IN THE COURT OF APPEALS OF IOWA

No. 0-686 / 10-0266
Filed October 20, 2010

TERRY FORBES Individually,
APRIL MARIE FORBES, Individually
and Mother and Natural Guardian of
TAYLOR ELIZABETH FORBES
and JORDYN RAYNA FORBES,
Plaintiffs-Appellants,

vs.

NATIONAL SERVICE COMPANY OF
IOWA, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Terry Forbes appeals from the district court's denial of his motion for a new trial following the jury's verdict finding National Service Company of Iowa, Inc. was not negligent. **AFFIRMED.**

Christopher D. Spaulding and Nicholas L. Shaull of Berg, Rouse, Spaulding & Schmidt, P.L.C., Des Moines, for appellants.

Bernard L. Spaeth Jr., and Kimberly S. Bartosh of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

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

TABOR, J.

An injured worker appeals from the district court's denial of his motion for a new trial following the jury's verdict finding the sanitation service hired to clean at the packing plant where he was employed was not at fault for his injuries. Terry Forbes contends he is entitled to a new trial because National Service Company (National) violated a pretrial ruling on Forbes's motion in limine seeking to exclude evidence concerning fault by Forbes's employer Swift & Company (Swift), common liability between Swift and National, and workers' compensation coverage. Because Forbes fails to provide us with an adequate record of how the district court ruled on his limine motion concerning Swift's fault or shared liability, we affirm the district court's order denying his motion for a new trial. In addition, we conclude Forbes failed to prove he was prejudiced by the jury's fleeting exposure to information that Forbes received workers' compensation benefits.

I. Facts and Procedural History

Forbes worked at Swift for eighteen years. His job at the packing plant involved operating a scald tub and de-hair machines designed to remove the hair from hog carcasses so they would be ready for the kill floor. He covered the early shift on September 18, 2006, punching in at 4:15 a.m. At that time of morning, the production line was yet to start up and the clean-up crew from National was still finishing its duties. Swift contracted with National to sanitize the processing plant.

When Forbes first arrived at his work area, he was walking along a metal catwalk, looking up to check the doors of the de-hair machines. Not realizing a grate had been left open, he fell through, banging his leg against the steel and twisting his right knee. His leg later developed an infection that required him to spend eight days in the hospital. By the time of the trial in November 2009, Forbes had been able to resume his previous duties at the plant, though he testified that his knee still caused him pain.

On August 22, 2008, Forbes[1] filed a petition alleging National was negligent in creating a safety hazard by failing to place the grate over the hole, causing his fall and subsequent injuries. National filed an answer denying the allegations of negligence and pleading as an affirmative defense that Forbes's own negligence was the proximate cause of his injuries. On July 14, 2009, Forbes filed notice of a workers' compensation lien, informing the court that he had been paid workers' compensation benefits by Swift, his employer, and asserting that Swift was entitled to be reimbursed up to the amounts of indemnity and medical benefits paid for the work-related injury, which was the subject of the pending litigation.

The district court set trial for November 17, 2009. On November 12, Forbes filed a motion in limine asking the court to order National not to mention any alleged fault by Swift for his injuries. He asserted: "Any conduct with regard to Swift's investigation or lack thereof, communications with Defendant, or lack thereof are inadmissible because Swift is not a party and also does not share

[1] Forbes's wife and children also sued for loss of consortium. Forbes also amended his petition several times for reasons not relevant to this appeal.

common liability with Defendant." The motion did not specifically refer to the indemnity clause in the independent contractor agreement between Smith and National. The limine motion also asked to exclude the fact Forbes received workers' compensation benefits from his employer.

National resisted the motion in limine, alleging that the extent of Swift's investigation was relevant to whether National was at fault and to the credibility of the anticipated testimony of various witnesses. The resistance further asserted that, given National's contractual obligation to indemnify Swift from any loss it sustains as a result of the negligence of National employees, whether Swift notified National regarding the incident bears on National's liability.

The record we have to review on appeal does not contain any reported argument on the motion in limine. Nor does the record reveal how the district court ruled on the motion. On the first day of trial, Forbes objected to National's opening statement, alleging that its attorney "violated a number of the Judge's rulings with regard to the fact that Swift is not a party in this case." Forbes argued that the district court had "sustained" his motion with regard to common liability and workers' compensation benefits. Forbes moved for a mistrial. National responded that the reason for bringing up the indemnification agreement between Swift and National was to "point out the fact that Swift had motivation to report this accident to National." The district court said it understood the points both parties were making, but noted the jury would have "absolutely no clue what [indemnity] means." The court ruled that it was not going to allow any testimony "about any kind of indemnity agreements or contractual arrangements for these

people because that is going to cross the line." The court overruled Forbes's mistrial motion and declined to give a cautionary instruction.

During the trial, Forbes lodged several relevancy objections to questions concerning the expectation for Swift employees to report safety problems in the plant. The court overruled some of the objections and sustained others. During Forbes's cross-examination, attorneys for National briefly displayed exhibits of two medical records. The first was a surgical consultation with three typed paragraphs, one of which included this sentence: "He saw Dr. Mooney because it was workman's comp." The second was a bill which included several references to "Gallagher Bassett W/C[2] Swifts # 1363651 Filed." Forbes's counsel asked for a bench conference outside the presence of the jury, during which he complained: "I mean how many different times and how many different ways are they going to inject things into this record that the Court has already given a ruling on?" The court responded: "We do need to get these things redacted before we throw them on the board. We did have an agreement and I did make a ruling." National's counsel apologized and explained that the failure to redact the workers' compensation references was inadvertent. Forbes did not ask for a mistrial, but did suggest the possibility of giving the jury a limiting instruction.

On the third day of trial, Forbes's counsel sought another bench conference outside the presence of the jury before the testimony of former Swift plant manager Doug Knowles. The attorney asked the court to prohibit

[2] Gallagher Basset is a management service for workers' compensation claims.

questioning concerning his client's workers' compensation claim and Swift's investigation of Forbes's injury. National's attorneys countered that inquiry about safety violations in the plant was relevant to test the credibility of Swift employees who earlier testified that National employees removed the grate repeatedly and that Swift employees reported it to their supervisors. The district court ruled:

> [T]o the extent you want to challenge the credibility of Mr. Fencl and Mr. Bolden, that's fine, but I'm not going to allow you to do it by interjecting workers' comp investigations . . . . But I think to the extent that if something happens in the plant, especially in the de-hair room and there is property damage, an injury, anything like that that is something that is routinely reported and he had no reports of anybody ever moving that grate, that challenges the testimony of those two individuals. That's fine. But that's it. Nothing past that.

On the fourth day of trial, Forbes's counsel asked for a "clear ruling" whether National could ask a witness about the indemnity agreement between Swift and National:

> I anticipate that [National's attorney] will try to get through [this defense witness] that because Swift would derive some benefit by proving that National Service Company was negligent in this matter, namely indemnity or other type of payment, that therefore NSC must not be negligent. And the fact that Swift had never contacted them about this proves that National Service Company didn't do anything wrong. . . . [T]his is just a way to get in Swift's negligence through the back door . . . .

The district court explained that it understood the parties' opposing theories regarding the admissibility of indemnity evidence, concluding:

> [M]y decision not to let this in has everything to do with weighing how the jury is going to view this. I think if we did not have workers' comp involved in this case, then I would have allowed all of this to be in.

The court went on to say that the prejudice to Forbes from the admission of the indemnity agreement would far outweigh any prejudice to National from its exclusion: "So that's the basis of my ruling and it's not going to change."

At the conference on jury instructions, Forbes requested

> an extremely general limited instruction in terms of the jury not speculating or wondering who needs to be paid back or how much . . . [b]ecause at this point I believe that the jury believes he received workers' compensation benefits but that he doesn't have to pay any back.

The court declined to give an instruction to that effect, saying, "They probably thought that he would get worker's comp as soon as they heard he was a hurt employee . . . that's just the nature of the beast."

The jury returned a verdict finding that National was not at fault. Forbes moved for a new trial, alleging that National had "injected into the record the potential fault of Swift, as well as Mr. Forbes' receipt of workers' compensation benefits." Forbes's motion alleged that National had violated the court's ruling on his motion in limine and that he had been entitled to a mistrial and to a limiting instruction. The district court overruled the motion. Forbes appeals on those grounds.

II. Scope of Review

The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.,* 714 N.W.2d 603, 609 (Iowa 2006). If the motion is based on a discretionary ground, we review it for an abuse of

discretion. *Id.* If, on the other hand, the motion is based on a legal question, our review is on error. *Id*.

Forbes moved for a new trial alleging the admission of irrelevant evidence at trial in violation of the court's ruling on his motion in limine. In this case, we review the district court's denial of the motion for new trial for an abuse of discretion. *See Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) ("We review the court's decision to admit relevant evidence for an abuse of discretion.").

III. Preservation of Error

National urges us to find that Forbes did not preserve error on his claims because the court's ruling on his motion in limine does not appear in the record. It is Forbes's duty as the appellant to provide us with a record on appeal "affirmatively disclosing the error relied upon." *See In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007). Forbes offers no verbatim record of how the court ruled on his motion in limine. At best, he points to his counsel's arguments during the course of the trial interpreting that limine ruling. National disputes Forbes's interpretation of the limine ruling, especially regarding the admissibility of the indemnity clause in the contract between Swift and National. National asserts that the district court

> advised the provision was relevant and could be introduced, not to prove Swift was at fault for Mr. Forbes'[s] accident, but rather for the inference that had such an accident occurred and had National been at fault in causing the same, Swift would have been motivated to inform National.

A court's pretrial ruling on a motion in limine often is not the last word on the admissibility of disputed evidence. *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974). Only if the ruling amounts to "'an unequivocal holding concerning the issue raised'" can its violation constitute reversible error. *Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993) (quoting *State v. Harlow*, 325 N.W.2d 90, 91 (Iowa 1982)). Without a definitive record of how the district court ruled on the motion in limine, we cannot determine whether National violated the ruling by mentioning an indemnity clause in its opening statement or by questioning Swift employees about whether they reported dangerous conditions in the plant.

It is evident from the district court's denial of Forbes's motion for mistrial following National's opening statement, that the court did not consider National's first mention of the indemnity clause to contravene the limine ruling. The court told National that it understood the argument about Swift's motivation to report any injuries, but advised that mention of the indemnity agreement had "bumped up against the line" and cautioned that any additional testimony about indemnity would "cross the line."

As the trial progressed, the district court continued to clarify what kind of questions National could ask concerning Swift's reporting of safety concerns. On the third day of trial, the district court allowed National to test the credibility of Swift employees by asking if complaints had been made about National employees leaving grates uncovered. As late as the fourth day of trial, Forbes's counsel was still asking for a "clear ruling" concerning anticipated testimony on indemnity. These mid-trial clarifications suggest to us that the initial ruling on the

motion in limine did not establish the absolute prohibitions on indemnity evidence suggested by Forbes on appeal. Without a record showing how the district court addressed the motion in limine, we cannot find that Forbes was entitled to a new trial based on National's violation of the district court's pretrial order.

We agree with National that Forbes did not preserve error on his claim that National "injected into the record" evidence "ruled irrelevant by the Court" concerning the potential fault of Swift. Because we do not have a clear picture of what evidence the district court deemed irrelevant in response to Forbes's motion in limine, we are unable to reach the question whether the court abused its discretion in denying the motion for new trial on that basis.

We do think that Forbes preserved error on his claim that National violated the court's limine ruling by revealing that Forbes received workers' compensation benefits. *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (recognizing exception to general error-preservation rules when record indicates that trial court and counsel all understood grounds for motion). When Forbes complained that two exhibits had not been adequately redacted to remove references to workers' compensation, the district court noted: "We did have an agreement and I did make a ruling." National did not question the definitive nature of the ruling on workers' compensation evidence, but rather apologized for the inattention to detail: "It certainly wasn't my intention to put that in front of the jury. I didn't even notice the reference to Gallagher Bassett." Because there is no question that the district court excluded information concerning Forbes's workers' compensation

benefits, we proceed to consider the merits of the new trial motion as it pertains to that evidence.

IV. Analysis of Workers' Compensation Evidence

National recognized its error in not redacting references to workers' compensation benefits from medical-related records before they were shown to the jurors on an overhead projector during the cross examination of Forbes. The question on appeal is whether the brief display of these references influenced the jury.

At issue are two exhibits: (1) Exhibit A, page 12, a consultation summary from Marshalltown Medical & Surgical Center that contains three type-written paragraphs; in the middle of the first paragraph was the sentence: "He saw Dr. Mooney because it was workman's comp.," and (2) Exhibit C1, page 6, a bill to Forbes from Marshalltown Orthopaedics that listed several charges incurred on several dates in 2006 and below three of the descriptions was the notation: "Gallagher Bassett W/C Swifts # 1363651 Filed." National's counsel questioned Forbes about aspects of the consultation summary, but did not draw attention to the disputed sentence. National started to ask Forbes about the bill when Forbes's attorney sought a bench conference. Outside the presence of the jury, Forbes charged that National had reneged on the agreement to redact these documents, and noted that Exhibit C1 was not as egregious as Exhibit A's mention of "workman's comp." Forbes did not move for a mistrial. The court directed National to redact the problematic references from the documents before resuming its cross examination and National did so.

On appeal, the parties wrangle over the impact the exhibits had on the jury. Forbes contends the references predisposed the jurors to believe that Swift, rather than National, was at fault for his injuries. National argues there is no proof in the record that "the inadvertent momentary display" of the exhibits influenced the jury, and even if it did, it "is more logical that such evidence would have influenced the amount of damages awarded, not the fact of fault."

We have no way to know whether the jurors even noticed the workers' compensation references at issue here, much less whether they were influenced by them in reaching their verdict. *Cf. Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 874 (Iowa 1989) (holding appellate courts do not presume prejudice from every mention of liability insurance at trial). The court instructed the jury that only exhibits received by the court constitute evidence to be considered during deliberations. The exhibits received as evidence were properly redacted.

Even if the unredacted references were considered evidence, not every erroneous admission of evidence requires reversal. *Graber*, 616 N.W.2d at 638. Only when a substantial right of the party is affected is reversal warranted. *Id*. We do not believe that Forbes's substantial rights were affected by the jury's fleeting exposure to the unredacted exhibits. We question whether the oblique references to "Gallagher Bassett W/C" would have even raised the specter of workers' compensation benefits for the average juror. Likewise, the sentence—"He saw Dr. Mooney because it was workman's comp."—on a separate exhibit was not so prominent amidst the three-paragraph, type-written consultation notes

that it was likely to have jumped out for the jurors. Even if the jurors noticed the phrase "workman's comp" while National's counsel was discussing another passage in the exhibit, the disputed sentence is not a clear expression that Forbes received benefits.

We also find support for National's position in *Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990). Our supreme court held that the jury in a negligence suit should not be informed that the injured party received workers' compensation benefits because the "only conceivable purpose of informing the jury of those benefits is to invite the jury to reduce [the plaintiff's] recovery because of them." *Schonberger*, 456 N.W.2d at 203. Here, the jury did not misuse the evidence of workers' compensation benefits to reduce Forbes's recovery because it did not reach the question of damages. We are not persuaded by Forbes's contention that these unexplained references to workers' compensation would have influenced the jury to find National was not at fault for his injuries.

We do not believe the district court abused its discretion in denying the motion for new trial on this ground.

AFFIRMED.