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Court of Appeals of Nebraska.

Ruth ERIKSON, surviving spouse of Harold Erikson, deceased, appellant,
v.
Renee ABELS and Travelers Insurance Company, appellees.

No. A-04-673.

March 7, 2006.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

James E. Harris and Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellant.
Michael F. Coyle and **Patrick S. Cooper**, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee Renee Abels.

IRWIN and SIEVERS, Judges. SIEVERS, Judge.

INTRODUCTION

***1** Ruth Erikson (Erikson), the surviving spouse of Harold Erikson (Harold), deceased, appeals the decision of the Douglas County District Court, which entered a judgment in favor of Renee Abels following a jury trial. The appeal centers on the extent to which the fact that workers' compensation benefits were paid to Harold as a result of his automobile accident with Abels can be used in the subsequent negligence action against Abels.

FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 1990, Harold was involved in a three-car accident in Omaha, Nebraska. Harold's vehicle, owned by Omaha Public Schools (OPS) and operated by Harold in the course of his employment with OPS, was involved in a rear-end collision with vehicles driven by Barbara J. Ryan and Abels. Harold filed a petition in the Douglas County District Court alleging that both Ryan and Abels were negligent. The trial court granted Ryan's motion for summary judgment prior to trial. Trial proceeded against Abels, after which trial the jury returned a verdict in favor of Abels. After Harold's motion for judgment notwithstanding the verdict was overruled, he appealed to this court.

In *Erikson v. Abels*, No. A-00-835, 2002 WL 452198 (Neb.App. Mar. 26, 2002) (not designated for permanent publication) (*Erikson I*), we found that under the range of vision rule, Abels was negligent as a matter of law, and that the district court erred in overruling Harold's motion for a directed verdict. Thus, we reversed, and remanded the cause for a new trial on the issues of proximate cause and damages.

Following our remand, Harold filed a "Motion to Realign Parties," alleging that OPS and Aetna Casualty and Surety Insurance Company (now Travelers Insurance Company) are necessary parties to the litigation and are entitled to have an " 'equal voice' " in the litigation. Throughout this opinion, we refer to OPS and Travelers Insurance Company collectively as "Travelers." The trial court denied the motion to realign parties. On April 24, 2003, Harold died of causes unrelated to the accident. Erikson, Harold's surviving spouse, then filed a motion for partial summary judgment which the trial court sustained in part, finding that Abels was negligent as a matter of law. However, the court overruled the motion with respect to the assertion that under the Nebraska Workers' Compensation Act, Abels was liable to Travelers for its subrogation claim based upon a decision of the Workers' Compensation Court ordering payment

and reimbursement to Harold for disability and medical expenses as a result of the accident, which payments exceed $200,000. We note that the only evidence in the record of the decision of the Workers' Compensation Court is indirect via the " Affidavit of H. Shelby Swain." The affidavit was offered during the May 2004 trial, but curiously, the offer was made outside the presence of the judge. Swain's affidavit stated that following a trial on May 13, 1994, in the Workers' Compensation Court, the compensation court found that Harold suffered a compensable accident and was entitled to workers' compensation benefits. According to Swain's affidavit, Travelers paid $157,188 in indemnity benefits and $46,053 in medical benefits up to the time of Harold's death, which occurred on April 24, 2003.

***2** Before the May 2004 trial, Erikson filed a " Motion to Determine Admissibility of Evidence and Prosecution of Plaintiff's Claim Joined by Employer. " In this motion, Erikson requested that the court " specifically rul [e]" on the admissibility of evidence contemplated to be introduced at the time of trial, which evidence was described as the testimony in the affidavit of Swain, of Travelers Insurance Company, that OPS was required to pay Harold workers' compensation benefits as a result of the accident. Erikson also alleged in the motion, apparently as support for the introduction of Swain's evidence, that pursuant to Neb.Rev.Stat. § 48-118 (Reissue 1993), Travelers " 'shall have an equal voice in the claim and prosecution of such suit,' " and that by "joining in the prosecution" of the claim, Travelers has "every right to seek affirmative relief, initiate discovery, retain expert witnesses, participate at trial, present opening and closing statements, examine and cross-examine witnesses and to take all other steps normally associated with the 'prosecution' of a civil matter." The motion did not contain a prayer for relief. At the hearing on the motion, separate counsel for Erikson, Abels, and Travelers were all present. Following that hearing, the trial court found that the proposed testimony of Swain was not relevant and that Travelers would not be allowed to act as an "independent party" to the litigation.

At the May 2004 trial, evidence was adduced on the issues of proximate cause and damages. Harold's testimony from March 27, 2000, was admitted at the May 2004 trial, because he had died of causes unrelated to the accident prior to such trial. Harold testified that he had worked for Gilmore Construction Company for 35 years and was then hired by OPS in 1983. As a carpenter for OPS, he had to do a lot of heavy lifting. He testified that prior to the accident, his neck would get stiff but it did not restrict his work. His neck started hurting the evening of the automobile accident, and the pain "kept getting worse."

Extensive medical evidence is in the record, but we provide only a brief summary. Harold sought medical treatment for neck pain from an orthopedic surgeon within 10 days of the August 28, 1990, accident. In October 1991, Harold had a "posterior spine fusion C1-2," and the physician who performed the surgery causally related his "residual central cord syndrome" to his automobile accident with Abels. Another physician testified that while the accident may have caused a cervical strain, Harold had "symptomatic instability at the C1 and C2 level" as early as 1976. This physician said that Harold had reached maximum medical improvement in January 1991. The jury returned a verdict in favor of Abels on May 30, 2004, and this appeal by Erikson timely followed.

ASSIGNMENTS OF ERROR

Erikson asserts, reassigned and restated, that the trial court erred "as a matter of law" in (1) denying Harold's motion to realign the parties and designate the insurance company as a party plaintiff; (2) " denying [OPS], and its workers' compensation insurance carrier, the right to have an equal voice in the lawsuit and prosecute the lawsuit pursuant to Neb.Rev.Stat. § 48-118"; and (3) finding that Abels "was not liable to Defendant [Travelers] on its subrogation claim for the workers' compensation benefits it paid to [Harold]." Erikson also asserts that the trial court erred in "allowing [Abels] to argue to the jury that photographs depicting minor collision damage infers [sic] lack of causation."

STANDARD OF REVIEW

***3** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Gutierrez v. Gutierrez,* 5 Neb.App. 205, 557 N.W.2d 44 (1996).

A civil jury verdict will not be disturbed on appeal unless clearly wrong. *Streeks v. Diamond Hill Farms,* 258 Neb. 581, 605 N.W.2d 110 (2000).

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Hawkes v. Lewis,* 255 Neb. 447, 586 N.W.2d 430 (1998).

ANALYSIS

Motion to Realign Insurer as Party Plaintiff.

Erikson asserts that the trial court erred in denying Howard's motion to realign Travelers as a party plaintiff. However, because Erikson does not argue this assigned error in her brief, we need not address the error on appeal. See *Shipferling v. Cook,* 266 Neb. 430, 665 N.W.2d 648 (2003) (errors assigned but not argued will not be addressed on appeal).

Denial of OPS' Right to Have "Equal Voice."

Erikson asserts that the trial court erred in "denying [OPS], and its workers' compensation insurance carrier [Travelers], the right to have an equal voice in the lawsuit and prosecute the lawsuit pursuant to Neb.Rev.Stat. § 48-118." The argument advanced in Erikson's brief shows that the assigned error relates to Erikson's "Motion to Determine Admissibility of Evidence and Prosecution of Plaintiff's Claim Joined by Employer" (hereinafter motion to determine admissibility). The motion asked the court to determine the admissibility of Swain's testimony that OPS, via Travelers Insurance Company, paid workers' compensation benefits to Harold as a result of the August 28, 1990, accident. The trial court overruled the motion, finding that Swain's testimony regarding payment of workers' compensation benefits was irrelevant. The court also denied what it characterized as Erikson's " request for a broad interpretation of Nebraska Revised Statute § 48-118 allowing [OPS] through Travelers Insurance Company to act as an independent party to litigation." Although Travelers, by its own counsel, joined in the motion, Travelers has not appealed, which naturally raises the issue of Erikson's standing to complain about the assigned error.

Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding. *Nielsen v. Nielsen,* 13 Neb.App. 738, 700 N.W.2d 675 (2005).

Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.... Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process... . Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court....

***4** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.... In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.... The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.

(Citations omitted.) *Cornhusker Pub. Power Dist. v. City of Schuyler,* 269 Neb. 972, 976-77, 699 N.W.2d 352, 357 (2005). Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing

it is not properly situated to be entitled to its judicial determination. *Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.,* 9 Neb.App. 552, 615 N.W.2d 490 (2000).

Section 48-118 provides a statutory right of subrogation for employers, or their insurers, who pay compensation benefits to employees who are negligently injured by third parties in on-the-job accidents. This recovery formerly was a "first dollar" recovery. See *Neumann v. American Family Ins.,* 5 Neb.App. 704, 713, 563 N.W.2d 791, 796 (1997) ("compensation carrier [gets] the 'first dollars,' and the injured employee gets only the 'excess' when there is a recovery from a tort-feasor liable for the employee's injury"). This concept also has been called "dollar for dollar" recovery. See *Turney v. Werner Enters.,* 260 Neb. 440, 618 N.W.2d 437 (2000). The amendment of § 48-118 by 1994 Neb. Laws, L.B. 594, changed this aspect of subrogation. See *Jackson v. Branick Indus.,* 254 Neb. 950, 581 N.W.2d 53 (1998). With the enactment of L.B. 594, insurers and employers are now subrogated for the amount judicially determined under the circumstances to be a fair and equitable division of the settlement or verdict. *Jackson v. Branick Indus., supra.* See, also, § 48-118 (Cum.Supp.1996). However, the amendment to § 48-118 (Reissue 1993) was held to be a substantive change which cannot be applied retroactively. *Jackson v. Branick Indus., supra.* Because Harold's accident occurred in 1990, prior to the enactment of L.B. 594, Travelers' right of subrogation is still "first dollar" reimbursement for the workers' compensation payments paid to Harold. But in other material respects, the handling of subrogation where workers are allegedly injured by a third party's negligence remains unchanged.

The statutory right of subrogation belongs to Travelers, not to Erikson, by the plain language of § 48-118. The statutory scheme is easily summarized: Travelers can either "join" in and actively "prosecute" its subrogation claim as provided by § 48-118 or sit on the sidelines, allow Erikson to prosecute the claim, and then receive its share of the recovery and pay its share of the expenses. See § 48-118 (if insurer joins in prosecuting of claim and is represented by counsel, reasonable expenses and fees shall be divided). See, also, *Janssen v. Tomahawk Oil Co.,* 254 Neb. 370, 576 N.W.2d 787 (1998) (if employer is not joined in action, there must be recovery before nonjoined employer is liable for attorney fees; joined parties may be liable for costs even if there is no recovery-critical factor is whether employer has participated sufficiently to be considered joined). Either way, the choice whether to "join" in the claim in order to actively prosecute the claim belongs to Travelers, not to Erikson. In arguing this assignment, Erikson principally relies on the following language from *Austin v. Scharp,* 258 Neb. 410, 419, 604 N.W.2d 807, 813 (1999):

***5** Once it became a party to the suit, [the subrogated employer] had an "equal voice" in its prosecution by operation of § 48-118. [The subrograted employer] was not relegated to the reactive posture suggested by the testimony of its attorney, but had every right to seek affirmative relief against [the third parties], to initiate discovery, to retain expert witnesses, and to take all other steps normally associated with the "prosecution" of a civil claim.

We have no quarrel with this language or its import, but it has no meaningful application to this case. Erikson ignores the fact it was said in the context of rejecting the employer's claim that it was not liable for fees and expenses because it was prevented from active participation in the litigation against the third parties by the failure of the injured worker's counsel to serve pleadings and discovery documents on its attorney or to notify the attorney of the scheduled mediation which resulted in settlement. The issue of fees and expenses like those in *Austin v. Scharp, supra,* is not involved in the instant case, and while Travelers could have had its counsel actively participate in the trial and do the things as detailed above in the quote from *Austin,* the fact of the matter is that the instant case was tried entirely by Erikson's own counsel and Erikson brings this appeal. While Erikson's counsel at oral argument suggested that he represented Travelers by virtue of representing Erikson, the fact is that Travelers had its own counsel who appeared on the motion under discussion, and as said, Travelers has not appealed. Moreover, we are not directed to any place in the record where Travelers was denied a "voice" in the

conduct of the lawsuit. Any disputes about Travelers' "voice" in the lawsuit is a matter to be brought before the trial court for a ruling, see § 48-118, which ruling can be and should be done on the record to preserve the matter for appellate review. But, at no place in the record did Travelers assert to the trial court that it was being denied its "voice" or right to prosecute the lawsuit. A trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Tyma,* 264 Neb. 712, 651 N.W.2d 582 (2002). In summary, Erikson asserts as error something which did not occur, and in any event, even if it had occurred, it is Travelers' claim of error to assert, and Travelers did not appeal.

As said before, to have standing to assert this claim, Erikson must have some legal or equitable right, title, or interest in the subject of the controversy. Erikson has no right or interest in whether the trial court prevented Travelers from "joining" in and "prosecuting" the tort action against Abels, because Erikson's right of recovery against Abels is unaffected by what Travelers does or does not do. Admittedly, the division of costs and fees between Erikson and Travelers is affected by whether Travelers joins in the action and actively prosecutes its subrogation interest, see *Janssen v. Tomahawk Oil Co.,* 254 Neb. 370, 576 N.W.2d 787 (1998), but fees and costs are not involved in any way in this appeal. Erikson can do discovery, select a jury, make an opening statement, introduce any relevant evidence, cross-examine Abels' witnesses, be heard on the matter of jury instructions, and make final argument to the jury-all irrespective of what Travelers does or does not do. And, under § 48-118 , Erikson has no legal or equitable right to assert that Travelers must actively join in the prosecution of the action against Abels.

***6** Therefore, for all of these reasons, Erikson does not have standing in this appeal to assert that the trial court erred in denying Travelers' right to have an "equal voice" in the prosecution of the claim against Abels, and in any event, the factual predicates for the claim of error are not in the record.

Abels' Liability to Travelers.

Erikson asserts that the trial court erred in finding that Abels "was not liable to Defendant [Travelers] on its subrogation claim for the workers' compensation benefits it paid to [Harold]." We are unaware of any such finding by the trial court, and Erikson's brief does not direct us to any such finding in the record. A trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Tyma, supra.*

However, Erikson's argument, to the extent that we understand it, seems to be different than the assignment of error. Summarized, her argument is that Travelers was entitled to a verdict equal to the amount of benefits paid to and for Harold, irrespective of what the jury might award Erikson. The underpinning for the argument is that when Travelers' statutory right of subrogation under § 48-118 is coupled with our previous holding in *Erikson I* that Abels was negligent as a matter of law, Travelers recovers as a matter of law what it has paid in benefits. No authority on point is cited, and there are other problems with the argument, not the least of which is that for the same reasons set forth in our earlier discussion, Erikson appears to lack standing to assert a claim belonging to Travelers, and that Travelers has not appealed.

Moreover, because the jury found that Erikson was not entitled to any recovery and because no assignment that such result was error is advanced, Travelers is not entitled to any recovery. This conclusion naturally follows from our decision in *Neumann v. American Family Ins.,* 5 Neb.App. 704, 713, 563 N.W.2d 791, 796 (1997), where we construed the version of § 48-118 in effect at the time of Harold's accident with Abels to mean that the compensation carrier gets the " 'first dollars' " and the injured employee gets only the " 'excess' " when there is a recovery from a tort-feasor liable for the employee's injury. In *Neumann,* the injured employee settled with the third party for $118,000, which the employee and the subrogated workers' compensation insurance carrier, American Family Insurance, stipulated was not a full and adequate recovery for the injuries sustained. The district

court performed an equitable division of the settlement, giving the great majority of the settlement proceeds to the injured worker. We reversed, reasoning that principles of equitable subrogation did not apply because American Family Insurance's subrogation rights were statutory. Therefore, under the version of § 48-118 then in effect (and in effect for the instant case, although now amended to mandate equitable division), the compensation carrier was clearly entitled to the entire recovery from the tort-feasor which, incidentally, was less than American Family Insurance had paid in compensation benefits. In *Neumann*, we held that because of the statutory mandate that the employee was entitled to the " excess" over the subrogation interest of the insurer, the district court erred, as a matter of law, in attempting to equitably divide the $118,000 paid to the injured employee by the tort-feasors. Thus, in *Neumann*, there was no "excess" for the employee, whereas in the instant case, there are no "first dollars " for Travelers and no "excess" for Erikson, because the jury awarded nothing. For multiple reasons, this assignment of error in without merit.

Photographs.

***7** Erikson asserts that the trial court erred in " allowing [Abels] to argue to the jury that photographs depicting minor collision damage infers [sic] lack of causation." Erikson again makes no citation to the record as to where in the record Abels "argue[s] to the jury that [the] photographs ... infers [sic] lack of causation," and we need not search the record for such. See *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992) (appellate court does not have duty to search record for error).

Assuming Erikson is asserting that Abels' argument regarding the photographs was made in either opening or closing statements, there is no error here because opening and closing statements were not made on the record. Thus, it is impossible for us to ascertain whether Erikson objected to Abels' alleged argument that the photographs infer lack of causation, and without an objection, such error is waived. See *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998). Moreover, the jury was instructed that "[s]tatements, arguments, and unanswered questions by the lawyers for the parties" are not evidence. Erikson's argument is without merit.

Affirmed.

INBODY, Chief Judge, participating on briefs.
Neb.App.,2006.
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