241 Neb. 482

[1482]Patrick M. SHAHAN, Appellant,

v.

Janet HILKER, Appellee.

No. S-89-1300.

Supreme Court of Nebraska.

Sept. 11, 1992.

Motorcycle operator brought action against automobile operator arising out of no-contact accident between automobile and motorcycle. Following a jury trial, the District Court for Buffalo County, Dewayne Wolf, J., entered award of $5,000 in favor of the motorcycle operator. Motorcycle operator appealed. The Supreme Court, Fahrnbruch, J., held that: (1) trial court should have permitted jury to consider evidence as to whether injury and damages plaintiff received in fall occurring subsequent to motorcycle-automobile accident were approximate result of defendant's negligence, and (2) trial court on remand was required to determine whether motorcycle operator's policy required insurer to defend operator through its attorney and as to whether statement given to adjuster was intended for information or assistance of attorney in defending her, for purposes of determining whether statement which operator gave to insurance adjuster was discoverable by operator of automobile.

Reversed and remanded with directions.

1. Appeal and Error ⇐930(1)

In reviewing a law action, court considers evidence most favorably to successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from evidence.

2. Evidence ⇐571(9)

For medical testimony to be basis for an award, it must be sufficiently definite and certain that conclusion can be drawn that there was causal connection between accident and disability.

3. Evidence ⇐555.10

Medical expert's testimony in accident case need not be couched in words "reasonable degree of medical certainty" or "reasonable probability."

4. Damages ⇐185(1)

Evidence, based upon testimony of motorcycle operator's doctor, was sufficient to support finding that there was causal connection between motorcycle operator's June 15 accident and the operator's June 30 fall, where the doctor indicated that side effects of two medications taken by operator for the June 15 motorcycle accident might have caused lightheadedness, dizziness, or drowsiness and that he might have lost his balance because of the medication.

5. Damages ⇐34

Tort-feasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is proximate result of original injury, except where subsequent injury or reinjury was caused by either negligence of injured person, or by an independent or intervening act of injured person, or by an independent or intervening act of third person.

6. Negligence ⇐62(1)

An "efficient intervening cause" is a new and independent act, itself a proximate cause of an injury, which breaks causal connection between original wrong and the injury.

See publication Words and Phrases for other judicial constructions and definitions.

7. Damages ⇐168(2)

Motorcycle operator should have been allowed to present evidence to jury regarding causation of his fall down stairs 15 days after motorcycle-automobile accident in operator's action against automobile operator; there was sufficient evidence to support finding that there was causal connection between the accident and the fall.

8. Negligence ⇐136(25)

Determination of causation is, ordinarily, matter for trier of fact.

9. Pretrial Procedure ⇐31, 33

Parties may obtain discovery regarding any matter, not privileged, which is relevant to subject matter involved in pending action. Sup.Ct.Rules, Discovery Rule 26(b)(1).

10. Pretrial Procedure ⇐37, 381
Witnesses ⇐204(2)

Insurance report or other communication made by an insured to his liability insurer, concerning an event which may be made basis of claim against him covered by policy, is privileged communication, as being between attorney and client, if policy requires company to defend him through its attorney, and communication is intended for information or assistance of attorney in so defending him; burden is on party opposing discovery to show that the material sought is privileged. Sup.Ct.Rules, Discovery Rule 26(b)(1).

11. Appeal and Error ⇐1178(6)

Trial court on remand was required to determine whether motorcycle operator's policy required insurer to defend operator through its attorney and as to whether statement given to adjuster was intended for information or assistance of attorney in defending her, for purposes of determining whether statement which operator gave to insurance adjuster was discoverable by operator of automobile. Sup.Ct.Rules, Discovery Rule 26(b)(1).

Syllabus by the Court

1. **Actions: Appeal and Error.** In reviewing a law action, the court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.

2. **Evidence: Expert Witnesses.** For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between an accident and a disability.

3. **Expert Witnesses.** A medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty" or "reasonable probability."

4. **Torts: Negligence: Proximate Cause.** A tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.

5. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which
[483] breaks the causal connection between the original wrong and the injury.

6. **Trial: Negligence.** Determination of causation is, ordinarily, a matter for the trier of fact.

7. **Parties: Actions.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

8. **Insurance: Attorney and Client: Proof.** A report or other communication made by an insured to his liability insurance company concerning an event which may be made the basis of a claim against him covered by the liability policy is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him. The burden is on the party opposing discovery to show that the material sought is privileged.

Siegfried H. Brauer, III, of Ross, Schroeder & Brauer, Kearney, for appellant.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., Kearney, for appellee.

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, Justice.

Patrick M. Shahan appeals a $5,000 jury award he received for personal injuries and property damage incurred as a result of a no-contact accident in Kearney, Nebraska, involving the motorcycle he was riding and an automobile driven by Janet Hilker.

In substance, Shahan claims that the trial court erred when it (1) refused to permit the jury to consider evidence as to whether injuries and damages he received in a fall occurring subsequent to the motorcycle-automobile accident were the proximate result of Hilker's negligence, (2) denied Shahan discovery of a statement Hilker gave to her insurance carrier's adjuster following the accident, and (3) refused to grant Shahan a new trial because of an inadequate verdict. We reverse the judgment and remand the cause to the district court for Buffalo County for a new trial.

[1] |484 In reviewing a law action, the court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Kappenman v. Heule,* 241 Neb. 54, 486 N.W.2d 27 (1992).

On June 15, 1987, Hilker was leaving the Hilltop Mall located on the east side of four-lane Highway 10 in Kearney. She drove her automobile west across the northbound lanes of the highway and turned south into the highway's westernmost southbound lane. In turning left into the westernmost southbound lane of the highway, Hilker intercepted the southbound path upon which Shahan was operating his motorcycle. Shahan testified that in an attempt to avoid a collision with Hilker's car, he took evasive action. He said he drove his motorcycle to his right and hit the west curb of the highway. He proceeded into 3- to 4-foot tall weeds, which were just off the highway, and lost control of his motorcycle. Shahan testified that he "flew over the handlebars" of his motorcycle. He landed on his face and then on his left shoulder. Shahan testified that he had pain in his lower back, in the base of his neck and head, in his left leg, and in his arms. The appellant was taken to the emergency room of a hospital, checked by Dr. Lawrence Bauer, and went home. Three days later, Shahan went back to work, had pain, and returned to Dr. Bauer for treatment. Dr. Bauer had more x rays taken and referred Shahan to a Dr. Salumbides. Dr. Bauer told Shahan that he did not foresee any problem with Shahan's going to Grand Junction, Colorado, for a vacation so long as he wore a cervical collar and did not overexert himself. Dr. Bauer prescribed medication for Shahan.

On June 30, 1987, while visiting his wife's relatives in Grand Junction, Shahan talked with his brother-in-law at the breakfast table. The brother-in-law went to the basement of the home, and Shahan stood at the top of the stairs visiting with him as the brother-in-law did chores at the foot of the stairs. Shahan testified, "I don't know what really happened. I was standing there, next thing I know my legs went out from under me. I was dizzy, kinda. I went down the stairs." Shahan said he had taken only the medicines prescribed by Dr. Bauer. He |485 testified that he had extreme pain in his left side and neck and that "I couldn't put things together to stand up" as a result of his fall down the stairs. He was helped to a bed, where he rested and then took a hot bath, but his pain got worse, Shahan said. He was taken to a hospital, where he was given a hypodermic injection. He had a reaction to the hypo but subsequently returned to his brother-in-law's home that evening. With his wife driving, Shahan returned home to Kearney the next day. He saw Dr. Bauer and did not return to work until the latter part of August. At trial, Shahan testified that he still had a "lot of problems" with his arm and neck.

Shahan testified that Hilker stopped her car when he was attempting to get up from the weeds after the accident, but that she took off "south down the highway." Hilker returned to the accident scene. She was

subsequently charged with "failure to yield right-of-way" and entered a plea of guilty to that charge.

Shahan first complains that the trial court refused to permit the jury to consider whether the injuries and damages he received in the fall down the stairs at his brother-in-law's home were a proximate result of Hilker's negligence in the prior motorcycle-automobile accident of June 15.

The record is silent as to what issues were submitted to the jury. None of the jury instructions were included in the transcript, nor were they requested to be included in that document. The record reflects that Shahan objected to only one instruction, and the record fails to reveal the content of that instruction and whether it was given to the jury. The bill of exceptions reflects that the trial court did sustain objections to Dr. Bauer's expressing an opinion as to whether the injuries Shahan received in Colorado were caused by the effects of the medications the doctor had prescribed for the injuries Shahan had received in the Kearney accident.

In an offer of proof, Dr. Bauer stated that the side effects of two medications taken by Shahan "might be lightheadedness, dizziness, [or] drowsiness" and that "probably both of those medications would have been at about their peak effectiveness at the time [Shahan] got up from the table and walked over to the top of the stairs and he very well may have lost his balance because of the medication and fallen down the stairs." In her |486 argument that the expert testimony was insufficient to establish causation of Shahan's fall, Hilker focuses on Dr. Bauer's use of the words "might," "probably," and "may." Brief for appellee at 11. However, when asked his opinion as to what caused the fall, Dr. Bauer replied, "Well, that would be my opinion that it was the result of the effect of the medication, that he sensed no pain." Dr. Bauer also stated that he prescribed the medication to relieve pain in Shahan's neck and that that pain was a result of the June 15, 1987, motorcycle accident.

[2–4] We have said that "for medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability." *Hohnstein v. W.C. Frank*, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991). A medical expert's testimony need not be couched in the magic words " 'reasonable degree of medical certainty or a reasonable probability.' " *Id.* Considered as a whole, Dr. Bauer's testimony was sufficiently definite and certain. A fact finder could properly conclude that there was a causal connection between the June 15 motorcycle accident and the June 30 fall.

Hilker also argues that Shahan's fall was not proximately caused by Hilker's alleged negligence in that (1) Shahan failed to eliminate possible intervening causes of his fall, including his own negligence or that of his physician, and (2) Shahan's injuries resulting from the fall were not a foreseeable consequence of Hilker's alleged negligence.

[5] In *Watkins v. Hand*, 198 Neb. 451, 453–54, 253 N.W.2d 287, 289 (1977), this court adopted the general rule which states that

> "a tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person."

[6–8] In *Delaware v. Valls*, 226 Neb. 140, 144, 409 N.W.2d 621, 624 (1987), we elected to maintain our traditional definition of an " 'efficient intervening cause,' " which we stated is "a new and independent act, itself a proximate cause of an injury, which |487 breaks the causal connection between the original wrong and the injury." Determination of causation is, ordinarily, a matter for the trier of fact. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990). Shahan should have been allowed to present evidence to the jury regarding causation of his fall down

the stairs in Grand Junction. The trial court erred in disallowing the testimony of Dr. Bauer with respect to the cause of Shahan's falling down the stairs.

[9] Shahan next argues that the trial court erred in overruling his motion to compel Hilker to produce statements which Hilker gave to her insurance adjuster concerning the June 15, 1987, accident. "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action...." (Emphasis supplied.) Nebraska Ct.R. of Discovery 26(b)(1) (rev. 1992).

[10] In *Brakhage v. Graff*, 190 Neb. 53, 56, 206 N.W.2d 45, 47–48 (1973), this court stated that

> the weight of authority appears to support the rule that a statement by an insured to his liability insurer is privileged. "According to the weight of authority, a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, *is a privileged communication, as being between attorney and client*, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him."

(Emphasis supplied.) This rule was not changed by the subsequent adoption of the current discovery rules or evidence statutes. The burden is on the party opposing discovery—in this case, Hilker—to show that the material sought is privileged. See, *Burlington Northern v. District Court*, 239 Mont. 207, 779 P.2d 885 (1989); *Nat. Farmers Un. Prop. & Cas. v. Denver D.C.*, 718 P.2d 1044 (Colo.1986).

[11] The record is silent as to whether Hilker's insurance contract required the insurance company to defend her through its attorney and as to whether the statement given to the adjuster was intended for the information or assistance of the attorney
488 in defending her. Upon remand, the trial court will need to determine whether Hilker's statement to the insurance adjuster is discoverable.

Because we are remanding this cause to the district court for a new trial on the issues of Shahan's subsequent injury and the discoverability of Hilker's statement to an adjuster for her insurance carrier, we need not further address Shahan's third assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS.

241 Neb. 488

488 **STATE of Nebraska, Appellee,**

v.

Lee WICKLINE, Appellant.

Nos. S–90–1135, S–90–1136.

Supreme Court of Nebraska.

Sept. 11, 1992.

Following affirmance of conviction for burglary and theft, 232 Neb. 329, 440 N.W.2d 249, and subsequent affirmance of denial of habeas corpus petition, 233 Neb. 878, 448 N.W.2d 584, motions for postconviction relief were filed. The District Court, Holt County, Edward E. Hannon, J., denied motions. Movant appealed. The Supreme Court, Hastings, C.J., held that movant was not denied effective assistance of counsel by reason of trial counsel's failure to object to hearsay testimony regarding eyewitness identification.

Affirmed.

1. Criminal Law ⇐1158(1)

In appeal involving proceeding for postconviction relief, trial court's findings will be upheld unless such findings are clearly erroneous.

2. Criminal Law ⇐998(3)

Claim that postconviction relief movant was denied his Fifth Amendment right to