

IN THE COURT OF APPEALS OF IOWA

No. 1-546 / 10-1364
Filed November 9, 2011

KRISTIE NEAS,
Plaintiff-Appellee,

vs.

**ODUAH DANIEL OSARO, M.D., and
CLINTON URGENT CARE, P.L.C.,**
Defendants-Appellants.

Appeal from the Iowa District Court for Clinton County, David H. Sivright Jr., Judge.

Defendants appeal the district court's ruling excluding evidence of the plaintiff's smoking from the medical malpractice trial. **AFFIRMED.**

Robert V.P. Waterman Jr., and Mikkie R. Schiltz of Lane & Waterman, L.L.P., Davenport, for appellants.

Michael J. Motto of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

SACKETT, C.J.

Defendants, Dr. Oduah Osaro and Clinton Urgent Care P.L.C., appeal from a jury verdict for Kristie Neas in her medical malpractice suit against them. They contend the district court committed reversible error in precluding the admission of evidence of plaintiff Kristie Neas's smoking. They argue the evidence was relevant to the damages Neas claimed and relevant to their ability to impeach Neas and her experts. We affirm.

I. BACKGROUND AND PROCEEDINGS. On April 4, 2007, Jessica Parks, individually and as parent and next of friend of Kristie Neas, a minor, filed a lawsuit against Dr. Osaro and Clinton Urgent Care, claiming they were negligent in failing to meet the applicable medical standard of care in the treatment of Neas's asthma from May 1, 2004, through April 15, 2005, and in their treatment of Neas on April 16, 2005.

Neas had suffered from chronic severe asthma since she was a young child resulting in several hospitalizations. In May of 2004, Neas began treating with Dr. Osaro at Clinton Urgent Care. Dr. Osaro prescribed various medications in an attempt to control Neas's chronic asthma and also treated her several times for asthma exacerbations.

On April 16, 2005, Neas had an asthma exacerbation and her mother took her to the hospital in Clinton where she was admitted by Dr. Osaro. Neas was given medication, but did not improve. Later that day, Dr. Osaro decided Neas needed to be intubated on an emergency basis. He performed the intubation and then transferred Neas by helicopter to the University of Iowa Hospital. Neas

remained intubated for approximately two days and was ultimately discharged home from the University Hospital two days after the intubation tube was removed.

Neas began experiencing breathing difficulty about a month later, and returned to the University of Iowa Hospital, where it was determined she had suffered a complication from the intubation that resulted in the formation of granulation tissue or scar tissue in her airway, which restricted her breathing. Because of the restriction, Neas underwent a tracheostomy, which allowed her to breathe through a tube in her neck. The tracheostomy tube remained in place for about thirteen months as Neas underwent multiple surgeries to remove the scar tissue in her throat. Ultimately, Neas had surgery to remove approximately one and one-half inches of damaged trachea.

The case proceeded to trial on April 26, 2010. The jury found the defendants were not negligent in the treatment of Neas's asthma from May 1, 2004 to April 15, 2005; however, the jury did find the defendants negligent in the intubation of Neas on April 16, 2005. The jury awarded Neas \$250,000 for past pain and suffering, \$250,000 for past loss of function of the body, \$250,000 for the present value of future pain and suffering, and \$250,000 for the present value of future loss of function of the body.

Dr. Osaro and Clinton Urgent Care claim the district court erred in refusing to allow them to introduce evidence Neas smoked tobacco and marijuana. Specifically, the defendants seeks a new trial based on the district court's failure to admit (1) the deposition testimony of Neas's friend, Ermilla Hernandez, who

stated Neas smoked cigarettes and Marlboro Lights were her brand; (2) two civil citations and judgments finding Neas guilty of underage possession of tobacco; (3) the testimony of Officer Blunt who observed Neas smoking and throwing a cigarette from her car window; (4) the video from Officer Blunt's vehicle showing a cigarette being thrown from Neas's window; (5) a report to the court which was filed in Neas's juvenile delinquency case wherein it was reported Neas admitted to using marijuana; and (6) Neas's testimony at trial about whether or not she smoked. The defendants assert this evidence was relevant to the amount and cause of Neas's damages, to impeach Neas, and to undermine her experts.

II. ERROR PRESERVATION. Neas first asserts the defendants failed to preserve error on the issues raised. To preserve error a party must make a specific objection and the trial court must be given an opportunity to rule on the objection and correct any error. *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003). Unless error is properly preserved in the trial court, the issue cannot be raised on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998).

The issue of Neas's smoking was first brought to the court's attention during a pretrial hearing on Neas's third supplemental motion in limine. Neas requested the court exclude, among other things, evidence of her conviction for underage possession of tobacco and possession of marijuana. The court specifically reserved ruling on this motion. *See State v. Harlow*, 325 N.W.2d 90, 91 (Iowa 1982) (stating the general rule is that granting or rejecting of a motion in limine is not reversible error unless an objection is made at the time the evidence

is offered at trial; however, no objection at trial is necessary where the court makes an unequivocal decision on the admission of the evidence at issue). The court did unseal the juvenile court records and requested the parties to address smoking and marijuana use with their experts so the court would know whether smoking would affect Neas's condition. Because the depositions of the experts had been taken before the issue of Neas's smoking arose, the court authorized the parties to take additional depositions during trial as necessary.

When one of Neas's treating physicians, Dr. Smith, was unavailable for a second deposition, the parties emailed questions to him regarding Neas's smoking and marijuana use. The email responses of Dr. Smith stated,

First, will tobacco and/or marijuana use cause damage to Kristie's reconstructed trachea and/or her vocal folds? No. Tobacco and/or marijuana will not cause structural damage to the trachea—tobacco and/or marijuana won't make the stenosis better or worse.

Secondly (and maybe more importantly) was Kristie or her mother specifically advised that these substances would damage her trachea or vocal folds (again, NOT her asthma)? I don't remember telling Kristie not to smoke. I don't think I knew she smoked. I know I didn't talk to her about marijuana.

. . . .

[W]ould smoking tobacco or pot increase the likelihood of Kristie (1) getting sick with bronchitis or other airway disease? Yes—smoke is an irritant and would exacerbate asthma.

(2) causing an inflammation-like effect in the respiratory tract such as redness, swelling, increased mucus production or thickening of the mucus membranes? Yes, smoking could/would cause inflammatory changes to the airway such as redness and increased mucus production. It would not however cause a significant tracheal obstruction. (Smoke typically causes peripheral airway disease—out in the lungs.)

Despite this answer from Dr. Smith, the transcript of the trial does not contain a ruling from the court on whether or not the evidence of Neas's smoking

and/or marijuana use would be admissible. Neas first alleged the lack of error preservation in her proof brief. Once alerted to the issue, the defendants filed a motion for correction of the record under Iowa Rule of Appellate Procedure 6.807.¹ Neas resisted the motion and a hearing was held on March 23, 2011.

At the hearing the court made the following record.

THE COURT: All right. Pursuant to Rule 6.807, the Court does find that there has been an omission from the record. I have a specific recollection of being asked to make a ruling, which had been previously deferred, about the admissibility of the citations Kristie received for underage possession of tobacco and the police video, which apparently—which allegedly showed a cigarette coming out of the driver’s side window of a car that she was operating, as I believe was the testimony, and also the testimony of a friend who said that Kristie smoked after her intubation. All of this was—all of this was after her intubation, as I recall.

I specifically remember being asked by Mr. Waterman—or Mr. Waterman pointed out they needed a ruling on this issue. I believe it was before Kristie was called to the stand.

I don’t remember whether we were in chambers or in the courtroom, and for the life of me, I cannot understand why we would do this without the court reporter present, but apparently, that’s what happened.

But I did rule that the underage possession of tobacco citations, her confessed use of marijuana, and the police video would be more prejudicial than probative, and I agreed with plaintiff that it should be excluded.

I remember Mr. Waterman saying that they wanted to make an offer of proof on that, and I told him he could—that we would

¹ Iowa Rule of Appellate Procedure 6.807 states in part:

If any difference arises as to whether the record truly discloses what occurred in the district court, commission, agency, or other tribunal, the difference shall be submitted to and settled by that court, commission, agency or other tribunal and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation or the district court, commission, agency, or other tribunal, either before or after the record is transmitted to the supreme court, or the appropriate appellate court on proper suggestion or on its own initiative, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted.

arrange to do that at a later time. I have a specific recollection of that happening. And I find that it is an omission from the record that should be, under Rule 6.807, corrected now.

THE COURT: I don't remember. I do specifically remember agreeing with the plaintiff that the underage possession of tobacco citation and confessed experimentation and/or use of marijuana in a juvenile court proceeding would not come in. Okay.

MR. MOTTO: All right.

THE COURT: Hold on a second. I don't remember during that discussion, before Kristie testified, if Emily Hernandez could be asked about Kristie smoking.

MS. SCHILTZ: She testified, your Honor, by deposition. So our reference to offer of proof—she was asked in her deposition. We deferred—

THE COURT: We left that out?

MS. SCHILTZ: We left those out. Three or four questions.

MR. BUSH: That's right.

THE COURT: I would have to rely on the transcript as to whether those objections were ruled upon when that deposition was read or played, because I don't remember that.

THE COURT: But I did exclude any questions to Kristie or any exhibits concerning her smoking or use of marijuana, and I did that because the medical evidence was that it wasn't—it would not exacerbate her airway structural defect. Plaintiff wasn't making any demands—wasn't requesting damages for asthma exacerbation after intubation.

And I specifically put in the instruction the jury was not to consider asthma on the second claim involving intubation. And I did that, I think, because I had kept out the smoking. I remember thinking about that in drafting the instructions—that since we're not talking about smoking, we can't let them consider asthma.

There was a lot of talk about smoking that aggravated asthma. So I specifically put in that instruction that you cannot consider asthma on the claim for damages for the air intubation situation.

THE COURT: Well, I have made my ruling. I'm going to enlarge the record to include my ruling which was omitted. As I remember, it came up before Kristie testified.

It was brought to my attention that we need to rule on this, and I did, on the questions concerning her smoking and marijuana use. And I also said she could not be—if she denied smoking, she could not be impeached with citations she received as a juvenile, or

she couldn't be asked about the marijuana—confessed use of marijuana in the juvenile file.

MR. MOTTO: If she denied smoking?

THE COURT: Well I wasn't going to let them ask her about smoking. I said we're not going to get there, because I thought it was more prejudicial than probative.

Based on the record made by the court, we find the defendants preserved error on the issue of the exclusion of evidence regarding Neas's smoking, except for the testimony of Ermilla Hernandez. The court did not specifically recall making a ruling on the admission of the three or four questions contained in Hernandez's deposition regarding her knowledge of Neas's smoking, and we fail to find any reference in the record that indicates such objection was made and ruled on during the trial.

Neas asserts the district court's ruling was in error because no such ruling on the admissibility of the smoking evidence ever occurred at trial. Thus, Neas claims the court's ruling on defendants' rule 6.807 motion was improper because it added to the trial record something that had not occurred. Neas asserts rule 6.807 is only to be used to correct an error made in the record, not to add to the record. Neas also asserts the defendants' motion was untimely as they waited until after Neas raised the issue in her appellee proof brief to file the rule 6.807 motion.

We find no merit in Neas's arguments. The court's ruling above makes it clear the court remembered ruling on the admissibility of some of the evidence of Neas's smoking and marijuana use. The court was not making an additional record, but was correcting an omission from the record, which is proper under rule 6.807. See Iowa R. App. P. 6.807; *McCleary v. Wirtz*, 222 N.W.2d 409,

415–16 (Iowa 1974). In fact, during the hearing on the motion for correction of the record, Neas’s trial attorney stated he would defer to the court’s memory regarding the ruling on the admissibility of the smoking and marijuana evidence, since he had no memory of the ruling.

In addition, the motion was timely as Neas’s proof brief was the first time the defendants were alerted to the fact Neas intended to challenge error preservation. Rule 6.807 provides the record can be corrected whenever any difference arises as to whether the record truly discloses what occurred, “either before or after the record is transmitted to the supreme court or the appropriate appellate court.” Neas did not raise the issue when the defendants made their offer of proof at trial, or when they filed their post trial motions on the issue.² We find the defendants preserved error on the issue of the admissibility of Neas’s smoking and marijuana use, except the admissibility of the deposition transcript of Ermilla Hernandez. As we find error was properly preserved, we address the merits of the defendants’ appeal.

III. SCOPE OF REVIEW. We review evidentiary rulings made by the district court for abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). “An abuse of discretion occurs when the trial court ‘exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.’” *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005) (citations omitted). The district court is given “wide latitude regarding admissibility” and reversal is only

² In fact in Neas’s resistance to the defendant’s motion for a new trial, Neas asserted the court “acted properly in refusing to admit potential smoking and/or marijuana use.” It is disingenuous for Neas to first acknowledge and support a ruling of the court during the post trial motions, and then on appeal claim no such ruling ever occurred.

required when a party is prejudiced by an unreasonable decision. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 5 (Iowa 2001).

IV. EXCLUSION OF EVIDENCE. If evidence is relevant to a dispute, it is generally admissible at trial. See Iowa R. Evid. 5.402. Relevant evidence is defined as “evidence having 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. However, even relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. Thus, the questions we must address are: (1) is the evidence of Neas’s smoking relevant, and (2) is the probative value of the evidence outweighed by the danger of unfair prejudice. The defendants assert the evidence of Neas’s smoking is relevant to the damages in this case and their ability to impeach the credibility of Neas and her experts.

A. Damages. The defendants first assert the evidence of Neas’s smoking is relevant to their defense of the damages Neas claimed resulted from Dr. Osaro’s negligent intubation. In support of her claim for damages, Neas testified the injury to her trachea changed the quality of her voice to be more raspy and deep, and made her more susceptible to illness because her trachea has been shortened. The defendants claim these injuries could also be caused by smoking. In addition, the defendants argue the evidence of Neas’s smoking was relevant to their affirmative defense that Neas failed to mitigate her damages by not following the doctor’s orders not to smoke. The defendants

argue the jury should have been able to consider whether the damages Neas claimed were due to the trachea injury or due to smoking, and whether Neas increased her damages by failing to quit smoking. We agree.

It is common knowledge that smoking is injurious to one's health.³ Consumers have been flooded with information about the dangers of smoking since 1965 when Congress enacted the Cigarette Labeling and Advertising Act, which required surgeon general warnings to be placed on all tobacco products. See Pub. L. No. 89-92, §4, July 27, 1965, 79 Stat. 283 (codified as amended at 15 U.S.C. §§1331–41 (2006)).⁴ In addition, two of Neas's experts testified smoking would increase the likelihood of Neas getting sick with airway diseases. Dr. Smith stated in his email response that while smoking will not cause damage to the reconstructed trachea, it would increase the likelihood of getting sick with bronchitis and other airway diseases as smoke is an irritant and would exacerbate asthma. He went on to say smoking would cause inflammatory

³ The district court was concerned that the defendants present expert testimony that smoking would negatively affect Neas's reconstructed trachea. However, in *Doe v. Central Iowa Health Systems*, 766 N.W.2d 787, 793 (Iowa 2009), the supreme court stated no expert testimony is needed when the causal connection between the action and the injury is within the knowledge and experience of a normal layperson. Even though we find expert testimony was not necessary to establish smoking is bad for Neas's health, the defendants did offer expert opinions that established smoking was specifically relevant to the damages in this case.

⁴ All packages of cigarettes must contain one of the following labels:
SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.
SURGEON GENERAL'S WARNING: Quitting smoking Now Greatly Reduces Serious Risks to Your Health.
SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth and Low Birth Weight.
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1).

changes in the airway such as redness and increased mucus production. Dr. Bukstein testified that exposure to secondhand smoke will increase the risk of getting sick with airway diseases and illness, and leads to inflammation and swelling. Thus, we find the evidence of Neas's smoking was relevant to the defense of the damages Neas claim resulted from the trachea injury.

In addition, smoking was relevant to the defendants' affirmative defense of failure to mitigate. In order to prove Neas failed to mitigate her damages, the defendants have to prove: (1) there was something the plaintiff could do to mitigate her loss; (2) requiring the plaintiff to do so was reasonable under the circumstances; (3) the plaintiff acted unreasonably in failing to undertake the mitigated activity; and (4) there is a causal connection between the plaintiff's failure to mitigate and her damages. *Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001).

The defendants assert the act of not smoking was the activity that Neas could have done to mitigate her loss, and that it was reasonable to require her not to smoke. The medical records and expert testimony offered at trial established Neas and her mother were told both before and after the trachea injury that Neas should avoid being exposed to secondhand smoke. In addition, Neas was provided patient education during her time at the University of Iowa Hospital that reinforced the importance of not beginning to smoke.

These warnings combined with the common knowledge that smoking is adverse to one's health and the testimony from the experts identified above that smoking is particularly harmful to Neas who has a shortened trachea, made the

evidence of Neas's smoking relevant to the Defendant's claim that Neas failed to mitigate her damages. The evidence of smoking would have a tendency to make the causation of Neas's damages less probable, and thus, was relevant to this case. See Iowa R. Evid. 5.401.

B. Impeachment. The defendants also assert the evidence of Neas's smoking was relevant to impeach her credibility and to undermine the testimony of her doctors. The defendants assert had they been allowed to ask Neas about smoking and had she denied it, they could have impeached her credibility through the use of the underage possession of tobacco citations, the juvenile court record where Neas admitted to using marijuana, Ermilla Hernandez's testimony,⁵ and Officer Blunt's testimony and video.

The difficulty with this argument is that Neas's attorney indicated during the offer of proof she would not have denied smoking but would have admitted to trying cigarettes and marijuana in the distant past, but then discontinued further smoking. Therefore, the underage possession of tobacco citations, the admission of marijuana use in the juvenile court record, and Officer Blunt's testimony and video, would have had no impeachment value.

Assuming for the sake of argument that Neas would have denied smoking consistent with her deposition testimony, where she denied smoking twice, the evidence of marijuana use would have still been inadmissible for impeachment purposes under Iowa Rule of Evidence 5.609(d) as it was obtained from Neas's

⁵ Above we established the defendants failed to preserve error on the issue of the admissibility of Ermilla Hernandez's testimony regarding Neas's smoking. Thus, we will not address its impact on impeaching the credibility of Neas.

juvenile court record.⁶ The evidence of the underage possession of tobacco citations, and Officer Blunt's testimony and video would have been inadmissible for impeachment purposes in light of Iowa Rule of Evidence 5.608(b) which provides, "[s]pecific instances of the conduct of a witness, for the purposes of attacking or supporting the witness's credibility, other than conviction of crime as provided in rule 5.609, may not be proved by extrinsic evidence." Since the tobacco citations and Officer Blunt's testimony and video are extrinsic evidence, rule 5.608(b) prevents their admissibility to attack Neas's credibility.

Finally, the defendants assert the evidence of Neas smoking could have been used to undermine Neas's experts' testimony by demonstrating their incomplete knowledge of Neas's behavioral history. Defendants assert they should have been allowed to cross-examine Neas's experts about how the knowledge of Neas's smoking would have impacted their opinions on causation and damages. They contend they were denied the right to question the experts regarding Neas's exposure to smoke, its risks, and harmful effects.

The record does not support the defendants' contention that they were denied the ability to question Neas's experts about smoking or marijuana use. In fact, the court specifically directed the parties during the hearing on the motions in limine to ask the experts how tobacco and marijuana use would affect Neas's condition with regard to the claims of permanency and failure to mitigate. Later the court granted the defendants' request to supplement Dr. Smith's deposition on the issue of smoking. In addition, defense counsel questioned two of Neas's

⁶ Iowa Rule of Evidence 5.609(d) provides in part, "Evidence of juvenile adjudications is generally not admissible under this rule."

experts during trial about smoking. Nowhere in the record did the court prohibit the defendants from asking Neas's experts about smoking, its risks, or harmful effects.

C. Prejudicial. While we found the evidence of smoking relevant to Neas's damages, this does not end our inquiry. We next have to analyze whether the evidence should be excluded, despite its relevance, because its probative value is substantially outweighed by the danger of unfair prejudice.

Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions of the case is unfairly prejudicial.

Henderson, 696 N.W.2d at 10–11 (internal quotation marks omitted). The district court in this case based its decision to exclude the evidence on its evaluation that the evidence of smoking would be unduly prejudicial. While the underage possession of tobacco citations were civil and not criminal in nature, the citations would still have a tendency to provoke an instinct to punish Neas for this behavior. The same can be said about Officer Blunt's testimony and video and the admission of marijuana use in the juvenile court record.

Determining the balance between the evidence's probative value and the danger of unfair prejudice in this case is a close call. Based on our deferential standard of review, we are not able to say the district court abused its discretion in finding the evidence of smoking more prejudicial than probative. See *Kurth*, 628 N.W.2d at 5 (“[W]e grant the district court wide latitude regarding

admissibility.”). We therefore affirm the district court’s ruling excluding the evidence of Neas’s smoking. While we find the evidence was relevant, we do not find the district court abused its discretion in finding the prejudicial effect substantially outweighed its probative value.

AFFIRMED.