . production [of the evidence] during any subsequent litigation." *See id*.

Moreover, Myers suffered no prejudice when the district court declined to give her requested spoliation instruction. On appeal, she argues that she was prejudiced because the instruction would allow the jury to infer that Perkins

dropped the tool bag and that the jury would hold Crawford liable for its employee's negligent handling of the bag, but would not hold Crawford liable for an equipment malfunction. But during opening argument and at various points throughout the trial, Myers argued that Crawford was negligent regardless of whether the bag broke or Perkins dropped it. Myers's attorney explained to the jury that, "[t]he evidence will show it doesn't matter whether [the tool bag] fell off, [or] it broke, because Tom Perkins was negligent in not checking the bag, inspecting the bag, and Crawford was negligent in not having a policy or procedure." Having explained to the jury during opening statements, and explored during Perkins's testimony, that either dropping the bag or failing to inspect the bag before it broke both could constitute negligence, we cannot say that failing to give the requested instruction prejudiced Myers.

B. Mistrial Based on Alleged Misconduct by Crawford's Attorney

Myers contends the district court abused its discretion in declining to grant a mistrial. She moved for a mistrial several times throughout the suit; the district court denied her requests because it found she had not been prejudiced by the alleged misconduct. On appeal, she argues that Crawford's counsel engaged in prejudicial misconduct and violated her motion in limine by asking potential jurors whether they had ever received workers' compensation benefits and by emphasizing during opening statement that she was injured at work.

"[T]he trial court has considerable discretion in determining whether [an attorney's] alleged misconduct, if there was such, was prejudicial" and the trial court's conclusion on this matter is "entitled to much weight." *Baysinger v.*

Haney, 261 Iowa 577, 581, 155 N.W.2d 496, 498 (1968); *Connelly v. Nolte*, 237 Iowa 114, 130, 21 N.W.2d 311, 319 (1946). "Regardless of the misconduct, prejudice to the complaining party must be made affirmatively to appear before a reversal is justified." *Connelly*, 237 Iowa at 130, 21 N.W.2d at 319. We will not disturb the district court's determination of such questions on appellate review "unless it appears probable a different result would have been reached but for [the] claimed misconduct of counsel." *Baysinger*, 261 Iowa at 582, 155 N.W.2d at 499.

Because counsel's alleged misconduct was not so prejudicial that a different result would have been probable absent such conduct, we affirm the district court's denial of mistrial. Although the district court admonished counsel for asking prospective jurors whether they had filed a workers' compensation claim, the court concluded this conduct was not prejudicial and we give the district court's determination "much weight." *Connelly*, 237 Iowa at 130, 21 N.W.2d at 319. Neither counsel's voir dire nor his opening statement directly violated the limine ruling, which precluded mention of Myers's workers' compensation benefits. The disputed question directed to the potential jurors asked about their own workers' compensation experiences. Likewise, his opening statement explained the facts of the case—which included the fact that Myers was injured while at work. Of note, Myers's own counsel first apprised the jury of the fact that her injury occurred while she was at work.

Although the fact that the complained-of-conduct did not violate the limine ruling is not dispositive, it bolsters our view that the district court did not abuse its

discretion in declining to grant a mistrial. In contrast to the case here, defense counsel in *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803–04 (Iowa 1992) asked multiple questions in direct violation of the district court's limine ruling, which precluded mention of plaintiff's prior claims or settlements. The court barred such evidence, recognizing that it may be prejudicial to the plaintiffs since "'hostility [is] ordinarily felt against'" litigious persons. *Mays*, 490 N.W.2d at 803-04 (citation omitted). Despite defense counsel's multiple direct references to plaintiff's previous claims against others—a topic which the court recognized as likely prejudicial and which directly violated the limine ruling—the court declined to grant a mistrial. *Id.* at 803–04. Here, the alleged misconduct was not as onerous as the conduct deemed non-prejudicial in *Mays.* Crawford's counsel did not directly refer to the workers' compensation benefits received by Myers. To the extent that counsel's actions were misconduct, we cannot say that they were so prejudicial that a different result would have been probable absent the disputed question posed to prospective jurors and the reference that Myers was injured while at work. *See id*. The district court did not abuse its discretion in declining to grant a mistrial.

AFFIRMED.