IN THE COURT OF APPEALS OF IOWA

No. 7-959 / 07-0572
Filed January 30, 2008

PERCY BURT and PHYLLIS BURT,
Plaintiffs-Appellants,

vs.

ROYAL FLUSH SHUTTLE SERVICE, INC.,
and DENNIS LEE GATES,
Defendants-Appellees.

and

Tina Miller,
Defendant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Plaintiffs appeal following a verdict and judgment entry awarding them damages in their personal injury action against defendants. **AFFIRMED.**

David A. O'Brien of Willey, O'Brien, L.C., Cedar Rapids, for appellants.

Brandon Adams, Waterloo, for defendant Tina Miller.

David L. Riley of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellees.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Percy and Phyllis Burt appeal following a verdict and judgment entry awarding them damages in their personal injury action against Royal Flush Shuttle Service, Inc. (Royal Flush), Dennis Lee Gates, and Tina Miller.[1] We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

On a snowy evening in February 2004, Percy was a passenger in a Royal Flush shuttle bus driven by Gates. The bus was bound for a casino in Tama, Iowa, when it was involved in a collision with a vehicle driven by Miller. Miller's vehicle struck the passenger side rear corner of the bus in an uncontrolled intersection. The bus then collided with a tree. The seat Percy was sitting in broke, and a passenger that was sitting behind him fell on top of him.

Percy went to the hospital the night of the accident complaining of pain in his left leg and back. He was treated for a left knee contusion and lumbar strain and released. Shortly after the accident, he was referred to Dr. Arnold E. Delbridge for "left knee difficulties and also back pain." After he started seeing Dr. Delbridge, Percy began to experience swelling in his left knee and his left knee would occasionally "give out" on him. He also continued to have back pain. Percy had arthroscopic surgery on his left knee, and Dr. Delbridge recommended that he undergo surgery to address his back problems.

Percy and his wife, Phyllis, filed a personal injury action against Royal Flush, Gates, and Miller in January 2006, alleging the negligence of the defendants caused the collision and Percy's resulting injuries. The Burts sought

[1] Miller is not a party to this appeal.

damages for bodily injury, medical expenses, and loss of consortium. The case proceeded to trial on March 13, 2006. The jury returned a verdict in favor of the Burts, finding seventy percent of the causal fault was attributable to Miller's negligence while thirty percent of the causal fault was attributable to the negligence of Royal Flush and Gates. The jury assessed Percy Burt's damages at $6943, and did not find Phyllis Burt to have sustained any loss of consortium.

The Burts appeal, claiming the district court abused its discretion in allowing defense counsel to make inadmissible and prejudicial statements to the jury during his opening statement and closing argument. The Burts further claim the court abused its discretion in "instructing the jury they could not use common sense in rendering their verdict." Finally, the Burts claim the court erred in refusing to submit an instruction to the jury.

II. SCOPE AND STANDARDS OF REVIEW.

"The trial court has broad discretion in passing on the propriety of jury argument and we will not reverse unless there has been a clear abuse of such discretion." *Rasmussen v. Thilges*, 174 N.W.2d 384, 391 (Iowa 1970).

We review a challenge to the district court's refusal to submit a jury instruction for correction of errors at law. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004). *But see Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006) ("We review the . . . claim that the trial court should have given the defendant's requested instructions for an abuse of discretion.").

MERITS.

A. Opening Statement.

At the conclusion of defense counsel's opening statement, he stated, "So forgive me for going on and on. There - - We've spent a lot of time with [this case]. We both feel very passionately about our positions." Counsel for the Burts voiced a general objection, and the trial court judge instructed defense counsel, "You can only speak for yourself, . . . you shouldn't express your personal opinion about that; you can't say how [the plaintiffs' attorney] feels." Defense counsel responded, stating, "That's true, I can't. I feel very passionately about - -," at which point the Burts' attorney objected again, asserting "he can't talk about how he feels about the case either." Before the court ruled on the second objection, defense counsel continued, concluding, "If I've gone too long, I apologize. That's all I was leading up to."

The Burts claim the district court abused its discretion in allowing defense counsel to interject his personal beliefs into his opening statement to the jury. They argue defense counsel improperly stated his personal opinion about the case when he claimed he was "passionate" about his position. We reject this assignment of error.

Although "[c]ounsel has no right to . . . interject personal beliefs into argument" or "play to the passions of the jury through . . . interjection of his personal opinion as to the merits of the case," *Rosenberger Enterps., Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995), we do not believe the district court abused its discretion in its ruling on defense counsel's aforementioned statements in this case.

"Ordinarily where a trial court in response to requests promptly admonishes the jury to disregard an improper argument there is not prejudicial error." *Lange v. City of Des Moines*, 404 N.W.2d 585, 587 (Iowa Ct. App. 1987). The district court in this case admonished defense counsel to refrain from expressing his personal opinion about the case after the Burts objected to his remarks. Furthermore, when counsel's statement is viewed in context it appears that, as the defendants assert, he was "simply trying to explain why he spent so much time in opening remarks" rather than improperly attempting to "play to the passions of the jury. . . ." *Rosenberger Enterps.*, 541 N.W.2d at 908 (remanding for new trial where plaintiff's counsel asserted his personal opinion and "inappropriately attempted to influence the jury by references to his personal belief in God and the death of his father"). It is unlikely defense counsel's claim in his opening statement that he was "passionate" about the case caused the jury to decide the issues "on emotion rather than law and fact," *id.*, especially in view of the court's response to the objection. We therefore conclude the district court did not abuse its discretion in this regard.

B. Closing Argument.

During jury selection, the defendants' attorney initiated a discussion with the potential jurors about the Scooter Libby perjury trial, ultimately concluding,

> Well, this is not a perjury trial, folks. We're not charging anybody criminally with lying under oath. But I think over the course of this trial you're going to hear that Mr. Burt said several things under oath that are not true . . . . But you can't send him to jail, you can't fine him, but there are some things you can make of that in this case. . . .

No objection was made to these statements. Counsel for the Burts, however, warned the jury in his opening statement that "[a]s you will learn here at trial, . . . [Percy's] memory is not very good, it's a little confused. . . ."

Throughout his cross-examination of Percy, defense counsel pointed out numerous inconsistencies among Percy's testimony at trial, his deposition, his responses to interrogatories propounded by the defendants, and statements he made to his medical providers. Counsel for the Burts attempted to address Percy's inconsistent statements in his closing argument, stating,

> Mr. Burt, look, he's a 70-year-old man. He has not even an 8th grade education. And if I had to stand up here in this closing argument and tell you folks you need to rely on Percy's recollections and his statements . . . in order to find causation . . . I couldn't do it. . . . He's all over the place.
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> . . . .
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> . . . And [defense counsel] went through this whole dog and pony show about Mr. Burt's not accurately portraying all of his medical injuries and his preexisting condition.
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> . . . .
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> . . . The implication here is that [Percy] is faking this injury, that he's exaggerating, they all but said he's lying. I mean they opened up voir dire by talking about this Scooter Libby trial where the guy was accused of perjury. . . . Well, you know, why wouldn't he just throw in some lost wages if it was exaggerated and faked?

The defendants' attorney responded to these comments in his closing argument as follows:

> My bottom line conclusion here is that Mr. Burt has not been very candid with you or with me or with Dr. Delbridge. This is not a perjury trial, he's not charged with a crime. Perjury is a felony in this state but that's not - -

Counsel for the Burts objected. The district court overruled the objection and allowed defense counsel to continue arguing along somewhat the same lines.

The Burts claim the district court abused its discretion in overruling their objection to defense counsel's aforementioned statements. They argue that

"[c]laiming . . . the Plaintiff in a personal injury case committed felony perjury and really ought to be put in jail is clearly one of those instances where no admonition by the Trial Court could remedy the prejudice inflicted." *See Schroedl v. McTague*, 259 Iowa 627, 644, 145 N.W.2d 48, 58 (1966) (recognizing there are some "matters occasionally put before a jury which are so prejudicial that no admonition can erase them"). We reject this argument for the reasons that follow.

"The scope of closing arguments is not strictly confined, but rests largely with the sound discretion of the trial court." *Lane v. Coe College*, 581 N.W.2d 214, 218 (Iowa Ct. App. 1998). Although "the credibility of witnesses is a proper subject for discussion during closing argument," *id.*, we agree with the Burts that defense counsel's repeated references to the crime of perjury were questionable. *See, e.g., State v. Graves*, 668 N.W.2d 860, 875-76 (Iowa 2003) (holding it is improper for a prosecutor to attempt to "inflame the passions of the jury" by calling the defendant a liar). However, we cannot say the district court abused its discretion in allowing these statements given that the Burts' attorney did not object to defense counsel's initial mention of perjury in the jury selection process. Moreover, in an apparent attempt to rehabilitate his client, counsel for the Burts was the first to mention in closing arguments the questionable statements made by the defendants' attorney during jury selection. *See McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989) ("[A] litigant cannot complain of error which he has invited or to which he has assented.").

We also do not believe that "prejudice resulted or a different result could have been probable but for" the alleged misconduct in argument. *Rasmussen*,

174 N.W.2d at 391. The Burts received a verdict in their favor, and they complain only about the amount of the verdict, which we find not inconsistent with the evidence. We therefore reject this assignment of error.

C. District Court's Statement to the Jury.

We turn next to the Burts' claim that the district court improperly instructed the jury they could not use common sense in rendering their verdict. Their claim arises from a medical record admitted as an exhibit at trial that detailed the treatment Percy received at the hospital the night of the accident. That exhibit also contained "Patient Discharge Instructions," which the defendants used to support their argument that Percy was not seriously injured in the accident. Counsel for the Burts responded to this argument in his closing argument, asserting,

> Well, these are the canned instructions that go out every time somebody comes in with a contusion or back pain. . . . You have people on this jury that have medical expertise. If you have any questions about that, you can ask them.

In reply, the defendants' attorney stated in his closing argument,

> And there is no evidence that this is a canned instruction. And he's asking you to - - to back in the jury room for medical people to start interpreting this and providing evidence to other jurors? You can't do that.

The Burts' attorney objected and argued the jurors "most certainly can use common sense in their experience in the jury room." The district court overruled the objection, stating, "Common sense and experience is not the same as testifying one way or another as an advocate. They're not advocates." The Burts argue on appeal "the jury was left with the impression by the Trial Court

that they could not use common sense and their experience in reviewing the medical records and rendering their verdict."

We do not agree with the Burts' characterization of the district court's ruling on their objection. As the aforementioned portions of the trial transcript make clear, the district court did not improperly "order[ ] the jury to leave their common sense and experiences behind in reviewing the medical records." Instead, the court's ruling correctly reflected the principle that jurors "are not partisans or advocates, but are judges – judges of the facts." *Dorcas v. Aikman*, 259 Iowa 63, 69, 143 N.W.2d 396, 401 (1966). It also appears to have been intended to remind the jury that they were restricted to evidence presented at trial, and could not create evidence in the jury room. Furthermore, the district court instructed the jury at the close of evidence to "[c]onsider the evidence using your observations, common sense and experience." We therefore find no merit to the Burts' claim that the district court improperly instructed the jury they could not use common sense in rendering their verdict.

D. Jury Instruction.

The Burts' final claim is that the district court erred in refusing to submit a proposed jury instruction. They argue the jury should have been allowed to draw a negative inference from the fact that the defendants did not request or obtain an independent medical examination of Percy, as authorized by Iowa Rule of Civil Procedure 1.515.[2] At trial, the Burts submitted the following jury instruction:

> Because the Plaintiff's physical condition has been placed in controversy, the Defendants had the opportunity to have the

[2] Rule 1.515 provides, "When the mental or physical condition . . . of a party, . . . is in controversy, the court . . . may order the party to submit to a physical examination by a health care practitioner. . . ."

> Plaintiff examined by a doctor of their choice. In this case, Defendants chose not to have the Plaintiff examined by a doctor of their choice. You may give this omission as much weight as you think it deserves, considering all of the other evidence in the case.

We do not believe the district court erred in refusing to submit this jury instruction. Neither rule 1.515 nor cases citing the rule authorize a fact finder to draw the requested negative inference. *See Pexa*, 686 N.W.2d at 160 (stating a 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). In addition, although the court did not submit the instruction to the jury, the Burts were allowed to argue "that there [was] no other medical testimony" in the case other than that provided by their expert, Dr. Delbridge. *See Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994) ("[E]rror in refusing to give a requested instruction does not warrant reversal unless it is prejudicial to the party."). We conclude the district court did not err in refusing to give the requested instruction in this case.

III. CONCLUSION.

The district court did not abuse its discretion in overruling the Burts' objections to various statements made by defense counsel during his opening statement and closing argument. There is no merit to the Burts' claim the court improperly instructed the jury they could not use their common sense. We further conclude the court did not err in refusing to submit a jury instruction requested by the Burts. The judgment of the district court is accordingly affirmed.

AFFIRMED.