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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1297**

Kathleen Bernstrom, et al.,
Appellants,

vs.

American Family Mutual
Automobile Insurance Company,
Respondent.

**Filed June 4, 2012
Affirmed
Crippen, Judge***

Kittson County District Court
File No. 35-CV-09-5

Robert M. Albrecht, Brink Sobolik Severson Malm & Albrecht, P.A., Hallock, Minnesota
(for appellants)

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(for respondent)

Considered and decided by Connolly, Presiding Judge; Crippen, Judge; and
Harten, Judge.*

* Retired judges of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CRIPPEN, Judge

This is an appeal from the judgment following a jury verdict in favor of appellants on their claim for underinsured motorist (UIM) benefits. Appellants assert that the district court erred by denying their bad-faith claim under Minn. Stat. § 604.18 (2010). By notice of related appeal, respondent-insurer challenges the district court's denial of its motion for a new trial on the UIM claim. We affirm.

FACTS

Appellant Kathleen Bernstrom (Bernstrom) was injured in an automobile accident on December 13, 2003. Respondent American Family Mutual Automobile Insurance Company (American Family) insured both Bernstrom and the other driver, Arnold Augustson. Bernstrom's policy had no-fault limits of \$20,000 each for medical and wage loss and UIM coverage of \$50,000. Augustson had liability coverage with a \$50,000 limit. Appellants, Bernstrom and her husband, Gordon Bernstrom, successively sought no-fault benefits under their own policy, liability benefits from Augustson's policy, and UIM benefits from their own policy.

Bernstrom's Injuries and Medical Treatment

At the time of the accident, Bernstrom was taken to an emergency room and complained of low back pain. X-rays and a CT disclosed a compression fracture of the L1 vertebrae, but the X-rays also showed degenerative disc disease. In 2003 and 2004, Bernstrom sought treatment for her continuing low back pain from Dr. Karen Warner at her local clinic over a number of visits; Dr. Warner prescribed medicine and physical

therapy. Bernstrom again complained of back pain in February 2006, and Dr. Warner referred her to Dr. Damle at the Altru Hospital.

In Bernstrom's first visit to Dr. Damle's office, a physician's assistant who conducted the initial examination reported the patient's chronic low back pain, observing that this reflected degenerative disc disease and joint inflammation; the physician's assistant thought that the start of Bernstrom's current symptoms coincidental to her 2003 accident suggested that they were correlated, yet, as the district court found, she observed that there was "no way to say specifically" that the accident was the cause of her current symptoms. An MRI taken around that time showed the L1 compression fracture and mild degenerative arthritis.

On a number of occasions for three years beginning in April 2006, Dr. Damle treated Bernstrom for pain with steroid injections. Additional treatments can be performed once a year.

The No-Fault Claim and First IME

Bernstrom submitted her medical bills for payment through her no-fault insurance with respondent American Family. Kathy Fremstad, a senior no-fault claims adjuster for American Family, evaluated Bernstrom's claim to determine whether the medical expenses were reasonable, necessary, and related to the accident. In connection with the no-fault claim, Bernstrom complied with Fremstad's request that she participate in an independent medical examination (IME).

Dr. Charles Hartz conducted this initial IME. After noting Bernstrom's prior treatment with Dr. Warner and Dr. Damle, he diagnosed her with a healed fracture of the

first lumbar vertebrae due to the automobile accident. He noted that she had not complained of or been treated for any lumbar spine injuries or problems before the accident, based on a review of her medical records dating back to 1995. He concluded that the treatment she received was related to the injuries from the auto accident, citing the fact that she had no pre-existing back pain before the accident, but that it was a chronic problem after the accident.

The Liability Claim and Second IME

After obtaining no-fault benefits, appellants sought to recover under the liability coverage of Augustson's policy. American Family, as Augustson's insurer, represented him in the action. American Family requested a second IME and Dr. Donald Starzinski performed this exam. He found that Bergstrom had preexisting degenerative osteoarthritis and an L1 fracture, possibly caused by the auto accident. However, he concluded that only 50% of the symptoms Bergstrom suffered the first six months after the automobile accident could be attributed to the accident. He concluded that the other 50% of symptoms within six months of the accident and all of Bernstrom's symptoms six months after the accident, including all of the symptoms that Dr. Damle treated, were caused by her preexisting condition of arthritis.

Appellants agreed to settle the liability claim for \$45,000 shortly before trial, and gave American Family a *Schmidt-Clothier* notice to preserve the UIM claim. The insurer's earlier, lesser settlement offers were rejected.

The UIM Claim and Bad-Faith Proceedings

Appellants next sought recovery under their UIM coverage. After refusing a \$15,000 offer, appellants brought the present legal action to recover their \$50,000 UIM policy limits. American Family answered, contending that appellants had been fully compensated by the \$45,000 liability payment and thus Augustson was not an underinsured motorist. Respondent again offered to settle the UIM claim for \$15,000. Appellants rejected this offer and moved to amend their complaint to add a claim for bad faith costs pursuant to Minn. Stat. § 604.18. The court granted the motion.

Prior to trial, American Family made a motion to exclude the deposition testimony of Kathy Fremstad, the claims adjuster on Bernstrom's no-fault claims. Counsel for appellants explained that they had taken the claims adjuster's deposition in the UIM action after American Family had denied that Bernstrom's medical bills were related to the accident. Appellants agreed to redact portions of Fremstad's testimony in which their counsel questioned her about the dollar amounts paid for no-fault medical benefits or relating to no-fault premiums. Over American Family's objection, the district court allowed the redacted deposition to be entered into evidence at trial.

American Family did not depose either of the appellants during the UIM proceedings; nor did it obtain an IME for purposes of the UIM trial. American Family admitted that Augustson was liable, and a jury trial was held to determine whether and what portion of Bernstrom's injuries were caused by the automobile accident versus her preexisting arthritic condition and whether Gordon Bernstrom suffered loss of consortium as a result of the accident.

At trial, the jury heard deposition testimony from the two IME doctors, as well as Dr. Damle, Bernstrom's treating physician. Dr. Damle testified that all of the treatments that he performed on Bernstrom were reasonable, necessary, and directly related to her automobile accident and that future treatment would be reasonable and necessary as well. Dr. Damle conceded that Bernstrom's other conditions—degenerative disc disease and joint inflammation—are chronic conditions that develop over time. He testified that he did not have any doubt that Bernstrom had degenerative disc disease before her accident and conceded that it was probable that, even had she not been involved in the automobile accident, Bernstrom eventually would have needed the treatments that he performed on her. He explained that Bernstrom's degenerative arthritic changes are common in one her age and that a person could suffer a sudden onset of painful symptoms following something as innocuous as a sneeze.

At the close of trial, American Family submitted proposed instructions on the nature of no-fault and UIM benefits. The district court declined to give the instructions.

The jury awarded Bernstrom \$100,000 for past pain, disability, and emotional distress; \$2,176.84 for past wage loss; \$23,526.87 for past health care expenses; \$200,000 for future pain, disability, and emotional distress; \$3,000 for loss of future earning capacity; and \$125,000 for future health care expenses. The jury also awarded Gordon Bernstrom \$25,000 for loss of consortium. The district court entered judgment in favor of respondents for the UIM policy limits of \$50,000, subject to a pending proceeding on appellants' bad-faith claim.

The district court held an evidentiary hearing on appellants' bad-faith claim. Both appellants testified, and they also offered expert testimony on insurance claims-handling practices. American Family presented its in-house counsel, who made the claims decisions, and an expert who opined that it had acted reasonably in denying the claim for policy limits. The district court issued an order denying the bad-faith claim. The court subsequently denied American Family's motion for a new trial and awarded appellants' costs and disbursements for the UIM trial.

D E C I S I O N

1. Appellants' bad-faith claim.

Appellants contend that respondent acted in bad faith when it offered to settle their UIM insurance claim for \$15,000, knowing that they were entitled to the UIM policy limits of \$50,000. Minn. Stat. § 604.18 provides a remedy for the bad-faith denial of first-party insurance claims. A court may make an award under the statute if it finds both "the absence of a reasonable basis" for denying insurance benefits and that the insurer knew this lack of a basis for denial or acted "in reckless disregard" of the lack of a basis. *Id.*, subd. 2; *see also id.*, subd. 4(b) (providing for court determination of issues). We review the district court's factual finding that these statutory requirements were not met for clear error. *See* Minn. R. Civ. P. 52.01 (providing that, when matters are tried to the court, findings of fact will be reversed only if clearly erroneous).

Applying the statutory standard in this case, the district court found that appellants had "not shown by a preponderance of evidence" that American Family lacked a reasonable basis for denying payment of full policy benefits. On the contrary, the court

found a reasonable basis existed “at least” because of pre-existing-condition evidence in testimony of Dr. Damle and report of Dr. Starzinski; the court also noted “the conservative venue” and the need for a large verdict to permit recovery over benefits already paid. The court emphasized that American Family had not denied appellants’ UIM claim, but rather had offered to settle the claim for \$15,000, which American Family believed was an appropriate settlement, given appellants’ previous receipt of \$20,000 in no-fault benefits under their own policy and \$45,000 under Augustson’s policy. The court also noted that American Family had relied on the advice of its counsel—who had represented it in both the liability and UIM suits—to determine that the \$15,000 offer was reasonable. These findings have support in the record and are not clearly erroneous.

Appellants assert that the court erred by disregarding the evidence favoring a high damages recovery and in particular the medical opinions that the injuries were caused by the accident, rather than the preexisting condition. The district court acknowledged these opinions but nevertheless found that they did not establish the lack of a reasonable basis for the insurer’s actions, given the conflicting evidence regarding causation. Appellants have failed to show that the district court clearly erred in its weighing of the evidence.

Appellants also assert that American Family acted in bad faith by failing to adequately investigate their UIM claim.¹ According to appellants’ expert, the

¹ The district court noted that, under the plain language of the statute, the existence of a reasonable basis to deny the claim appears to be dispositive. Minn. Stat. § 604.18, subd. 2 (requiring insured to show absence of reasonable basis to deny claim *and* insurer’s knowledge of or reckless disregard to the lack of a reasonable basis for denial).

deficiencies in American Family's investigation of the UIM claim included the failure to depose Bernstrom during the UIM proceedings, failure to ever depose Gordon Bernstrom, and failure to request a third IME in connection with the UIM proceedings. But the district court found that, "[d]uring the entire course of the UIM claim handling process and UIM litigation, [American Family] had the benefit of access to and knowledge of the complete discovery and investigation previously conducted in the underlying liability lawsuit." More specifically, American Family had access to all of Bernstrom's medical records, employment records, and tax returns; it had the transcript of Bernstrom's deposition from the liability proceedings; and its counsel "had also had occasion to meet and interact with Gordon Bernstrom." And appellants' expert conceded that it would be a judgment call whether an insurance company employing the same outside counsel that it did for a liability suit would choose to redepose the same plaintiff in a subsequent UIM suit. On this record, the district court did not clearly err by finding that appellants had "not shown by a preponderance of the evidence that [respondent] failed to conduct a reasonable investigation."

In sum, the district court did not clearly err by finding that appellants failed to demonstrate that respondent acted in bad faith by declining to pay policy limits on appellants' UIM claim. Also, the district court did not err by denying appellants' request

Appellants assert that, under the Wisconsin caselaw from which Minnesota's statutory language is derived, an insurer must conduct an adequate investigation in order to have a reasonable basis for denying a claim. *See, e.g., Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753, 757 (Wis. 1995) (explaining that first prong of test requires evaluation of insurer's investigative efforts). Because we agree with the district court that appellants have not shown that American Family's investigation was inadequate, we need not review this assertion.

for costs incurred in connection with the bad-faith proceeding. *See Quade & Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994) (“The determination of what costs are reasonable is left to the discretion of the trial court.”), *review denied* (Minn. Mar. 15, 1994). And because we affirm the district court’s denial of the bad-faith claim, we need not reach American Family’s argument that the district court erred by applying a preponderance-of-the-evidence burden of proof to this claim.

2. The court did not abuse its discretion by denying the new-trial motion.

By notice of related appeal, American Family challenges the district court’s denial of its motion for a new trial on the UIM claim, asserting that the district court erred by admitting the testimony of no-fault claims adjuster Kathy Fremstad and by denying its request for jury instructions on the nature of no-fault and UIM benefits. The district court exercises broad discretion in determining whether to grant a new trial and will not be reversed absent an abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

Admission of the Fremstad Deposition Testimony

American Family primarily asserts that the district court erred by denying its motion to exclude Fremstad’s testimony because the testimony was irrelevant and prejudicial. “Evidentiary rulings concerning materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are within the trial court’s sound discretion and will only be reversed when that discretion has been clearly abused.” *Johnson v. Wash. Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994) (quotation omitted).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Minn. R. Evid. 401. It is evidence that “logically tends to prove or disprove a material fact in issue.” *Shea v. Esensten*, 622 N.W.2d 130, 134 (Minn. App. 2001) (quotation omitted). Otherwise relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403.

Because appellants settled their liability claim against Augustson, they were required during the UIM proceedings to show that their injuries were caused by the accident. *See Employers Mut. Co. v. Nordstrom*, 495 N.W.2d 855, 856 (Minn. 1993) (explaining that UIM lawsuit “raises the same issues of damages and tort liability as in a tort action”). Fremstad testified regarding her evaluation of Bernstrom’s claims for purposes of determining whether she was entitled to no-fault benefits. In the course of that evaluation, Fremstad reviewed the medical expenses submitted by Bernstrom and determined that they were “reasonable, necessary, and related to the accident.” She also sought the IME from Dr. Hartz, which appellants relied on in these proceedings to demonstrate that Bernstrom’s injuries were caused by the accident, rather than a preexisting condition. The district court did not abuse its discretion by determining that Fremstad’s testimony was relevant to the causation issue.

To support its argument that the deposition testimony was irrelevant and prejudicial, American Family focuses on the fact that no-fault benefits are available regardless of who caused a car accident. *See Pusasta v. State Farm Ins. Cos.*, 632

N.W.2d 549, 552 (Minn. 2001) (explaining that only no-fault issue concerns the extent of causation between the accident and the injury). But American Family concedes that Augustson was at fault for the accident, and thus its arguments respecting the cause of the accident are inappropriate.

American Family also asserts that the standards for showing a causal link between the accident and injuries are more relaxed in the no-fault context. It is true that, in the no-fault context, “the requisite connection between use and injury is something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury.” *N. River Ins. Co. v. Dairyland Ins. Co.*, 346 N.W.2d 109, 114 (Minn. 1984) (quotation omitted). But American Family’s counsel elicited from Fremstad a concession that her role was limited to evaluating the no-fault claims, and the jury apparently was instructed to determine the damages that—under the tort standard—were directly caused by the accident.² On this record, we cannot conclude that the district court clearly abused its discretion by declining to exclude Fremstad’s testimony under Minn. R. Evid. 403.

Appellants also assert that Fremstad’s testimony was inadmissible as evidence of a collateral source under Minn. Stat. § 548.251, subd. 5 (2010). But Fremstad’s testimony was redacted to exclude any reference to the payment of no-fault benefits. Indeed, the only references to no-fault benefits were in the questions by American Family’s counsel that were intended to limit Fremstad’s testimony to the no-fault context, and “[o]ne who

² As we observe below, although we have not been provided with a transcript of the court’s jury instructions, a document entitled Jury Instructions in the district court’s file includes an instruction on direct cause.

procures error may not assert such error as the basis for obtaining a new trial.” *Isler v. Burman*, 305 Minn. 288, 296, 232 N.W.2d 818, 822 (1975). Moreover, neither counsel’s questions nor Fremstad’s responses indicated whether no-fault benefits were paid. Thus, Minn. Stat. § 548.251, subd. 5, did not preclude admission of Fremstad’s testimony.

Finally, appellants argue that Fremstad’s testimony was inadmissible under Minn. R. Evid. 409, which provides that “[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.” Again, in this context, we note the limited nature of Fremstad’s testimony, which was redacted to eliminate any reference to the payment of no-fault claims. Accordingly, we conclude that rule 409 was not implicated.

Denial of Requested Jury Instructions

American Family argues that the district court’s failure to give its requested instructions on the nature of no-fault and UIM benefits prompted jury confusion as to the causation standard that it was to apply in this case. District courts exercise broad discretion in instructing juries. *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). “We review jury instructions to determine whether, *taken as a whole*, they are confusing or misleading on a material issue.” *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 406 (Minn. App. 2007) (emphasis added), *review denied* (Minn. Dec. 11, 2007). American Family has not provided this court with a transcript of the instructions given to the jury in this case.³ Accordingly, we lack a sufficient record to review

³ The record does contain a document entitled Jury Instructions, but neither party has indicated whether these are the final instructions given by the court. We nevertheless

respondent's assertion that the district court erred by not giving the requested charge. *See Eichinger v. Wicker Enters.*, 389 N.W.2d 759, 761 (Minn. App. 1986) (declining review of issues for which no transcript had been provided), *review denied* (Minn. Aug. 27, 1986); Minn. R. Civ. App. P. 110.02, subd. 1 (providing that, in event that appellant orders partial transcript, respondent shall notify reporter of additional portions necessary for review).

Because we find no abuse of discretion in the district court's admission of the Fremstad testimony and because we have not been presented with a record to review the court's instructions to the jury, we cannot conclude that the district court abused its discretion by denying American Family's motion for a new trial.

Affirmed.

observe that this document includes an instruction on "direct cause," which we believe was sufficient to apprise the jury of the standard by which it was to determine the damages caused by the accident. *See, e.g., Kinning v. Nelson*, 281 N.W.2d 849, 853 (Minn. 1979) ("A party is not entitled to a specific instruction on his theory of the case when the substance of the requested specific instruction is adequately contained in the general charge.").