IN THE COURT OF APPEALS OF IOWA

No. 0-733 / 09-1852
Filed December 8, 2010

ROBERT J. DOTY,
Plaintiff-Appellant,

vs.

DARWIN OLSON d/b/a RIVER CITY CONSTRUCTION AND STORAGE,
Defendant-Appellee.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

Robert Doty appeals the district court's refusal to instruct the jury concerning negligence arising from alleged OSHA violations and challenges the district court's order taxing him the cost of deposition transcripts and court costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Anthony Bribriesco, Bettendorf, for appellant.

William Bush, Davenport, for appellee.

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

TABOR, J.

Plaintiff Robert Doty seeks a new trial of his personal injury suit, alleging the district court erred in refusing to instruct the jury that defendant Darwin Olson's alleged violation of federal or state Occupational Safety and Health Administration (OSHA or IOSHA) standards was either negligence per se or some evidence of negligence. Because Doty was not Olson's employee, we agree with the district court's determination that he was not entitled to an instruction on per se negligence. And, although we conclude the district court should have instructed the jury that an OSHA violation could be considered as non-conclusive proof of negligence, Doty is not entitled to a new trial because he did not suffer prejudice when the court declined to give the instruction.

Doty also challenges the district court's taxation of costs. Finding the district court erred in taxing the costs of two deposition transcripts to Doty, we reverse and remand for entry of an amended cost assessment.

I. Facts and Procedural History

Olson is a homebuilder and operates a company called River City Construction. Olson contracted with the plumbing company which employed Doty and eventually hired Doty to do plumbing jobs as an independent contractor. Doty installed plumbing for Olson on six different building projects, two of which were still underway in January 2006.

On January 16, 2006, Doty stopped by a housing addition in Camanche where Olson's company was constructing a new home. Doty testified that Olson asked him to visit the site to offer a bid on the plumbing. Olson testified that he

planned to do the plumbing on that project himself and that Doty entered the site without an invitation. While at the construction site, Doty stepped between stud walls and onto a tarp covering the ten-by-three-foot stairway shaft. The insulated tarp had been placed across the shaft by Alvin Cromer, owner of Cromer Masonry, Inc., to prevent the freshly poured concrete from freezing. Doty fell eight to ten feet onto the concrete basement floor, hitting his head and elbow and shattering his heel.

Doty called Olson on his cell phone for help because he did not know the address of the construction site to tell a 911 dispatcher. Olson called 911 and rushed to the site. Fire department rescuers hoisted Doty from the basement with ropes and pulleys because the stairs had not been installed yet. Doty was eventually transported to the University of Iowa Hospital where surgeons repaired his calcaneus fracture with nine screws and a metal plate. Doty underwent a second surgery in April 2007 to remove the plate and screws. After his injury, Doty could not perform the physically demanding work he used to do as a plumber.

Doty filed a petition at law on December 13, 2006, alleging that Olson's negligence in failing to take proper safety precautions at the construction site caused his injuries.[1] The matter went to trial on July 13, 2009. Both sides called expert witnesses to testify regarding OSHA and argued about the relevance of the OSHA standards in their closing arguments. After presentation of the evidence, Doty's attorney requested that the court instruct the jurors that they

[1] Doty settled his claim against Cromer Masonry before trial.

could use Olson's alleged violation of OSHA standards in deciding the question of negligence. The district court declined to give Doty's requested instructions.

On July 20, 2009, the jury returned a verdict awarding Doty $37,500 in damages, including $18,000 in past lost wages; $2000 in past loss of function of the body; $8000 in present value of future loss of function of the body; $3500 in past pain and suffering; and $6000 in future pain and suffering. The jury assessed the percentages of comparative fault as follows: fifteen percent for Olson, thirty-five percent for Cromer, and fifty percent for Doty. The district court entered judgment in the amount of $5625 for Doty. The judgment entry taxed costs to Olson in the amount of $528.58.

Olson applied to recover $4305.07 in costs—including expenses for depositions, exhibits, expert witness, travel, and court costs—pursuant to Iowa Code chapter 677 (2005). The application noted that on June 26, 2009, Olson filed an offer to confess, submitting a settlement amount of $50,000. In response to Olson's application, the district court taxed costs in the amount of $2186.73—including the cost of deposition transcripts, a video deposition, and expert witness fees—to Doty. Court costs were split with Olson ordered to pay $140 for costs incurred before June 26, 2009, and Doty ordered to pay $340 for those incurred after June 26, 2009.

Doty appeals the district court's refusal to instruct the jury concerning negligence arising from alleged OSHA violations and challenges the district court's order taxing him the cost of deposition transcripts and court costs.

II. Standard of Review

We review the district court's refusal to give a requested jury instruction for legal error. *Gamerdinger v. Schaefer*, 603 N.W.2d 590, 595 (Iowa 1999). The court is required to instruct the jury in accord with a party's request if the proposed instruction states a correct rule of law, applies to the facts, and the concept is not embodied in other instructions. *Id*.

We also review the district court's interpretation of chapter 677 for legal error. *Harris v. Olson*, 558 N.W.2d 408, 409 (Iowa 1997). On the question whether the deposition costs are "necessarily incurred" within the meaning of Iowa Rule of Civil Procedure 1.716, we review the district court's determination for an abuse of discretion. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 786 (Iowa 2002).

III. Negligence Instructions Regarding Alleged OSHA Violation

Where employers violate an OSHA or IOSHA standard, the violation is negligence per se as to their employees. *Koll v. Manatt's Transp. Co*., 253 N.W.2d 265, 270 (Iowa 1977). The per se negligence standard is appropriate because "one of the primary purposes of OSHA standards is to protect a certain class of persons, employees, from the kind of harm the standards are designed to prevent: workplace injuries." *Wiersgalla v. Garrett*, 486 N.W.2d 290, 293 (Iowa 1992). An OSHA violation is some "'evidence of negligence as to all persons who are likely to be exposed to injury as a result of the violation.'" *Wiersgalla*, 486 N.W.2d at 293 (citing *Koll*, 253 N.W.2d at 270).

Doty argues the district court erred in rejecting his request to instruct the jury using either Iowa Civil Uniform Jury Instruction Number 700.10[2] or Number 700.11.[3] The first of these uniform instructions would have allowed the jury to find the defendant's conduct was per se negligent based on an OSHA violation. The second requested instruction would have allowed the jury to consider the evidence of an OSHA violation as relevant, but not conclusive proof of negligence.

Olson contends that because Doty was an independent contractor and not Olson's employee, Doty was not entitled to the per se negligence instruction. As for Uniform Instruction Number 700.11, Olson argues that the essence of the instruction was sufficiently embodied in two other instructions the trial court submitted to the jury.

Specifically, Instruction Number 16 advised the jury as follows:

> The plaintiff claims the defendant was at fault by being negligent. The ground of fault has been explained to you in other instructions. The plaintiff must prove all of the following numbered propositions:
>
> A. The defendant was at fault. In order to prove fault, the plaintiff must prove any one or more of the following alternative assertions of negligence:
>
> B. Defendant owner failed in his duty to exercise ordinary care in the maintenance of his premises for the protection of lawful visitors.
>
> C. Defendant failed to keep the premises in a reasonably safe condition for an independent contractor.

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[2] 700.10 Safety Code - Negligence Per Se. (Name of Safety Code) requires (Substance of Safety Code). A violation of this law is negligence.

[3] 700.11 Safety Code/Custom - Evidence Of Negligence. You have received evidence of . . . [applicable safety code provisions]. Conformity with . . . [the provisions of a safety code] is evidence that (name of party) was not negligent and . . . [violations of its provision] is evidence that (name of party) was negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.

> 1. The defendant's fault was a proximate cause of the plaintiff's damage.
> 2. The amount of damage.
>
> If the plaintiff has failed to prove any of these numbered propositions, the plaintiff is not entitled to damages. If the plaintiff has proven all of these propositions, you will consider the defense of comparative fault . . . .

And Instruction Number 18 provided:

> Persons who hire an independent contractor to do work on their property have the duty to exercise reasonable care to keep portions of the property under their control in a reasonably safe condition for the independent contractor.
>
> A failure to do so is negligence.

Olson also points out that the district court allowed evidence concerning his alleged OSHA violation into the record through expert witness testimony and did not restrict Doty's counsel from asserting in his closing argument that the OSHA violation was evidence of Olson's negligence.

As a fallback position, Olson asserts that any error in declining to instruct the jury regarding the legal significance of an alleged OSHA violation was harmless. Olson notes that Doty's requested instructions would have provided the jury guidance only on the question of negligence and the jury, in fact, found Olson negligent. Olson claims the OSHA instructions would not have made any difference to the jury's assessment of comparative fault.

Turning first to Doty's request for Uniform Instruction Number 700.10, we agree with the district court that Doty's status as an independent contractor (rather than an employee) precludes a fact finder from determining that Olson's alleged violation of OSHA or IOSHA standards constituted negligence per se. *See* Iowa Code § 88.4; *see also Wiersgalla*, 486 N.W.2d at 293. Doty suggests

on appeal that "[t]here is a legal question of whether Plaintiff should be treated as an 'employee' of Defendant Olson for purposes of OSHA," but does not provide us with any argument or authority to support the position that a general contractor's violation of OSHA standards would be negligence per se as to an independent contractor. In the absence of any substantive argument on this point, we cannot reach its merits. *See State v. Piper*, 663 N.W.2d 894, 914 (Iowa 2003) (concluding that any consideration of the merits of a claim on appeal presented as a "one-sentence conclusion without analysis" would require the court to "'assume a partisan role and undertake the [party's] research and advocacy,'" which the court declined to do (citation omitted)).

Turning next to Doty's request for Uniform Instruction Number 700.11, we disagree with the district court's decision not to advise the jury that Olson's alleged OSHA violation constituted non-conclusive evidence of negligence. Olson's disregard of a statutory duty, even if the duty was not particularly directed at Doty, could be considered by the trier of fact as a material fact and evidence of negligence. *See Koll*, 235 N.W.2d at 270 (holding "'[a] general statutory duty is ordinarily for the benefit of all persons who are likely to be exposed to injury from its non-observance'" (citation omitted)); *see also Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 237 (Iowa 1974) (holding district court erred in not instructing jury that violation of safety statute was evidence of negligence though not negligence as a matter of law).

We also reject Olson's claim that Instructions 16 and 18 sufficiently embodied the concept communicated by Uniform Instruction Number 700.11. Those instructions concerning Olson's general duty of care toward lawful visitors and independent contractors did not mention the breach of a safety code or provide any guidance to jurors who may have questioned how they should apply testimony concerning potential OSHA or IOSHA violations. The district court erred in not submitting Uniform Instruction 700.11 as requested by Doty.

Still, we do not find that Doty is entitled to a new trial based on his jury instruction claims. Error in refusing to give a jury instruction does not require reversal unless the error is prejudicial. *Gore v. Smith*, 464 N.W.2d 865, 868 (Iowa 1991); *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989). The purpose for submitting Instruction Number 700.11 was to provide guidance to the jury about whether Olson's conduct constituted negligence. In this case, the jury decided that Olson was fifteen percent at fault for Doty's injuries. This verdict signals that the jurors found Olson was negligent even without being instructed that a potential OSHA violation could be viewed as some evidence of his negligence. Moreover, a plain reading of the instruction does not provide any guidance regarding the percentage of fault attributable to the defendant and does not suggest the jury should amplify the percentage of fault borne by defendants who violate OSHA standards. Doty does not assert how Instruction 700.11 would have changed the percent of fault the jury allocated to the various parties. Nor does he show that the jury's allocation of fifty percent of the fault to Doty himself would have been impacted by an instruction that

Olson's duty under OSHA was evidence of Olson's negligence. We are convinced the additional instruction would not have affected the jury's comparison of fault among the parties. *See City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 21 (Iowa 2000).

IV. Deposition and Court Costs

"Court costs are taxable only to the extent provided by statute." *Coker v. Abell-Howe Co*., 491 N.W.2d 143, 151 (Iowa 1992). We strictly construe statutes providing for recovery of costs. *Id*. Under Iowa Code section 677.10, if a plaintiff fails to obtain a judgment for more than the settlement offered by the defendant before trial, "the plaintiff cannot recover costs, but shall pay the defendant's costs from the time of the offer." The taxable costs are limited to those incurred after the time of the defendant's offer to confess judgment. *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230, 232 (Iowa 1984).

The judgment following the verdict shall award only such portion of deposition costs as were "necessarily incurred" for testimony offered and admitted at trial. Iowa R. Civ. P. 1.716; *Long v. Jensen*, 522 N.W.2d 621, 624 (Iowa 1994). Our supreme court has read this rule as requiring the district court to engage in a two-stage analysis: first reaching a factual finding that the deposition was introduced into evidence in whole or in part and second exercising its discretion to decide if all or some of the cost was "necessarily incurred." *EnviroGas, L.P.*, 641 N.W.2d at 786.

Doty contests the district court's November 17, 2009 assessment of Doty for Olson's costs in four different categories: (1) $50.89 for obtaining a copy of

Dr. McKinley's deposition transcript; (2) $1304.34 for obtaining a transcript and video deposition of William Dunlop; (3) $681.50 for the deposition transcript of Doty's expert witness Jerome Skeers; and (4) $340 in "usual court costs." Doty does not challenge the court's taxation of $150 for William Dunlop's expert witness fee. We will address each of Doty's cost claims in turn.

Copy of McKinley deposition transcript. As part of his case in chief, Doty played the videotaped deposition of his treating surgeon, Dr. Todd McKinley. The parties waived reporting of the videotaped deposition. Doty's attorney stated that he could "provide a copy of the record." Both parties assert on appeal that the written deposition was submitted to the court. We conclude that the district court should not have taxed Olson's $50.89 expenditure for a copy of Dr. McKinley's deposition transcript to Doty. "'Allowable costs are limited to the cost of the original of depositions and do not include the expense of duplicate copies obtained for convenience of counsel.'" *Coker*, 491 N.W.2d at 153.

Dunlop videotape deposition. At trial, Olson presented the videotaped deposition of William Dunlop, an expert on OSHA regulations, to the jury. The parties waived reporting of the videotape and Olson submitted a written transcription of the deposition to the court reporter; the deposition transcript was included with the trial exhibits on appeal.

Doty argues he should not be taxed with the cost of the video deposition because only the cost of the written transcript was "necessarily incurred" under Rule 1.716. Olson counters that it was not feasible to bring Dunlop, who lived more than 300 miles away, to Clinton County to deliver live testimony. We find

no abuse of discretion in the district court's decision to tax the cost of the videotaped deposition to Doty. *See Lake v. Schaffnit*, 406 N.W.2d 437, 442 (Iowa 1987) (finding no abuse of discretion in trial court taxing cost of video deposition to unsuccessful party under Iowa Code section 625.3).

Skeers deposition transcript. Doty called Jerome Skeers to testify as an expert on OSHA regulations. Olson claims the district court properly taxed the costs of Skeers's deposition to Doty because Olson's counsel used the deposition to impeach Skeers during cross examination. We reject Olson's claim. Skeers' deposition was not offered and admitted at trial, but instead was referenced for impeachment purposes. A successful party may not recover deposition costs under Rule 1.716 by "mere oral reference" to a witness's deposition during trial. *Long*, 522 N.W.2d at 624; *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa Ct. App. 1994) (finding abuse of discretion for court to tax cost of deposition when used to impeach witness). The district court erred in taxing the $681.50 in deposition transcript cost to Doty.

"Usual court costs." Finally, Doty asserts the district court lacked authority to tax the "usual court costs" incurred after June 26, 2009, to him. We conclude the trial court had authority under Iowa Code sections 625.1 and 677.10 to apportion court costs between Doty and Olson, according to the date on which the costs were incurred. *See Coker*, 491 N.W.2d at 153.

In sum, the district court properly taxed the cost of the Dunlop deposition and a portion of the court costs to Doty, but abused its discretion in taxing the costs of the McKinley and Skeers depositions to Doty. Accordingly, we remand

this matter to the district court for entry of an order instructing the clerk to delete $732.39 ($50.89 + 681.50) from the costs of the action assessed against Doty.

Costs on appeal are taxed equally to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.