IN THE COURT OF APPEALS OF IOWA

No. 7-836 / 06-1777
Filed January 16, 2008

DAVID E. CHRISTENSEN,
Plaintiff-Appellant,

vs.

CESIA ZELAYA and
DAGOBERTO ZELAYA,
Defendants-Appellees.

Appeal from the Iowa District Court for Marshall County, William J. Pattinson, Judge.

Plaintiff appeals from a judgment in his favor for injuries sustained by him in an automobile accident. **AFFIRMED.**

Theodore Hoglan of Condon & Hoglan Law Firm, Marshalltown, for appellant.

Harry Perkins III and Douglas A. Haag of Patterson Law Firm, L.L.P., Des Moines, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

The plaintiff, David Christensen, sued the defendants, Cesia and Dagoberto Zelaya, for injuries sustained by Christensen in an automobile accident. Because the Zelayas admitted fault prior to the commencement of the trial, the issues at trial were limited to proximate causation and damages. The jury returned a special verdict form in favor of Christensen awarding him $4307.72 in damages, and the district court entered judgment in favor of Christensen. Christensen appeals, claiming error in various evidentiary rulings made by the court and error in the special verdict form submitted to the jury by the court. We affirm.

I. Background Facts and Proceedings.

Christensen was injured in an automobile accident that occurred when Cesia Zelaya ran a stop sign and collided with Christensen's vehicle on May 3, 2002. Christensen sued the Zelayas on May 3, 2004. Prior to the commencement of trial, the Zelayas admitted fault, so the issues at trial were limited to proximate causation and damages. Christensen suffered injuries to his left shoulder, upper back, and upper extremities as a result of the automobile accident.

During trial, Christensen offered several exhibits into evidence that Zelayas' counsel objected to on relevancy grounds. These exhibits included a medical report, marked Exhibit 10; an unpaid bill, marked Exhibit 12; and hospital records, marked Exhibit 19. The trial court sustained Zelayas' objections and ruled Exhibits 10, 12, and 19 were inadmissible.

At the conclusion of trial, the district court submitted a special verdict form to the jury for their determination of damages for medical expenses, physical pain and suffering, and loss of body function from May 3, 2002, to the time of trial, as well as for future lost earning capacity, future pain and suffering, and future lost body function.[1] The jury returned the special verdict form in favor of Christensen, awarding him damages in the total amount of $4307.72. The district court entered judgment on the jury verdict on November 1, 2006.

Christensen has appealed. He contends the district court erred when it failed to admit Exhibits 10, 12, and 19. Christensen also contends his chiropractor should have been permitted to testify as a "lay witness." Finally, he argues the court erred in failing to instruct the jury on his claim for past loss of earnings.

II. Scope and Standards of Review.

Trial courts are granted broad discretion concerning the admissibility of evidence. *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002). Discretion is abused when the court exercises discretion on grounds or for reasons that are clearly untenable. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997). We only reverse a trial court's evidentiary rulings if it abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992).

Additionally, "[w]e review a challenge to the district court's refusal to submit a jury instruction for correction of errors of law." *State v. Ceaser*, 585

[1] The special verdict form also asked for a monetary amount for the repair cost for Christiansen's wristwatch.

N.W.2d 192, 193 (Iowa 1998). In doing so, "[w]e evaluate the alleged instructional error from the perspective that a trial court is generally required to give a requested instruction 'when it states a correct rule of law having application to the facts of the case.'" *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004) (citation omitted).

III. Discussion.

During trial, Christensen offered into evidence an unpaid bill for medical services from Dr. Hatfield of Des Moines Orthopaedic Surgeons, marked Exhibit 12. The Zelayas' counsel objected to the unpaid bill on relevancy grounds, and the district court sustained the objection, ruling the unpaid bill was inadmissible under *Pexa*. *See id*. Christensen contends the court erred in its ruling; we disagree.

As our supreme court explained in *Pexa*, in order for an injured plaintiff to recover the cost of medical care, he must prove the reasonable value of the services rendered. *Id.* at 156. "The reasonable value of medical services can be shown by evidence of the amount paid for such services or through the testimony of a qualified expert witness." *Id.* Thus, the amount charged is not relevant unless that amount was paid or an expert witness has testified to the reasonableness of the charges. *Id.* In this case, there was no evidence presented during trial that the bill from Dr. Hatfield was paid. Nor was there any testimony by a medical expert that the charges were reasonable in terms of amount. Moreover, there was no testimony presented that the services for which Christensen were billed were necessitated by any negligent act attributable to the Zeyalas. *See Stanley v. State*, 197 N.W.2d 599, 606 (Iowa 1972) (stating that

before an award for medical and hospital expenses can be made "the evidence must show they were made necessary by the negligent act of the defendant"). Therefore, we conclude the district court did not abuse its discretion in ruling Exhibit 12 was inadmissible.

Christensen also offered into evidence a medical report prepared by Dr. Hatfield, marked Exhibit 10, and records from the University of Iowa Hospitals and Clinics, marked Exhibit 19. The Zelayas' counsel objected to these exhibits on relevancy grounds and the district court sustained the objections. Christensen contends the court erred in ruling these exhibits were inadmissible. Once again, we disagree.

In order for there to be a recovery of medical expenses Christensen had to show the medical activity within the exhibits was made necessary by the negligent act of the Zeyalas. *Id.* Dr. Hatfield did not testify at trial, nor did any other physician. No physician testified regarding anything having to do with Exhibit 10 or 19. Upon our review of the record, we find there was no evidence presented at trial that tended to prove the medical activity reflected in Exhibits 10 and 19 was made necessary by any negligent act attributable to the Zeyalas. Rather, the record reveals that Christensen had sustained a severe and permanent work-related injury in December 2000, prior to the automobile accident with the Zelayas, and was continuing to be treated and examined for that injury at the same time he was undergoing treatment for his automobile accident-related injuries. Therefore, in the absence of any testimony connecting the medical services discussed in Exhibits 10 and 19 to the automobile accident with the Zeyalas, we conclude the district court did not abuse its discretion in

ruling these exhibits were inadmissible based on relevancy grounds. *See Spahr v. Kriegel*, 617 N.W.2d 914, 916 (Iowa 2000) (stating the district court has wide discretion in the matter of relevancy rulings).

Christensen also claims the district court erred in ruling that his chiropractor, Dr. Fritz, could not testify at trial. The Zelayas contend Christensen failed to preserve error on this issue. After the district court refused to allow the doctor to testify, Christensen had the burden of demonstrating the substance of his proposed testimony by an offer of proof. Iowa R. Evid. 5.103(*a*)(2); *Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa. Ct. App. 1994). Because Christensen made no offer of proof, we agree this issue has not been preserved for appellate review. *Id.*

Even if Christensen had preserved this issue for our review, we find no abuse of discretion in the district court's ruling. On appeal, Christensen contends that because Dr. Fritz was a treating physician and not an expert witness, he should have been allowed to testify as a lay witness pursuant to Iowa Rules of Evidence 5.701. However, in Christensen's answers to the interrogatories, he never listed Dr. Fritz as a witness who had any knowledge of any facts that may be relevant or as a person intended to be called as a witness. Moreover, Christensen never supplemented his answers to identify Dr. Fritz as a potential trial witness as required by Iowa Rule of Civil Procedure 1.503(4). The purpose of rule 1.503(4) "is to avoid surprise and to permit the issues to become both defined and refined before trial." *Hariri v. Morse Rubber Prods. Co.*, 465 N.W.2d 546, 550 (Iowa Ct. App. 1990) (citation omitted).

It was not until the first day of trial that Christensen's counsel decided to call Dr. Fritz as a witness. At trial, Christensen's counsel explained that he assumed Christensen's chiropractor bill, marked Exhibit 13, would be entered into evidence because Zeyalas' counsel did not have any foundational objections. Christensen's counsel explained that after the trial began he realized relevancy would be an issue in admitting the exhibit, so he contacted Dr. Fritz and made arrangements for him to testify at trial later that same day. Zelayas' counsel argued that because Dr. Fritz had not been identified as a potential witness until the first day of trial, to allow him to testify would effectively deprive the Zelayas of their opportunity to take Dr. Fritz's pretrial discovery deposition and/or to prepare in any other meaningful way to present objections and cross-examination. We agree. Because Christensen failed to identify Dr. Fritz as a potential witness prior to trial, we conclude the district court did not abuse its discretion in refusing to let Dr. Fritz testify.

Christensen also contends the district court erred in not allowing Christensen to testify as to the restrictions his doctors gave him. However, Christensen failed to preserve this issue for our review because he did not make an offer of proof as to what those restrictions were. *See Strong*, 523 N.W.2d at 599. Nonetheless, addressing the issue on the merits, we find no abuse of discretion in the court's ruling.

Christensen contends his testimony should have been admitted pursuant to Iowa Rule of Evidence 5.803(4) and (24). We find this claim to be without merit. Iowa Rule of Evidence 5.803(4) is an exception to the hearsay rule that pertains to statements made by a patient to a physician. Therefore, it is not

applicable in this case where statements were made by a physician to the patient. Iowa Rule of Evidence 5.803(24) is also inapplicable in this case. Rule 5.803(24) can only be used as an exception to the hearsay rule when the proponent cannot produce substantially the same evidence in a non-hearsay fashion "through reasonable efforts." In this case, Christensen could have called the doctor who gave him the restrictions as a witness. Moreover, Christensen did not comply with any of the advance notice requirements stated in rule 5.803(24).

Furthermore, because Christensen testified on cross-examination that he had no restrictions in connection with his work and/or non-work activities caused by the automobile accident in this case, we do not believe the exclusion of this hearsay testimony adversely affected any substantial right of Christensen. *See* Iowa R. Evid. 5.103(*a*) (stating "a substantial right of the party" must be affected in order to find the court's evidentiary ruling erroneous).

Finally, on appeal Christensen contends the district court erred in not giving an instruction on "loss of earning capacity" from May 3, 2002, to the time of trial. At trial Christensen requested the court to instruct the jury on his damage claim for "past loss of earnings" and did not raise the issue of loss of earning capacity. Zelayas assert that a "claim for impairment to earning capacity is distinct from a claim for past loss of earnings," and thus, Christensen has not preserved error on the issue of the court's failure to instruct the jury on the loss of earning capacity. Our supreme court has explained that "[t]he measure of damages for loss of earning capacity is 'the difference between the value of an individual's services, if working, as he would have been but for the injury, and the

value of the services of an injured person, if working, in the future.'" *Sallis v. Lamansky*, 420 N.W.2d 795, 798 (Iowa 1988) (citation omitted). The court further stated, "It is the loss of earning capacity that is compensable, not the loss of earnings." *Id.* The court explained that "the loss is to be measured by the impairment of general wage earning capacity, rather than loss of wages for a specific occupation . . . ." *Id.* (citation omitted). Therefore, because Christensen failed to raise a claim for loss of earning capacity at trial, we conclude this issue had not been preserved for our review on appeal. *See Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401-02 (Iowa 1992) (holding an issue not presented to and passed on by the trial court may not be raised on appeal for the first time).

Although Christensen did preserve error in connection with the district court's refusal to instruct the jury on Christensen's damage claim for "past loss of earnings" at trial, he did not address this issue in his brief; therefore, Christensen has waived any error on this issue. *See Shivvers v. Mueller*, 340 N.W.2d 586, 588 (Iowa 1983) ("Trial errors raised on appeal but not addressed in appellant's brief or oral argument are deemed waived.").

However, even if Christensen had not waived this issue on appeal, we find no merit in his claim. The district court must refuse to instruct the jury on "an issue having no substantial evidential support or which rests on speculation." *Greenwood v. Mitchell*, 621 N.W.2d 200, 204 (Iowa 2001) (citation omitted). In this case, there was no evidence in the record that any work or non-work restrictions were placed on Christensen in connection with injuries he received from the automobile accident. However, there was evidence that Christensen received work restrictions and was unable to do "active" work for a period of time

prior to the automobile accident because of a disabling leg injury that occurred while he was working for a trucking company in December 2000.[2] Thus, based on our review of the record, we would conclude the district court did not abuse its discretion in refusing to submit Christensen's requested instruction on past loss of earnings.

IV. Conclusion.

We have reviewed the assignments of error urged by Christensen and have found no basis for reversal. Accordingly, we affirm the district court.

AFFIRMED.

[2] Following his leg injury, Christiansen was unable to work for six months because he had restrictions on his lifting, bending, leaning, walking, sitting, and driving. After six months, he began working half-days; however, he stopped working on January 9, 2002, because his position was eliminated. From January 2002 until the time of the accident with the Zeyalas, Christiansen and his brother worked at a garage they were opening; however, Christiansen was not able to do "any actual work" because he could not "kneel or bend to do anything in a garage."