IN THE COURT OF APPEALS OF IOWA

No. 0-704 / 09-1738
Filed November 24, 2010

TIM MCCANDLESS, INC., and
SWIETER AIRCRAFT SERVICES, INC.,
Plaintiffs-Appellees,

vs.

GENE YAGLA,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

An attorney appeals from a jury verdict in favor of the plaintiffs in a legal malpractice action. **REVERSED AND REMANDED.**

Robert M. Hogg and Patrick M. Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

William W. Graham of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellees.

Heard by Vogel, P.J., and Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, J.

We must decide whether the district court abused its discretion in admitting evidence in a legal malpractice action that an attorney smelled of alcohol during trial.

I. Background Facts and Proceedings

Attorney Gene Yagla represented Tim McCandless, Inc. and Swieter Aircraft Services, Inc. in a civil lawsuit filed against them. A money judgment was entered against McCandless and Swieter in that lawsuit.

Shortly after the trial ended, Yagla entered a substance abuse treatment facility. Yagla's law partner advised McCandless and Swieter that Yagla was in treatment for alcoholism and asked them whether "he had been drinking during your recent trial." Both told him they smelled alcohol on Yagla's breath.

McCandless and Swieter sued Yagla[1] for legal malpractice arising from his representation in the first trial. The petition alleged Yagla was negligent in failing to use "reasonable professional care, skill and knowledge" in his representation of them.

Prior to trial, Yagla filed a motion in limine, seeking to exclude evidence of his alcohol use during the first trial. The district court denied the motion. The court also did not allow witnesses to opine on whether Yagla was intoxicated during trial and specifically excluded evidence of Yagla's post-trial treatment for alcoholism.

[1] The plaintiffs also sued Yagla's former law firm but withdrew the claim against the firm at the beginning of trial.

In opening statements, and again on cross-examination of Yagla, plaintiffs' counsel asserted Yagla was an alcoholic who relapsed during the underlying trial. Both times defense counsel moved for a mistrial. The motions were denied. Following the denial of the second motion for mistrial, Yagla admitted he consumed alcohol at least once and probably twice during the trial but said it did not affect his handling of the case.

Several witnesses testified to the smell of alcohol on Yagla's breath during the underlying trial. No witness testified that Yagla was intoxicated during the underlying trial or that his alcohol consumption impaired his pre-trial or trial performance.

At the conclusion of the legal malpractice trial, a jury awarded damages in favor of McCandless and Swieter and against Yagla for $72,695.77 and $15,041.44 respectively.

Yagla moved for a judgment notwithstanding the verdict and for new trial. In his motion for new trial, he argued that the district court erred in submitting four of five specifications of negligence. The district court denied the motions and Yagla appealed.

II. Evidentiary Ruling—Alcohol Smell Evidence

Yagla argues the evidence relating to the smell of alcohol on his breath was not relevant and, even if relevant, was unfairly prejudicial. *See* Iowa Rs. Evid. 5.401, .403.

A. Relevance

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 R. Evid. 5.401. "Irrelevant evidence is not admissible." *Graber v. City of Ankeny*, 616 N.W.2d 633, 637 (Iowa 2000); *see also* Iowa R. Evid. 5.402. "The test is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence.'" *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000) (quoting *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988)). Our review of an evidentiary ruling is for an abuse of discretion.[2] *Crookham v. Riley*, 584 N.W.2d 258, 268 (Iowa 1998).

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[2] At least one state court has concluded the proper standard for reviewing relevancy rulings is for errors of law. *See State v. Titus*, 982 P.2d 1133, 1137 (Or. 1999). The court reasoned,

> Relevance determinations under OEC 401 . . . can yield only one correct answer; evidence either is relevant or it is not. Under OEC 401, if evidence logically is relevant, a trial court has no discretion to label it as irrelevant. *See generally* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, 420 (2d ed. 1994) (because determinations of relevance are based upon logic and experience, there is little reason to defer to the trial court). Accordingly, we conclude that we must review determinations of relevance for errors of law.

Our state has not made this distinction. *See* Iowa R. Evid. 5.401 cmt. ("The determination of relevance is for the trial court's discretion"); *see also Shawhan v. Polk County*, 420 N.W.2d 808, 809 (Iowa 1988) ("Issues of relevancy and prejudice are matters normally left to the discretion of the trial court; we reverse the trial court only when we find a clear abuse of that discretion"). Some opinions, however, imply that an "error" rather than "abuse of discretion" standard might apply to the review of relevancy rulings. *See, e.g.*, *Graber*, 616 N.W.2d at 638 ("We review the court's decision to admit *relevant* evidence for an abuse of discretion." (emphasis added)); *McClure*, 613 N.W.2d at 235 (referring to "erroneous" rulings); *State v. Brewer*, 247 N.W.2d 205, 214 (Iowa 1976) (beginning by making determination that evidence was "relevant," then noting the trial court was "obliged to exercise its discretion and determine whether its probative value was outweighed by its prejudicial effect"). As Mueller and Kirkpatrick point out in their analysis of the comparable federal rule,

> The bare question whether evidence satisfies the relevancy standard . . . is much more a matter of logic and experience, and on this point there is less reason to be deferential to the trial judge. In short, the process of appellate review of the bare question of relevancy does not call for the degree of deference usually captured by a reference to the discretion of the trial judge . . . .

Christopher B. Mueller & Laird C. Kirkpatrick, 1 Federal Evidence § 4:3, at 573 (3d ed. 2007).

The jury was instructed the plaintiffs would have to prove several elements to establish legal malpractice, including the following:

> The Defendant, Gene Yagla, was negligent in one or more of the following ways:
> a. failing to designate or offer testimony of expert witnesses;
> b. failing to present available evidence favorable to his clients;
> c. failing to adequately prepare witnesses to testify;
> d. failing to adequately prepare for trial;
> e. allowing otherwise improper evidence to be presented[.]

None of these specifications mentioned alcohol use, intoxication, or impairment as a result of alcohol use.[3] Plaintiffs' counsel nonetheless argued that evidence of the smell of alcohol on Yagla's breath should be admitted because "it is evidence of intoxication." Counsel continued, "[I]t certainly is evidence of negligence in every area where it comes up." And, he asserted, because the defense would urge that Yagla tried the underlying lawsuit just as he had tried every other case, the plaintiffs "ought to be able to counter that position by providing evidence that no, that isn't what was going on here. You tried this case the way you did because you were impaired." Yagla's attorney responded that the plaintiffs

> did not have any witness who could express an opinion that at any point either in this trial or in the preparation for the trial Gene Yagla was impaired by virtue of intoxication. . . . If you don't have any evidence, why should the jury be allowed to speculate, gee, he smelled of alcohol, ergo he was drunk. That's not evidence.

[3] An argument could be made that, under an objective relevancy test such as the one we use, there should be no inquiry into the reason for the breach of a standard of care; the question is simply whether the attorney met the standard of care. *See Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 442 (Tex. App. 2009) (citing *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989)). This argument was not made here.

This discussion between counsel and the court narrowed the argument to the following key question: Could evidence of the smell of alcohol on Yagla's breath be used to prove the specifications of negligence set forth in the jury instructions? In answering yes, the district court reasoned

> there is some limited relevance to the evidence of the smell of alcohol on Mr. Yagla's breath during the course of the trial. I agree it's prejudicial. I do not believe it is necessarily unduly prejudicial, simply because we do have other witnesses . . . who would testify that they did not smell alcohol on Mr. Yagla's breath during the course of his performance.

We are not persuaded there was any relevance to the proffered evidence, limited or otherwise.

The plaintiffs admitted they sought to introduce the evidence of alcohol on Yagla's breath to show he was impaired, yet no witness testified to an impairment as a result of alcohol usage. Indeed, the plaintiffs withdrew the expert witness they had designated to testify to "the significance of an odor of alcohol or alcoholic beverage on a person under circumstances reflected by the evidence in this case and/or hypothetical circumstances." And, the expert they did call stated only that a lawyer who consumed alcohol "to the point where he is under the influence to the extent that he isn't able to competently perform his services for his clients" violates "his duty as a lawyer and his standard of performance and care as a lawyer." These hypothetical facts were not the facts elicited at trial; there was no evidence Yagla was "under the influence" much less that he was incapable of competently performing his services as a result. *See Martinson Mfg. Co. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984) ("Legal malpractice consists of the failure of an attorney to use such skill, prudence and

diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake."); *see also Dessel v. Dessel*, 431 N.W.2d 359, 361 (Iowa 1988) (setting forth elements of legal malpractice claim). Without these additional links, the evidence that Yagla smelled of alcohol had no "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 R. Evid. 5.401; *see also Smith v. Shagnasty's, Inc.*, 688 N.W.2d 67, 72 (Iowa 2004) (stating intoxication can be proven when a person's (1) reason or mental ability has been affected, (2) judgment is impaired, (3) emotions are visibly excited, or (4) bodily actions or motions are out of control).

Our conclusion is bolstered by an opinion the plaintiffs cited in their trial papers. *See Watson ex rel. Watson v. Chapman*, 540 S.E.2d 484, 487 (S.C. Ct. App. 2000). That opinion states:

> The fact that a physician may have been an alcoholic while practicing medicine does not, in and of itself, create a separate issue or claim of negligence; however, it is relevant "when that alcoholism translates into conduct falling below the applicable standard of care."

Watson, 540 S.E.2d at 487 (quoting *Ornelas v. Fry*, 727 P.2d 819, 823 (Ariz. Ct. App. 1986)). Unlike the plaintiffs in *Watson*, who introduced evidence that Dr. Chapman "appeared impaired during and immediately after the delivery," McCandless and Swieter did not present any evidence of impairment. *Id.* at 488. Instead, they left the jury to speculate that the smell of alcohol on Yagla's breath translated into a breach of applicable standards of care. *Cf. id.*; *see also Ornelas*, 727 P.2d at 823 ("[A]ppellants were unable to furnish any evidence that

at the time of the alleged malpractice, Dr. Fry's performance was in any manner impaired because of the use of alcohol.").

Also instructive is *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 444–45 (Tex. App. 2009), a legal malpractice action against attorneys who represented a client in a divorce proceeding. At issue was the trial court's exclusion of evidence relating to an attorney's "purported 'alcohol or substance abuse.'" *Beck*, 284 S.W.3d at 442. Although decided on comparable rule 5.403 prejudice grounds rather than rule 5.401 relevance grounds, the following statement is equally applicable here:

> [A]ppellants come no closer to establishing any relationship between Terry's alleged drinking or drug use and his performance when representing Beck than Beck's testimony about what he termed Terry's 'strange' behavior during the mediation. Without more, the evidence falls short of supporting an inference that Terry's performance when negotiating the Mediated Settlement Agreement was actually impaired by alcohol or drugs. Similarly, even crediting [a witness's] opinions that alcohol and drug addiction can adversely impact a lawyer's judgment, there is nothing linking this general observation to Terry's performance during the settlement negotiations.

Id. at 444–45.

In the absence of evidence showing impairment during Yagla's representation of the plaintiffs, the evidence of alcohol smell on Yagla's breath was irrelevant and its admission amounted to an abuse of discretion. *See Ornelas*, 727 P.2d at 824 ("Appellants were not denied the opportunity to present the evidence of alcoholism to the jury, but rather were only required to lay a reasonable foundation establishing its relevancy before it could be admitted.").

B. Rule 5.403 Prejudice

Our determination that the evidence was irrelevant means we "do not reach the second step of the analysis under rule 5.403, that is, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004). However, assuming for the sake of argument the evidence was marginally relevant to the issue of Yagla's negligence, we have no trouble concluding in the alternative that it was unduly prejudicial in the absence of evidence showing impairment. *See Beck*, 284 S.W.3d at 444–45; *see also Griffin v. McKenney*, 877 So. 2d 425, 438 (Miss. Ct. App. 2003) (holding trial court acted within its discretion in excluding evidence of physician's alcoholism on the ground it would invite the jury "to speculate" the physician acted improperly in treating this patient).

During jury voir dire, two potential jurors expressed negative feelings about alcohol on an attorney's breath. One panel member stated: "If there's a lawyer I'm paying to represent me, I don't think I should smell liquor on his breath. Whether he's drunk or not, I just don't think that fits." Another stated: "I don't want to smell liquor on somebody I'm dealing with either."

As noted, the smell of alcohol on Yagla's breath became a theme of the plaintiffs' trial presentation. In opening statements, plaintiffs' counsel referred to Yagla as an alcoholic who "relapsed during that trial and started drinking again." The plaintiffs' expert opined on a breach of the standard of care based on facts about impairment that did not mirror the facts adduced at trial. During plaintiffs' cross-examination of Yagla, counsel asked,

> [I]n fact you testified in your deposition that your history has been that you will be in remission, I think was the word you used, from alcoholism for a period of time, maybe around a year, maybe longer, maybe shorter, and then you'll relapse. And I asked you whether you knew whether you had been drinking or not at any time during your handling of the . . . case, prior to the trial, and you couldn't recall, isn't that right?

Although the district court denied defense counsel's motion for mistrial based on this question, the court stated the "spirit" if not the "letter" of prior admissibility rulings may have been violated. The court also commented the ruling was a "close call." The court gave the jury a curative instruction, but we agree with defense counsel's statement that "you can't un-ring Big Ben."

In sum, even if the challenged evidence were deemed relevant to a fact of consequence, that evidence was unduly prejudicial, as it generated "overmastering hostility" towards Yagla. *State v. Johnson*, 224 N.W.2d 617, 621 (Iowa 1974).

C. Harmless Error

The admission of irrelevant evidence does not amount to reversible error if the error is harmless. *Sullivan*, 679 N.W.2d at 29. Under this type of prejudice analysis, which differs from a rule 5.403 prejudice analysis, we presume prejudice and reverse unless the record affirmatively establishes otherwise. *Id.* at 30. The record does not affirmatively establish otherwise.

The evidence on the plaintiffs' five specifications of negligence was not overwhelming. *See id.* (noting "the properly admitted evidence was far from overwhelming"). While the plaintiffs' expert testified to breaches in the standard of care, her testimony was offset by defense expert opinions asserting Yagla met the standard of care. One of these experts noted that Yagla minimized the

damage award against his clients in the underlying trial to thirty percent of what was requested. *See Crookham*, 584 N.W.2d at 265–66 ("When the alleged malpractice action rests upon the defendant lawyer's mishandling of a claim or lawsuit, proof of damages necessarily involves analysis of the value of that underlying claim or cause of action.").

Yagla minimized his clients' monetary exposure in the underlying trial without the use of expert witnesses. Concededly, Yagla's failure to call experts in the underlying action was the strongest of the five specifications of negligence, as the plaintiffs presented evidence that he missed the deadline for designating them. However, Yagla testified he preferred not to use experts and the particular experts being considered could have proved harmful to the case. In short, even the evidence on this specification of negligence was not overwhelming.

We conclude the admission of evidence relating to the smell of alcohol on Yagla's breath was not harmless error. While our analysis could end here, Yagla raises a jury instruction issue that may arise on remand. Therefore, we will address his assertion that the district court "erred by instructing the jury on five specifications of negligence."

III. Jury Instructions

To reiterate, the district court instructed the jury on the following specifications of negligence:

> a. failing to designate or offer testimony of expert witnesses;
> b. failing to present available evidence favorable to his clients;
> c. failing to adequately prepare witnesses to testify;
> d. failing to adequately prepare for trial;
> e. allowing otherwise improper evidence to be presented[.]

Yagla asserts these specifications were improper or unsupported by the evidence. Our review is for correction of errors at law. *Banks v. Beckwith*, 762 N.W.2d 149, 151 (Iowa 2009).

1. Failure to designate or offer testimony of expert witnesses. The plaintiffs claimed Yagla should have offered the testimony of two expert witnesses in the underlying trial and should have designated a third witness as an expert. As noted in connection with our harmless error analysis, evidence was presented that Yagla did not call experts because he missed the expert designation deadline, but there was also evidence that Yagla's decision not to call experts was a tactical decision.[4] Because reasonable minds could have drawn different inferences on the reason for the absence of defense experts in the underlying trial, we conclude the district court did not err in instructing the jury on this specification of negligence. *See Crookham*, 584 N.W.2d at 265 ("'Even if the facts are undisputed, if reasonable minds could draw different inferences from the evidence, the case should be submitted to the jury.'" (citation omitted)).

2. Failure to present available evidence favorable to his clients. The plaintiffs' expert identified three pieces of evidence that she believed Yagla should have offered in the underlying action. She asserted these exhibits were not "designated in a timely manner" and, accordingly, "never came into evidence." Additionally, she asserted that at least one of these exhibits would have been presented by a witness who was not allowed to testify as an expert

[4] Yagla testified an expert witness was "like having a pet snake in your back pocket, you don't know who it's going to bite."

because he was not designated. Based on this testimony, we conclude the district court did not err in instructing the jury on this specification of negligence.

3. Failure to adequately prepare witnesses to testify. McCandless and Swieter testified Yagla did not prepare them for their trial testimony. However, Swieter acknowledged that he and Yagla met every morning before trial. Plaintiffs' expert did not speak to this specification of negligence and no witness testified to specific omissions by Yagla in his preparation of witnesses and how those omissions affected the damage award in the underlying action. *See Ruden v. Jenk*, 543 N.W.2d 605, 611 (Iowa 1996) (stating the plaintiff in a legal malpractice action must show the loss would not have occurred but for the attorney's negligence). For these reasons, we conclude the district court erred in instructing the jury on this specification of negligence. *See Koeller v. Reynolds*, 344 N.W.2d 556, 561 (Iowa Ct. App. 1983) (finding expert required where "the lawyer's shortcomings would [not] be plain to laymen without the testimony of those trained in the profession")

4. Failure to adequately prepare for trial. This broad specification of negligence may encompass some of the other specifications but it was not independently supported by an expert opinion. Additionally, Yagla presented evidence that he participated in pretrial depositions, attended experts' inspections of the airplane, corresponded with his clients, and attempted to consult with experts. Indeed, his opposing counsel in the underlying trial testified it was not Yagla's style to come to trial unprepared and he did not do so in that trial. While McCandless and Swieter expressed a general dissatisfaction with Yagla's trial performance, they did not point to any specific trial-preparation

omissions not mentioned in our discussion of other specifications of negligence. Based on this record, we conclude the district court erred in instructing the jury on this specification of negligence. *See Hatfield v. Herz*, 109 F. Supp. 2d 174, 181–82 (S.D.N.Y. 2000) (rejecting plaintiff's vague claim that attorney failed to adequately prepare for trial when attorney presented evidence of his trial preparation, which included correspondence with his client and participation in pretrial proceedings); *see also Mills v. Cooter*, 647 A.2d 1118, 1122 (D.C. 1994) ("An attorney and client may sometimes disagree as to what the attorney should do to protect the client's interest. We do not believe that under such circumstances, the attorney is required or even permitted to disregard his own professional judgment.").

5. Allowing otherwise improper evidence to be presented. The plaintiffs finally claimed Yagla was negligent in opening the door to the introduction of evidence that Swieter's authority to inspect airplanes for the Federal Aviation Administration was suspended. While we question whether Yagla's challenge to this specification of negligence was properly preserved, we elect to bypass this concern and proceed to the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

At trial, plaintiffs' expert testified in detail about this specification of negligence. Based on her testimony, we conclude the district court did not err in instructing the jury on this specification.

IV. Conclusion

We reverse and remand for a new trial. *See Sullivan*, 679 N.W.2d at 31; *Guidichessi v. ADM Milling Co.*, 554 N.W.2d 563, 566 (Iowa Ct. App. 1996). On

remand, the jury shall not be instructed on the third and fourth specifications of negligence: Yagla's failure to adequately prepare witnesses to testify and Yagla's failure to adequately prepare for trial. We find it unnecessary to address any of the remaining issues raised by the parties.

REVERSED AND REMANDED.