

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-13-726

CHRISTINA REED

APPELLANT

V.

CYNTHIA MARIE ADAMEC

APPELLEE

Opinion Delivered MARCH 12, 2014

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DISTRICT
[NO. CV-12-183]

HONORABLE J. MICHAEL
FITZHUGH, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Christina Reed and Cynthia Adamec were involved in a vehicle collision on April 7, 2011. Reed was stopped at a red light, and then, according to her, when the light turned green, she proceeded into the intersection and was hit by a car driven by Adamec. Reed filed a complaint against Adamec on February 16, 2012, alleging that Adamec was negligent in causing the collision and that as a proximate result of the collision, Reed sustained personal injuries that have caused her to incur medical expenses and suffer physical and mental pain and anguish. She submitted medical bills totaling approximately \$5,000. The case was tried to a jury, which found in favor of Reed but awarded damages totaling only \$227, which included \$68 for the “value of the nature, extent, duration and permanency, if any, of the injury” and \$159 for “medical bills,” an amount that matched the bill Reed received for her visit to a walk-in clinic on the day of the vehicle collision. Judgment was entered on April

29, 2013, and on May 8, 2013, Reed filed a motion for new trial. In her motion, she contended that the jury had failed to properly assess damages, and in addition, she argued that Adamec had injected evidence into the trial that violated Reed's attorney-client privilege; that the trial court erred both in allowing a comparative-fault instruction and denying her directed-verdict motion regarding comparative fault; and that the trial court erred in refusing to instruct the jury that medical testimony was not required regarding injuries when the person responsible for medical bills is present to testify. On May 13, 2013, an amended judgment was entered to add the award costs of \$175.30. On May 21, 2013, the trial court entered its order denying Reed's motion for new trial. On June 5, 2013, she filed her notice of appeal from the denial of her request for a new trial.

In this appeal, Reed contends that 1) the trial court erred by allowing Adamec to introduce evidence that was protected by the attorney-client privilege; 2) the trial court erred by denying Reed's proffered jury instruction; and 3) the trial court erred in denying Reed's motion for directed verdict on Adamec's comparative-fault claim. We affirm.

I. Attorney-Client Privilege

For her first point of appeal, Reed contends that the trial court erred by allowing Adamec to introduce evidence that was protected by the attorney-client privilege. We disagree.

The "communication" at issue deals with Adamec's references to Reed's attorney being the one who referred her to the physical therapist for treatment, *i.e.*, that it was not a doctor referral. Reed contends that the trial court erred in not prohibiting Adamec's counsel

from making references to that referral because it was protected by the attorney-client privilege. We find no error under the circumstances presented in this case.

Rule 502 of the Arkansas Rules of Evidence provides in pertinent part:

(5) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications [communications] made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer’s representative, (2) between his lawyer and the lawyer’s representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

Here, it is unnecessary for us to decide whether the privilege actually attached to this “communication” because, even if it did, Reed clearly waived it. As noted by appellee, first, when asked about the referral in deposition, Reed did not raise the attorney-client privilege, claiming instead not to be able to remember; and in discovery, the physical therapist’s records—disclosing that the referral was made by Reed’s counsel—were produced with no objection based on privilege raised and no request to redact the records.

Reed’s further reliance upon a Rule 403 balancing test also does not convince us that

this evidence should have been excluded. A trial court may exclude evidence, although relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. Our standard of review on appeal is whether the trial court manifestly abused its discretion in allowing the evidence. *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999). In the absence of abuse of discretion, we will not reverse. *Id.* As explained at the outset, even if the information were privileged, something we need not decide here, Reed waived that privilege. Under these circumstances, the trial court did not abuse its considerable discretion in this regard.

II. Proffered Jury Instruction

Next, Reed contends that the trial court erred by denying her proffered jury instruction regarding Arkansas Code Annotated section 16-46-107. We disagree.

Arkansas Code Annotated section 16-46-107 provides:

16-46-107. Identification of medical bills at trial.

(a) Upon the trial of any civil case involving injury, disease, or disability, the patient, a member of his family, or any other person responsible for the care of the patient shall be a competent witness to identify doctor bills, hospital bills, ambulance service bills, drug bills, and similar bills for expenses incurred in the treatment of the patient upon a showing by the witness that such bills were received from a licensed practicing physician, hospital, ambulance service, pharmacy, drug store, or supplier of therapeutic or orthopedic devices, and that such expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial.

(b) Such items of evidence need not be identified by the person who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary.

Reed proffered an instruction that incorporated the above statute within AMI 601 (Statute, Ordinance, or Regulation as Evidence), and it was rejected by the trial court. We find no

error in that rejection.

Reed argues that throughout the trial, Adamec's counsel called attention to the fact that Reed did not have a medical doctor testifying about causation of her injuries and that Adamec at least implied that the jury should not award the physical therapist's charges because Reed's attorney was the one who made the referral. We agree with Reed that a party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support it, *see, e.g., Casteel v. State Farm Mut. Auto. Ins. Co.*, 66 Ark. App. 220, 989 S.W.2d 547 (1999), but we do not agree that the trial court erred in refusing her proffered instruction under the circumstances of this case.

The quoted statute is concerned with which witnesses are competent to identify medical bills and the foundation that must be laid before such bills are admissible. Here, Reed's medical bills were admitted into evidence. That decision had been made before the case went to the jury. Thus, the statute simply had no relevance to the issues that would be before the jury. Allowing AMI 601, modified to include the above statute, would have been more confusing than helpful to the jury in this case.

III. Comparative Fault

For her final point of appeal, Reed contends that the trial court erred in denying her motion for directed verdict on Adamec's assertion of comparative fault. The gist of Reed's argument is that there was no evidence that she did anything wrong, and therefore giving the jury an instruction on comparative fault was error. We disagree.

In determining whether a directed verdict should have been granted, we review the

evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Buckalew v. Arvest Trust Co.*, 2013 Ark. App. 28, 425 S.W.3d 819. Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented. *Id.*

As noted by Adamec, the jury was instructed with AMI 907, which provides in pertinent part that “[a] driver approaching a green light has a right to assume, until the contrary is or reasonably should be apparent, that another driver will obey a red light and acting on that assumption she is not required to slow down or bring her vehicle under such control as to be able to stop in order to avoid a collision.”

Reed’s assessment of the evidence before the trial court is not entirely accurate because, here, aside from the fact that the jury was not required to believe Reed’s testimony that she did not enter the intersection until her light turned green, there was also evidence that the jury could have considered which undermined the “green light” assumption within AMI 907. That is, evidence was presented that Adamec’s vehicle crossed through four of the five lanes in the intersection before the collision occurred; Reed acknowledged at trial that her vision was obstructed in that direction because of other vehicles at the intersection; and she acknowledged that she continued to enter the intersection even after other vehicles moved forward but then stopped. Under these facts, the trial court saw comparative fault as a fact question for the jury. We agree. We find no error in the trial court denying the directed-verdict motion on the issue of comparative fault and instructing the jury on it.

Cite as 2014 Ark. App. 170

Affirmed.

WALMSLEY and GRUBER, JJ., agree.

Milligan Law Offices, by: *Phillip J. Milligan*, for appellant.

Hardin, Jesson & Terry, PLC, by: *C. Ryan Norton*, for appellee.