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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1683**

James J. Akre, et al.
Respondents,

vs.

MetLife Auto and Home Insurance Company
(Economy Premier Assurance Company),
Appellant.

**Filed August 19, 2008
Affirmed in part and reversed in part
Lansing, Judge**

Goodhue County District Court
File No. 25-CV-06-1322

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Considered and decided by Worke, Presiding Judge; Lansing, Judge; and
Stoneburner, Judge.

UNPUBLISHED DECISION

LANSING, Judge

The district court granted judgment as a matter of law modifying the percentages of fault allocated by a jury on James and Sheri Akre's coverage claim against their automobile insurer for injuries that the jury found were caused by both James Akre and an unidentified driver. The insurer appeals the modification, and, by notice of review, the Akres challenge the district court's denial of an adverse-inference instruction on evidence spoliation. Because sufficient evidence supports the jury's apportionment of fault, we reverse the judgment-as-a-matter-of-law modification. But the district court did not abuse its discretion by refusing the adverse-inference instruction or denying the Akres' motion for a new trial on that ground, and we accordingly affirm each of those decisions.

FACTS

James Akre sustained severe injuries in a vehicle collision just outside of Lake City. At the time of the accident, Akre was driving his 1997 GMC Yukon south on Highway 61 when he observed two vehicles in front of him swerve to the right. Although he did not know what caused the vehicles to swerve, he also swerved right because the road widened at that point to accommodate a right-turn lane, and he could negotiate the swerve without leaving the roadway. As he proceeded, he observed an obstruction on his left, which was later identified as a headboard from a bed.

The two vehicles in front of Akre successfully navigated back into the southbound lane of traffic. Akre's vehicle, however, swerved radically to the left and entered the northbound lane of traffic, colliding with a northbound pickup truck. Akre testified that

“when [he] turned to the right, the next thing [he] knew [he] was flying left.” Both the state patrol’s investigating officer and its accident reconstructionist concluded that Akre had swerved to the right to avoid the headboard, then swerved back to the left and lost control of his vehicle. Akre’s own expert resisted the characterization of the incident as involving a loss of control, but conceded that the collision was precipitated by a “hard steering maneuver back to the left.”

An owner of a business that adjoined the highway near the point of the collision had earlier observed a white pickup truck loaded with junk travelling south on Highway 61 when it lost part of its load. The pickup truck driver “drove ahead, he stopped, he backed up and looked it over, then he drove real slow again, and he stopped and backed up again, and . . . then he took off,” and turned right onto County Road 4 less than a mile down the road. The business owner got into his own vehicle and drove to the area of the headboard, intending to move it off the road. Before he could reach the headboard and other debris, however, a truck drove over it, and the pieces scattered on the highway. The business owner decided to get a push broom to remove the headboard and other debris from the road. By the time he returned, the collision had already taken place.

In addition to the two vehicles in front of Akre, at least three other vehicles swerved around the headboard before the collision. One of the vehicle drivers testified that she was travelling southbound followed closely by two other vehicles when she observed the headboard in the road. She testified that she swerved left, into the oncoming lane of traffic to avoid the headboard, while the two cars behind her swerved to

the right. All three of these vehicles successfully navigated back into their lane of traffic. The driver who had swerved left, turned right onto County Road 4, where she saw a man attempting to load a large carpet back onto a white pickup truck. State troopers were never able to identify or apprehend the man who was driving the white pickup truck.

Akre filed a claim with MetLife Auto and Home Insurance Company (MetLife) under his uninsured motorist coverage, which extends to unidentified motorists. MetLife denied the claim, asserting Akre's negligence as the sole cause of the collision, and Akre sued. By the time of trial, the parties had stipulated that the unidentified driver was negligent and that Akre would recover the \$300,000 policy limit should the jury apportion less than fifty-one percent of causal negligence to him. Thus, the issues for the jury to decide were: whether the unidentified driver's negligence was a direct cause of the collision; whether Akre was negligent; whether Akre's negligence was a direct cause of the collision; and if both were found causally negligent, the percentage of fault attributable to the unidentified driver and to Akre.

Before trial, Akre's attorney requested an adverse-inference jury instruction based on MetLife's destruction of the vehicle that Akre was driving at the time of the collision. It was undisputed that Akre's automobile had been in the possession of MetLife and that, despite MetLife's agreement to preserve it for examination by experts, the vehicle had been destroyed. Akre did not allege intentional destruction but asserted that he was prejudiced by destruction of the automobile because his expert did not have the opportunity to determine whether any vehicle defects contributed to the cause of the accident. In the course of the discussions on the spoliation motion, MetLife conceded

that Akre was not speeding and that he had not failed to apply his brakes properly. The district court, after hearing an offer of proof from Akre's expert, denied the request for an adverse-inference instruction.

Following two days of testimony and arguments by counsel, the court instructed the jury on the issues for its determination. The court specifically advised the jury that assigning more than fifty percent of the fault to Akre would result in no recovery to him, and Akre's counsel emphasized this point during his closing argument.

The jury completed a special-verdict form containing five questions. The court had answered Question 1—whether the unidentified driver was negligent—in the affirmative. The jury answered Questions 2, 3, and 4 in the affirmative—indicating their findings that Akre was also negligent and the negligence of both Akre and the unidentified driver directly caused the collision. Answering Question 5, the jury apportioned seventy percent of fault to Akre and thirty percent to the unidentified driver. Under Minnesota's comparative fault law, Minn. Stat. § 604.01 (2006), the jury's apportionment resulted in Akre recovering nothing.

Akre moved for judgment as matter of law or, in the alternative, a new trial, arguing that the evidence did not support the findings that he was negligent and more at fault than the unidentified driver, and that the district court had committed prejudicial error in refusing Akre's request for an adverse-inference instruction based on MetLife's spoliation of evidence.

The district court denied Akre's motion for a new trial based on spoliation and also denied Akre's motion for judgment as a matter of law with respect to Akre's

negligence. The district court granted Akre's motion for judgment as a matter of law on the jury's apportionment of fault. The court emphasized that the unidentified driver had knowingly left debris on the roadway and that Akre was forced to swerve before the collision. This, the court concluded, amounted to reckless behavior that was far more culpable than any conduct by Akre. The court explained that "[w]hen this [c]ourt reviews the minimal evidence presented at trial of the actual negligence on the part of [] Akre, and compares that with the reckless behavior of the unidentified driver of the pickup, this [c]ourt can only conclude that the jury's verdict and apportionment of negligence is 'manifestly and palpably' against the weight of the evidence." Accordingly, the district court amended the special-verdict form to apportion fifty-one percent of the fault to the unidentified driver and forty-nine percent to Akre.

MetLife appeals the district court's judgment modifying the percentages of fault assigned by the jury. Akre has noticed review of the district court's refusal to give an adverse-inference instruction based on spoliation. Akre has not requested review of the jury's finding that he was negligent, and that issue is accordingly not before us.

D E C I S I O N

I

We review de novo the district court's grant of judgment as a matter of law (JMOL). *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). JMOL is appropriate only "when a jury verdict has no reasonable support in fact or is contrary to law." *Id.* (citing *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990)); *see also* Minn. R. Civ. P. 50.01(a). The jury's apportionment of fault will not be set aside "unless

there is no evidence reasonably tending to sustain the apportionment or the apportionment is manifestly and palpably contrary to the evidence.” *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980) (quotation omitted).

There is very little precedent for modifying a jury’s apportionment of fault on a motion for JMOL. In fact, we are able to locate only two cases in which the Minnesota Supreme Court has endorsed such a practice. And those cases involved the reversal of liability determinations but did not reassign specific degrees of negligence. In *Robertson v. Johnson*, the supreme court found palpably contrary to the evidence the jury’s apportionment of fifty percent negligence to a defendant who could not reasonably have avoided being struck by the plaintiff’s vehicle when the plaintiff swerved into oncoming traffic to avoid another accident. 291 Minn. 154, 156-57, 190 N.W.2d 486, 487-88 (1971). In *Winge v. Minn. Transfer Ry. Co.*, the Minnesota Supreme Court affirmed the district court’s preverdict grant of a motion for directed verdict based on a determination that the fault of the plaintiff-driver exceeded that of the defendant-railroad. 294 Minn. 399, 406, 201 N.W.2d 259, 264 (1972). *Winge* involved the comparison of fault between a railroad’s failure to sound a whistle warning to a driver seen approaching the train at a railroad crossing and that driver’s failure to maintain a proper lookout despite his familiarity with the railroad crossing. *Id.* at 405-06, 201 N.W.2d at 264.

Generally, however, both the supreme court and this court have upheld juries’ apportionments of fault. *See, e.g., Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W.2d 362, 368 (Minn. 1979) (“While the evidence might also have supported a finding that the doctors’ negligence . . . exceeded the hospital’s negligence . . . , we cannot say that the

jury's decision to the contrary is unfounded in the evidence.”); *Steinhaus v. Adamson*, 304 Minn. 14, 20, 228 N.W.2d 865, 869 (1975) (upholding jury verdict apportioning sixty percent of fault to defendant who could not remember events leading up to automobile collision that killed plaintiff, even though circumstantial evidence showed that defendant had right of way); *Martin v. Bussert*, 292 Minn. 29, 38, 193 N.W.2d 134, 139 (affirming jury verdict assigning only twenty percent of fault to defendant despite fact that defendant was required to yield to plaintiff's right-of-way); *Eliason v. Textron, Inc.*, 400 N.W.2d 805, 807 (Minn. App. 1987) (upholding jury verdict apportioning one-hundred percent of fault to plaintiff-pedestrian who was struck by truck in intersection based on evidence that he had been drinking and did not enter the intersection until after truck did).

Mindful of the supreme court's admonition that we should not “interfere with a jury's decision apportioning causal negligence except in those rare cases where there is no dispute in the evidence and the fact-finder can come to but one conclusion,” we are compelled to reverse the district court's modification of the percentages of fault assigned by the jury. *See Steinhaus*, 304 Minn. at 20, 228 N.W.2d at 869 (cautioning against reapportionment of causal negligence).

Akre asserts that the unidentified driver was more at fault because but-for the headboard in the road, there would have been no collision. MetLife responds that Akre's failure to keep his vehicle under control was a greater contributing cause, particularly when at least five other drivers were able to swerve around the headboard without losing control of their vehicles. Given these arguments, and the supporting evidence presented

to the jury, we cannot say that the jury's apportionment of fault was manifestly and palpably contrary to the evidence.

The district court based its determination that the unidentified driver was more at fault on an assessment of the degree of the parties' departures from reasonable care, reasoning that the unidentified driver had acted not just negligently but recklessly. But the comparison required is between "the relative contribution of each party's negligence to the damage in a causal sense." *Winge*, 294 Minn. at 403, 201 N.W.2d at 263; *see also* Minn. Stat. § 604.01, subd. 1a (2006) ("Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault."). We find no basis for requiring that the jury include within the comparative-fault analysis a general assessment of the degree of departure from the due-care standard instead of applying the proper standard of comparing the relative causal contribution of each party's negligence to the resulting damages.

II

The district court's denial of a motion for a new trial, determination of jury instructions, and ruling on a motion for spoliation sanctions are all subject to review only for abuse of discretion. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (spoliation sanctions); *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 476-77 (Minn. App. 2006) (new trial motion), *review denied* (Minn. Aug. 23, 2006); *Bolander v. Bolander*, 703 N.W.2d 529, 539 (Minn. App. 2005) (jury instructions), *review dismissed* (Minn. Oct. 28, 2005). The district court's decision not to give an adverse-inference instruction withstands this limited scrutiny.

“Spoliation sanctions are typically imposed where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence.” *Foust v. McFarland*, 698 N.W.2d 24, 30 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). “This is true where the spoliator knew or should have known that the evidence should be preserved for pending or future litigation; the intent of the spoliator is irrelevant.” *Id.* “When the evidence is under the exclusive control of the party who fails to produce it, Minnesota also permits the jury to infer that the evidence, if produced, would have been unfavorable to that party.” *Id.* (quotation omitted). The appropriateness of a sanction for spoliation of evidence is determined by the prejudice to the opposing party. *See Wajda v. Kingsbury*, 652 N.W.2d 856, 860 (Minn. App. 2002), *review denied* (Minn. Nov. 19, 2002).

The district court concluded that an adverse-inference instruction was not warranted because Akre could not demonstrate any likelihood that inspection of the spoliated vehicle would have produced evidence favorable to him. At the court’s request, Akre made an offer of proof on prejudice. Akre’s expert testified that having access to an air bank control module, or “black box,” would have allowed him to estimate the speed of Akre’s vehicle at impact. The expert further testified that examining the car would have allowed him to determine whether there was a problem with the SUV’s steering. On cross-examination, however, the expert conceded that a steering failure would likely cause different tire markings than those observed at the scene. He further conceded that there was no evidence from Akre or anyone else suggesting the steering went out. Upon questioning by the court, the expert agreed that, while an inspection would have been

optimal to rule out a vehicle defect, nothing in the physical or testimonial evidence suggested such a defect. Akre himself did not assert any basis for believing that the vehicle had malfunctioned. And the speed of Akre's vehicle was not an issue in the trial.

Relying on the offer of proof and the stipulation that Akre was not speeding, the district court concluded that Akre was not prejudiced by the missing evidence. The court concluded that MetLife would be prejudiced by the requested adverse-inference instruction, because the instruction would insert a speculative issue into the case. The district court's reasoning is sound, and we are unable to conclude that denial of the instruction was an abuse of discretion.

Affirmed in part and reversed in part.