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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joseph F. Schaefer and LaVonne J. Schaefer, Plaintiffs/Appellants, vs. Souris River Telecommunications Cooperative and Gerald Pettys, Defendants/Appellees.	District Court No. 98-C-568 Supreme Court No. 20000011

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WARD COUNTY, NORTH DAKOTA
THE HONORABLE GARY A. HOLUM

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This case involves a claim by Plaintiffs as a result of a rear-end accident involving Plaintiff, Joseph Schaefer, with whose vehicle Gerald Pettys collided. Pettys is an employee of Souris River Telecommunications Cooperative.

Liability was admitted in the case, so damages were the only issue tried to the court and jury in March, 1999. The jury returned a verdict on March 10, 1999, finding that Plaintiffs had not suffered a serious injury. Subsequently, the action was dismissed, pursuant to that verdict.

Plaintiffs then moved for a new trial, which was denied by the Honorable Gary Holum, District Judge, by Memorandum Opinion dated November 5, 1999, and Order and Judgment dated November 14, 1999.

Subsequently, Plaintiffs appealed to this court.

STATEMENT OF FACTS

On June 1, 1993, Plaintiff, Joseph Schaefer, was a passenger in his own vehicle, when it was struck from the rear by a vehicle driven by Defendant, Gerald Pettys, an employee of SRT Communications, Inc. The vehicle in which Schaefer was riding, a pickup, suffered minor damage. An estimate of repair for $653 was obtained for Schaefers' vehicle. See Plaintiffs' Exhibit 3. Over half of this amount, $350, was for the replacement of the rear bumper.

None of the occupants of either vehicle required hospitalization immediately after the accident, nor any medical attention of any kind. Tr. 164-66. Both vehicles

were driven from the accident scene. Tr. 167. Approximately six weeks after the accident, Joseph Schaefer first received medical attention for back pain allegedly related to the accident of June 1, 1993. Tr. 167. Thereafter, up until the time of trial, Schaefer was seen by doctors less than 10 times for ailments related to back pain. See Plaintiffs' Exhibits 6-10.

Joseph Schaefer had been diagnosed with degenerative joint disease, or degenerative arthritis, in 1980, when he was 53. Over the years, he was prescribed medication for inflammation and pain related to the disease. In 1990, as a result of his degenerative arthritis, he was forced to have complete replacements of both of his knees. He continued to receive medications thereafter for inflammation and pain as a result of the disease.

In January, 1992, Schaefer was in a car accident in which he suffered a compressed vertebrae fracture. The accident with which this case deals took place on June 1, 1993. Schaefer has been involved in four other accidents since then, for which he sought medical care. On June 24, 1994, he fell and injured his tailbone, requiring medical attention. On February 16, 1995, he was involved in an accident in which his horse trailer tipped and he injured his shoulder and neck. On September 22, 1995, he fell on a cement floor, fracturing his ribs. On October 24, 1995, he fell and injured his knee.

In addition to the degenerative arthritis and the injuries suffered in the accidents referred to above, Schaefer also suffers from heart and hernia problems.

Over the years, he has been prescribed medications at various times for pain related to injuries suffered in other accidents, as well as other ailments from which he suffers.

ARGUMENT

I. THE COURT PROPERLY EXCLUDED PLAINTIFFS' EXHIBITS 14 AND 16.

Exhibit 16, offered by Plaintiffs, was a computer printout of all prescriptions sold to Joseph Schaefer by Nilles Drug from January 1, 1993, through November 4, 1998. App. p. 30. Exhibit 14 was purported to be a summary of all prescription drugs prescribed for Joseph Schaefer as a result of injuries allegedly suffered in the accident of June 1, 1993, from the date of the accident to January 18, 1999. App. p. 39. Both of these exhibits were excluded by the trial court for lack of foundation.

Foundation testimony is necessary to identify evidence and connect it with the issue in question. Taylor v. State, 642 P.2d 1294, 1295 (Wyo. 1982). As this court stated in Erdmann v. Thomas, 446 N.W.2d 245, 246 (N.D. 1989): "It is axiomatic that a foundation must be laid establishing the competency, materiality, and relevance of all evidence." (citing Cansler v. Harrington, 643 P.2d 110, 113 (Kan. 1982)). Whether an exhibit should be excluded on the basis of lack of foundation is within the sound discretion of the trial court. Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer, 338 N.W.2d 64, 66 (N.D. 1983).

In this case, Exhibits 14 and 16 were offered through the testimony of LaVonne Schaefer, Joseph Schaefer's wife. Consequently, it is her testimony which must show the competency, materiality, and relevance of the two exhibits to establish a proper foundation for their admission into evidence.

It should be noted that, prior to Mrs. Schaefer's testimony, the medical records of Dr. Richard Geier, Joseph Schaefer's primary treating physician, were offered by the Plaintiffs and admitted into evidence. These records documented all of the times that Dr. Geier had seen Joseph Schaefer going back to the early 1980s and continuing to the date of trial. They also showed on each visit what Dr. Geier had seen Schaefer for and what he had prescribed, if anything, for each ailment. Dr. Geier's records clearly established that he had prescribed various drugs for Schaefer on numerous occasions for matters totally unrelated to the accident of June 1, 1993. However, when Mrs. Schaefer testified, attempting to establish a foundation for Exhibits 14 and 16, the exhibits, which included drugs prescribed for other ailments, were offered as evidence of all medications prescribed for Joseph Schaefer as a result of injuries allegedly suffered in the accident of June 1, 1993. Mrs. Schaefer testified as follows:

Question: (by Bolinske)	Now did Dr. Geier prescribe some medications over the course of time for Joe's condition.
Answer: (by Mrs. Schaefer)	Yes, he did.
Question:	What did he prescribe.
Answer:	Do you mind I have it written down, could I look at the paper, please.
Question:	Sure.
Answer:	He described - -

Mr. Nostdahl: Excuse me, your Honor, I guess I am going to object on the grounds of lack of foundation. What condition are we talking about here.

Mr. Bolinske: The condition resulting, the injuries, neck ache and pain and so forth from the 1993 accident.

The witness: Yes.

Mr. Nostdahl: I have the same objection your Honor. This is not a medical witness here, I don't think she can tell us what he prescribed for what condition.

Mr. Bolinske: She can tell us what he took your Honor and what he went to the doctor for and what he got.

The Court: You can tell us what he took. Overruled to that extent.

Answer: Okay. He took Voltaren, anti-inflammatory medication; Toradal for pain; a Propoxyn for pain; Norflex for muscle spasms, and he also took Diclofenac and that's just another generic name for Voltaren that was prescribed.

Tr. 222-23.

Subsequently, under cross examination, Mrs. Schaefer repudiated her own testimony, admitting that one of the prescriptions referred to in the exhibits, Voltaren, and its generic equivalent, Diclofenac, which made up $1,428.11 of

Schaefer's alleged medical expenses, had actually been prescribed prior to the accident of June 1, 1993, for Mr. Schaefer's arthritic condition:

Question: (by Nostdahl)	Mrs. Schaefer, you testified concerning medical expenses that your husband incurred as a result of the accident of 6-1-93 and part of those medical expenses were prescription drugs that you purchased apparently?
Answer:	Correct.
Question:	You testified that one of the drugs that he had as a result of the accident was something called Voltaren?
Answer:	Voltaren, yes.
Question:	I'm sorry. And subsequently apparently he got another drug that was a generic Voltaren called Diclofenac, is that a correct statement?
Answer:	Correct.
Question:	That's some sort of anti-inflammatory?
Answer:	Right.
Question:	And I believe you also testified that he never took any of these medicines before the accident?
Answer:	Not that I can remember.
Question:	Okay. Would you be surprised if the medical records indicated that he was prescribed Voltaren as early as 1989?

Answer: No, I wouldn't be surprised.

Question: And if in fact the record from Dr. Geier indicates, this exhibit, Plaintiffs' Exhibit 10 indicates, on 1-9-89 that he put him on Voltaren, is that correct?

Answer: Yes, that is correct.

Question: And Voltaren is something that is prescribed for arthritis, isn't it?

Answer: Correct.

Question: Okay. Would it surprise you that he had been on Voltaren continuously from that date until the date of the accident?

Answer: No, that wouldn't surprise me at all.

Question: And he's been on Voltaren or the generic brand of Voltaren since then as well?

Answer: Yes, yes, he has.

Tr. 257-58.

Later, under redirect by her attorney, Mrs. Schaefer further admitted that her husband took Voltaren for arthritis in his knees, a condition which he had for many years prior to the accident:

Question: (by Bolinske) What was Voltaren taken for in 1989?

Answer: For his arthritis.

Question: In his, what part of his bod.

Answer: I imagine it would be his knees, because that is where he had the most problems.

Tr. 273.

Consequently, since Mrs. Schaefer's testimony, and Exhibits 14 and 16, which were offered through her testimony, were clearly contradicted by Joseph Schaefer's medical records, the trial court properly concluded that the foundation for these two exhibits was not credible and refused to admit them. Clearly, the evidence did not meet the competency and materiality requirements for foundation, as set forth by this court in Erdmann.

The foundation for Exhibits 14 and 16 was also objectionable because the person offering the exhibits, Mrs. Schaefer, was not properly qualified to establish the foundation. Schaefers maintain that expert testimony is not required to establish the foundation of admission of medical bills. With that premise, we do not argue. In cases dealing with this issue, this court has allowed the foundation for such evidence to be established by the injured party. See Erdmann 446 N.W.2d at 247 and Tuhy v. Schlabsz, 1998 ND 31, 574 N.W.2d 823. However, this court has not upheld the establishment of foundation for medical bills by any non-expert other than the claimant.

Indeed, if this testimony is allowed to establish foundation for medical bills, then it raises two issues. First, exactly where will the line be drawn with regard to nonexpert testimony to establish foundation for such evidence? Second, how can

a Defendant effectively cross-examine such testimony? The answer to the second question is that the Defendant cannot, and he essentially assumes the burden of proving what medical bills are not related to the injuries suffered in the accident.

Thus, Exhibits 14 and 16 were both incompetent and not offered through an appropriate witness. Therefore, the exhibits were properly excluded and the court did not abuse its discretion in refusing to allow their admission.

II. DEFENDANTS DID NOT STIPULATE TO FOUNDATION OF EXHIBITS 16 AND 14.

At the pretrial of this case, which was held on August 31, 1998, the following colloquy took place:

The Court: Do you anticipate that we will need another conference before trial or not?

Mr. Bolinske: Your Honor, I really don't. I certainly don't object to any medical records or other exhibits that I expect Mr. Nostdahl to have.

The Court: Okay.

Mr. Bolinske: And, you know, there is really nothing surprising, I don't think, that he's not already got. We've informally in fact exchanged documents that the other didn't have so I don't see any problem in that regard. I would like, I guess, there to be an understanding with respect to

foundation so that if, to avoid misunderstandings, I guess.

The Court: And in that line what do you have in mind.

Mr. Bolinske: Your Honor, as I say I'm fully willing to stipulate to the foundation of any documents that Mr. Nostdahl has in return for a reciprocal agreement.

The Court: Mr. Nostdahl.

Mr. Nostdahl: I see know problem with it.

The Court: Okay. Good. Thank you, gentlemen, that helps, that will speed things up once we get to trial.

Mr. Nostdahl: I guess with one condition, I don't know about any documents. Certainly medical documents I am not going to require the medical records librarian to be there.

Tr. of Pretrial p. 6-7, App. p. 61.

Exhibits 14 and 16 did not exist at the time of the pretrial, so Defendants had no knowledge of them. As set forth in the discussion at pretrial, Defendants had no intention of stipulating to documents of which they had no knowledge. Further, the stipulation that they agreed to was only with regard to medical records, that is, records made by medical institutions. There would be no effort to make things more difficult by requiring a records librarian to establish their foundation. That was the extent of the stipulation.

It must be pointed out to the court that Defendants made many efforts to attempt to determine the amount of Joseph Schaefer's medical expenses. Prior to the pretrial, Plaintiffs, in answer to an Interrogatory asking the amount of their medical expenses, simply replied that the total cost of medical services was unknown and constantly changing. Plaintiffs attached a medical records release so that Defendants could obtain the information. See Affidavit of Jim Nostdahl. App. p. 81.

Thereafter, Defendants inquired of Plaintiff's medical insurer, Blue Cross/Blue Shield as to what expenses it had paid and the response was it had paid none. Subsequently, Defendants obtained the no-fault expense ledger from Plaintiffs' automobile insurer and it showed medical expenses related to the accident of June 1, 1993, to be $536. See Exhibit 3 attached to Affidavit of Jim Nostdahl at App. p. 81.

Thereafter, Defendants wrote to Plaintiffs' counsel advising of the responses it received from Blue Cross/Blue Shield and the no-fault insurer and also advising that there was only $536 shown on the no-fault ledger. See Exhibit 2 of Affidavit of Jim Nostdahl, App. p. 81. Defendants further inquired of Plaintiffs' counsel in this letter of November 25, 1997, if he was aware of any further medical expenses. No response was ever received to that letter. App. p. 82.

Consequently, at the time of pretrial, there is no way that Plaintiffs could have known of any medical expenses in excess of $536, since their own investigation and inquiries to Plaintiffs uncovered only that amount. Therefore, there can be no

interpretation of any statement at the pretrial that Defendants were stipulating to a document whose existence was unknown, or to medical expenses whose amount was unknown.

Plaintiffs also point to an alleged stipulation just prior to the start of the trial. That conversation went as follows:

The Court:	Okay. Motion denied. Anything further.
Mr. Nostdahl:	Not from the defense your Honor.
Mr. Bolinske:	We have nothing, your Honor. Oh, unless - - Mr. Nostdahl and I did agree, your Honor, at the pretrial and again just before the recess to stipulate to the foundation of any medical records of the other party.
The Court:	Okay. Mr. Nostdahl, agreeable to you, sir.
Mr. Nostdahl:	That is correct your Honor.

Tr. 29.

Again, that was an agreement to a stipulation as to foundation of medical records. Medical records, refer to records kept by a clinic, a hospital, or some other medical institution, not exhibits compiled by Plaintiffs, their attorney, or billing records from their pharmacist.

Therefore, there was no stipulation to the foundation on Exhibits 14 and 16 at trial or before.

III. DEFENDANTS DID NOT ABUSE THE DISCOVERY PROCESS AND ANY OVERSIGHT DID NOT PREJUDICE PLAINTIFFS IN ANY WAY.

After Plaintiffs made their allegation in their motion for new trial concerning a document being read by Defendant, Gerald Pettys, at trial, Defendants reviewed their file and found a one paragraph statement by Gerald Pettys to his employer as to how the accident happened. Through an oversight, this document had not been given to Plaintiffs in Defendants answers to interrogatories. However, liability in this case was admitted; the only issue was whether the Schaefers met the no fault threshold and if so, what their damages were. While Defendants regret the oversight in not producing this particular document, there was no prejudice to Plaintiffs, since it had nothing to do with their damage claim.

IV. THE TRIAL COURT'S HANDLING OF READING DEPOSITIONS INTO EVIDENCE WAS APPROPRIATE.

The North Dakota Supreme Court has held that the trial judge has discretion as to how a trial shall be conducted and he is allowed great latitude and discretion in deciding that. Except for the abuse of that discretion, his conduct of the trial will not be grounds for reversal. Ward v. Shipp, 340 N.W.2d 14 (N.D. 1983).

The way the court allowed the depositions of Dr. Geier and Dr. Monasky to be read into evidence, with the person who actually asked the question at the deposition reading his part, was the most logical way to handle it. Anything else would have been misleading to the jury. Clearly, the court did not abuse its

discretion in this case and the reading into evidence of the depositions of Drs. Geier and Monasky was done appropriately.

Plaintiffs refer to a "sharp practice" by Defendants' attorney in reading the deposition of Dr. Geier into evidence and alleges that Defendants' attorney actually read it differently than the transcript. Defendants deny that this happened. However, if indeed that had happened, then Plaintiffs' attorney should have objected and asked the judge for an admonishment as well as for the judge to read the transcript the way it was typed up. No such objection or request was ever made by Plaintiffs. Consequently, Plaintiffs should not be heard to make any objection now or cite it as a reason for requesting a new trial.

CONCLUSION

Plaintiffs have shown no legitimate reasons for granting them a new trial. Therefore, their appeal should be dismissed.

Dated this 30 day of June, 2000.

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BY _____

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing BRIEF OF APPELLEES was mailed on the 30 day of June, 2000, to the following:

Robert Bolinske
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Bismarck, ND 58501

Jim Nostdahl