IN THE COURT OF APPEALS OF IOWA

No. 1-114 / 10-0439
Filed April 27, 2011

CAROLYN JEAN GARDNER as Executor of the Estate of Homer Gardner, and CAROLYN GARDNER, Individually,
Plaintiffs-Appellants,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY and MELISSA JOAN HEASLEY,
Defendants-Appellees.

Appeal from the Iowa District Court for Wapello County, Joel D. Yates, Judge.

The plaintiffs appeal following a verdict in favor of Nationwide Mutual Insurance on a claim for uninsured motorist benefits. **AFFIRMED.**

Steven Gardner of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellants.

Michael J. Moreland of Harrison, Moreland & Webber, P.C., Ottumwa, for appellees.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

Homer and Carolyn Gardner filed a negligence suit against Melissa Heasley for damages following a motor vehicle collision. The Gardners also brought a cause of action against their auto insurance carrier, Nationwide Mutual Insurance Company (Nationwide), seeking uninsured motorist benefits under their policy. The Gardners appeal following a verdict in favor of Nationwide. They contend a new trial is warranted for two reasons: (1) the court failed to compel disclosure of Heasley's transcribed statement on the final day of trial and (2) the court granted Nationwide's motion in limine seeking to prevent mention of Heasley's statement during cross-examination of its expert witness. Because the district court did not abuse its discretion in denying the Gardners' belated request for production and because they do not show how they were prejudiced, we decline to grant a new trial on the first ground. Because the Gardners failed to preserve error on the claim the court limited their cross-examination, we also decline to grant a new trial on the second ground.

I. Background Facts and Proceedings

On November 11, 2003, vehicles driven by Homer Gardner and Melissa Heasley collided during daylight hours on a gravel road in Wapello County. Heasely was traveling west when she crested a hill and claimed to see Gardner's vehicle in her lane of travel. She recalled attempting to avoid a collision by swerving into Gardner's lane to go around him. At the same time, Gardner swerved back into his own lane. The impact occurred in Gardner's lane.

Gardner was seventy-five years old at the time of the collision. Because he suffered a head injury in the crash, he could not remember how the incident happened. Gardner died on May 28, 2009, before this case came to trial.[1]

The Gardners were insured by Nationwide. On November 21, 2003, Nationwide obtained a recorded statement from Heasley regarding the November 11, 2003, collision. Nationwide provided a transcript of her statement to Jeffrey Peterson, an engineer at Skogen Engineering Group, Inc., hired to prepare an accident analysis. In his January 15, 2004 preliminary report, Peterson states that he reviewed the investigating officer's accident report and six photographs of the scene. The report then notes, "You have also provided us with a copy of the recorded statement of Melissa Heasley which you obtained on November 21, 2003."

On April 8, 2005, the Gardners filed suit against Nationwide[2] for uninsured motorist benefits. On May 19, 2005, Nationwide answered, denying the claim. In their interrogatories, the Gardners asked whether anyone had obtained any oral, written, or recorded statements of Heasley on Nationwide's behalf and sought a verbatim transcript. Nationwide responded on October 19, 2005, that a recorded statement was taken on November 21, 2003, in anticipation of litigation and was privileged. In their request for production of documents, the Gardners sought:

> Copies of all correspondence from Skoggard [sic] Engineering that in any way relate to the claims of the Plaintiffs herein or in any way

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[1] The plaintiffs at trial were Carolyn Gardner, as executor of Homer Gardner's estate, and Carolyn Gardner, individually.

[2] The Gardners also filed suit against Heasley, who counterclaimed seeking damages for Homer Gardner's negligence. On January 21, 2009, Heasley dismissed her counterclaim against Gardner with prejudice.

> relate to any claim of liability concerning Melissa Joan Heasley together with any and all reports prepared by, for or on behalf of Skoggard Engineering with reference to the motor vehicle collision occurring on November 11, 2003, as referred to in paragraph 7 of the Petition at Law filed herein.

In its response on November 3, 2005, Nationwide attached a copy of Peterson's preliminary report.

On March 9, 2006, the Gardners filed a motion to compel discovery seeking a ruling requiring Nationwide to fully answer an interrogatory requesting all correspondence between Nationwide and any designated expert witness. The Gardners filed a supplemental motion to compel the following day, demanding Heasley's November 23, 2003 recorded statement. They asked the court for

> an order finding that the requested documents are relevant to the subject matter of the pending action and not protected by any privilege claimed by Defendant Nationwide and issue an order compelling Defendant Nationwide to comply with Plaintiffs' reasonable discover requests.

Also on March 10, 2006, the Gardners designated Peterson as an expert witness. On March 20, 2006, the district court entered an order cancelling the hearing on the motions to compel, stating it had been informed "the parties resolved the pending discovery issue" and accordingly, "hearing on the motion to compel is no longer necessary." On May 1, 2006, Nationwide designated Peterson as a defense expert witness.

Trial in this matter began on February 9, 2010. Before cross-examining Peterson on the third day of trial, the plaintiffs' counsel asked to listen to the tape-recorded interview with Heasley that Peterson relied on, in part, to form his opinions. Nationwide's counsel objected that the request was untimely because

Gardner had four and one-half years to request the recording. The plaintiffs' attorney then pointed out that Nationwide previously argued the statement was not discoverable because it was privileged work product. The court asked the plaintiffs' attorney if he had filed a motion to compel. He responded that he had not, which appears from the record to have been a misstatement.

The court found the Gardners' request untimely and denied it. Nationwide then moved in limine to prevent any further reference to Heasley's transcribed statement. The court instructed the plaintiff not to "make further mention of the transcript." The plaintiffs' counsel asked that the transcript be made part of the record for appeal purposes. Nationwide's attorney responded by saying: "We'll do our best to comply as part of the request" but that it was Nationwide's position that the transcribed statement did not need to be part of the record. The Gardners' counsel then sought the court's permission to ask expert Peterson what information he relied upon in formulating his report. The court ruled:

> I guess we'll take up whatever question you want to ask. [Nationwide's attorney] will have the opportunity to object at that time, and we'll deal with it at that point.

Nationwide's attorney then inquired whether the court's limine ruling was still in place "in terms of where is the report." The court replied: "That's not changed."

During cross-examination of Peterson, the plaintiffs' attorney confirmed that the expert was provided a transcribed copy of Heasley's November 21, 2003 statement and that the expert had an opportunity to read the transcription. The

attorney did not ask any further questions about Heasley's initial statement to the insurer.

On February 12, 2010, the jury returned a verdict finding Gardner was sixty percent at fault in the collision. No post-trial motions appear in the record. The court entered judgment in favor of Nationwide on February 17, 2010. The plaintiffs filed a notice of appeal on March 10, 2010.

II. Standard of Review

We review a ruling on a motion to compel discovery for an abuse of discretion. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009). A reversal of a discovery ruling is warranted when the grounds underlying a district court order are clearly unreasonable or untenable. *Wells Dairy, Inc. v. Am. Indus. Refrigeration*, *Inc.*, 690 N.W.2d 38, 43 (Iowa 2004). A ruling that is based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion. *Id.* The trial court also has broad discretion in making evidentiary rulings. *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994). We will only disturb its evidentiary rulings upon a finding of abuse of that discretion. *Id.*

III. Analysis

The plaintiffs advance two main arguments with respect to Heasley's November 21, 2003 recorded statement. They claim Nationwide was required to provide them with a copy of the recorded statement in response to their discovery requests and, therefore, the court should have allowed them to review

the statement during the trial. The Gardners also claim they were entitled to cross-examine expert Peterson about the statement.

A. Preservation of Error

1. The failure to file a motion for new trial does not preclude our review of the discovery issue.

Nationwide asserts the Gardners failed to preserve error because they did not file a motion for new trial. Iowa Rule of Civil Procedure 1.004(8) allows an aggrieved party to move for new trial where the party's rights are substantially affected by errors of law occurring in the proceeding. Nationwide claims the Gardners' failure to file a motion for new trial leaves this court with nothing to review, citing *Gorden v. Carey*, 603 N.W.3d 588, 590 (Iowa 1999) ("Without having the benefit of a motion for new trial and a ruling thereon, there is nothing from which we can review the trial court's use of discretion.").

Gorden does not support Nationwide's argument for dismissal of the appeal. The Gardners made a record at trial seeking disclosure of Heasley's interview and transcript. The court denied that request. These measures preserved error on the disclosure question. *See Gorden*, 603 N.W.2d at 589 (holding plaintiff failed to preserve error where no motion for new trial was made *and* plaintiff failed "in any other manner [to] alert the trial court to her concern about the amount of damages awarded"); *see also* Iowa Code § 625A.2 ("An appellate court on appeal may review and reverse any judgment or order of the district court, although no motion for a new trial was made in such court.").

2. The court's ruling on Nationwide's motion in limine was not the final word on permissibility of certain cross examination.

On the other hand, we do not believe that the Gardners preserved error on their claim that the court erred in foreclosing their right to cross-examine Peterson about his reliance on Heasley's statement to the insurer. It is true that the district court granted Nationwide's motion in limine, directing the Gardners not to mention Heasley's statement during Peterson's cross-examination. But the court later clarified that the Gardners could ask the expert about the information he relied upon, Nationwide's attorney would have the opportunity to object to such questions, "and we'll deal with it at that point."

In general, a ruling on a motion in limine does not constitute reversible error. *Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993). The error occurs, if at all, when the matter is presented at trial. *Id.* An exception exists where the limine ruling reaches the ultimate issue and definitively determines the admissibility of the evidence. *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006). This case does not fit the exception. The district court left it up to the Gardners' attorney to "ask whatever question you want to ask" with the expectation that Nationwide could renew its objection and the court would issue a final ruling based on the specific question and objection. The Gardners' attorney asked the expert whether he received Heasley's transcribed statement from Nationwide and whether he had the opportunity to read it. These questions did not draw an objection from Nationwide. Accordingly, the district court did not issue any further rulings regarding the Heasley report. The Gardners' claim that the district

court "refused to allow cross-examination about the recorded statement and its influence on [the expert's] opinions" was not preserved for our review. *See 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."). Accordingly, we decline to address the merits of that issue.

B. Discovery Issue.

The Gardners argue on appeal that Nationwide waived its claim that Heasley's statement was protected by the work product privilege when the insurer disclosed the statement to its accident reconstruction expert. Without addressing whether the requested document remained privileged, the district court denied as untimely the Gardners' request to review the statement on the final day of trial. At oral argument, counsel for Nationwide conceded the document was no longer privileged,[3] but asserted the plaintiffs had a duty to renew their motion to compel discovery of the document.

In general, "a party is entitled to information that is not privileged and that is relevant to the subject matter of the lawsuit." *State ex rel. Miller v. Nat'l Dietary Research, Inc.*, 454 N.W.2d 820, 823 (Iowa 1990). A party is under a duty to supplement or amend its discovery responses with respect to any matter that bears materially on a claim or defense asserted by any party in the action. Iowa R. Civ. P. 1.503(4)(*a*)(3). A party must also amend a prior response if the party knows the response was incorrect when made or that it is no longer true and the

[3] Given the basis of the district court's ruling, we are not required to take a position on the question whether Nationwide waived the work product privilege by disclosing Heasley's statement to its accident reconstruction expert.

circumstances are such that a failure to amend the response is in substance a knowing concealment. Iowa R. Civ. P. 1.503(4)(*b*). The philosophy underlying our discovery rules is that "litigants are entitled to every person's evidence, and the law favors full access to relevant information." *Mediacom Iowa, L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004).

The Gardners contend Nationwide waived the work product privilege protecting Heasely's transcribed statement when the insurer designated the expert who reviewed it as a defense witness, triggering Nationwide's duty to disclose the statement to them. They say it is not incumbent upon plaintiffs to compel discovery where the defendant knows it has no grounds upon which to withhold the evidence. But the issue is more complicated in the present case where the plaintiffs' motion to compel—filed March 9, 2006, and supplemented March 10, 2006—was "resolved" by the parties without the need for a hearing, as memorialized in the court's order on March 20, 2006. The specifics of the parties' resolution do not appear of record, and we cannot speculate that the Gardners maintained any ongoing demand for Heasley's statement.

When the Gardners did renew their request for Heasley's transcribed statement on the final day of trial—having known of its existence for more than four years—we cannot say that the district court abused its broad discretion in declining to compel production. *See State v. Grimme*, 338 N.W.2d 142, 144 (Iowa 1983) (upholding trial court's denial of defendant's belated request to depose State's witnesses and noting that discretion to regulate the exercise of discovery is "very broad"). Because of its proximity to the trial process, the

district court is in a far better position than we are to determine the demands of justice on the question of production of the disputed document. *See id.*

Furthermore, even if the district court did abuse its discretion in refusing to order production of Heasley's statement, the Gardners did not take the steps necessary to show how they were prejudiced by the error. *See Bengford v. Carlem Corp.*, 156 N.W.2d 855, 867 (Iowa 1968) (holding non-prejudicial error is never ground for reversal in an appellate court). The Gardners' counsel did ask for the Heasley transcript to be made part of the record for purposes of the appeal, but did not follow through by seeking a ruling from the court on that proposal after Nationwide's attorney delivered his equivocal response to the request. It was the Gardners' duty to make a record to support their claim that they were prejudiced by the denial of production. *Cf. Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa Ct. App. 1994) (assigning burden of making an offer of proof to the party urging admission of the evidence).

The Gardners argue on appeal that the district court's errors "clearly prejudiced" them in the trial, but they supply no supporting rationale. Any prejudice predicated upon the Gardners' inability to review Heasley's recorded and transcribed statement is speculative at best. Without access to the transcript of the statement, this court has nothing to review.

AFFIRMED.