

APPELLATE COURT CASE NUMBER: A05-0714

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STATE OF MINNESOTA

IN COURT OF APPEALS

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SHERRY LEA RUSH,

*Appellant,*

vs.

TASHA LEE JOSTOCK AND CINDY MARIE JOSTOCK,

*Respondents*

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**APPELLANT'S BRIEF AND APPENDIX**

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## LEGAL ISSUES

1. *Was the trial court's admission of Dr. Kazi's testimony as to the DSM-IV and Waddell's signs of non-organic source of low back pain to support Defendants' contention that Plaintiff was malingering, prejudicial error?*

***TRIAL COURT HELD:*** *The trial court allowed Dr. Kazi's testimony as to the DSM-IV and Waddell's signs of non-organic low back pain to support Defendants' contention that Plaintiff was malingering.*

Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42 (Minn. 1997)

Sentinel Management Company, et al. v. Aetna Casualty and Surety Company, et al., 615 N.W.2d 819 (Minn. 2000)

Benson v. Northern Gopher Enters., 455 N.W.2d 444 (Minn. 1990)

Krech v. Erdman, 305 Minn. 215, 233 N.W.2d 555 (1975)

Minn. R. Ev. 702

2. *Did the trial court abuse its discretion by not giving Plaintiff's proposed jury instruction with regard to payment of medical bills to the jury?*

***TRIAL COURT HELD:*** *The trial court failed to instruct the jury that it would ensure no duplication of payments.*

Cameron v. Evans, 241 Minn. 200, 62 N.W.2d 793 (1954)

Alholm v. Wilt, 394 N.W.2d 488 (Minn. 1986)

3. *Did the trial court abuse its discretion by denying Plaintiff's motion for new trial on the basis that the jury's verdict was not supported by the evidence; but rather, was the result of passion or prejudice, when liability was admitted, the jury awarded damages for past and future medical expenses, but failed to award any money for past or future pain and suffering?*

***TRIAL COURT HELD:*** *The trial court denied Plaintiff's motion for new trial or conditional additur.*

Lamb v. Jordan, 333 N.W.2d 852 (Minn. 1983)

Clark v. Johnson Bros. Constr., 370 N.W.2d 896 (Minn. Ct. App. 1985)

Walser v. Vinge, 275 Minn. 230, 146 N.W.2d 537 (1966)

Hurr v. Johnston, 242 Minn. 329, 65 N.W.2d 193 (1954)

4. *Did the trial court abuse its discretion by not granting conditional additur or a new trial?*

***TRIAL COURT HELD: The trial court denied Plaintiff's motion for conditional additur or new trial.***

Pulkrabek v. Johnson, 418 N.W.2d 514 (Minn. Ct. App. 1988)

Page v. Blake, 309 N.W.2d 802 (Minn. 1981)

Carufel v. Steven, 293 N.W.2d 47 (Minn. 1980)

Reedon of Faribault, Inc. v. Faribault and Guaranty Insurance, Inc., 418 N.W.2d 488 (Minn. 1988)

5. *Did the trial court err in determining the amount of collateral sources to be deducted from Plaintiff's award?*

***TRIAL COURT HELD: The trial court made a Finding that Plaintiff paid \$118.40 to secure no-fault insurance in the two year period immediately preceding the accident and concluded that Plaintiff was not entitled to recovery of her insurance premiums for her automobile coverage for the two-year period immediately preceding the accident.***

Minn. Stat. § 548.36

6. *Did the trial court err in awarding costs and disbursements to Defendants and not awarding costs and disbursements to Plaintiff?*

***TRIAL COURT HELD: The trial court concluded that Defendants had prevailed, awarded Defendants their costs and disbursements and denied Plaintiff's motion for costs and disbursements.***

Luna v. Zeeb, 633 N.W.2d 540 (Minn. Ct. App. 2001)

Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998)

Minn. R. Civ. P. 68

Minn. Stat. § 549.02

Minn. Stat. § 549.04

### **STATEMENT OF THE CASE**

On July 18, 2000, Plaintiff Sherry Rush was injured when her vehicle was rear-ended by a vehicle driven by Defendant Tasha Jostock. Rush brought a personal injury action against Defendant Tasha Jostock, a minor, and her mother Cindy Jostock. (App. at 1-5). The matter was tried September 8<sup>th</sup> through 10<sup>th</sup>, 2004 before Judge Jodi L. Williamson, at the Olmsted County Courthouse.

### STATEMENT OF THE FACTS

On July 18, 2000, Plaintiff Sherry Rush was driving her 1999 Hyundai Accent from her home on Lake Zumbro to work at Mayo Clinic. (Tr. at 71, 88). When she reached the 400 block of North Broadway Avenue, in Rochester, Rush stopped her vehicle behind a large Chevrolet pickup truck, which was one vehicle in a long line of traffic delayed by a train, which was crossing Broadway Avenue. (Tr. at 68, 88-89). Defendant Tasha Jostock approached Rush's vehicle from the rear. (Tr. at 89). Jostock was not paying attention and slammed into the rear of Rush's vehicle. (Tr. at 89-90). At trial, Officer Joel Blahnik testified that the impact pushed Rush's vehicle into a pickup truck in front of her, wedging the front end of her car beneath the back bumper of the truck. (Tr. at 71).

Immediately following the impact, Rush remained in her vehicle because of neck and knee pain. (Tr. at 73, 89-90). An ambulance transported Rush to the emergency room of St. Mary's Hospital. (Tr. at 91-92). Rush complained of neck pain from the base of her skull to her neck, and numbness and tingling from her elbow to her shoulder. (Tr. at 92-94). By August 9, her symptoms had not changed and she underwent an MRI, which did not disclose any disk problems or any spinal cord impingements. (Tr. at 94). On August 11, Rush underwent an EMG, which did not show any damage to the nerve running down her arm. (Tr. at 96). Following the accident, Rush missed three weeks of work. (Tr. at 97).

In September 2000, Rush underwent an extensive physical therapy program. (Tr. at 98). Rush continued to use a cervical collar and was given a TENS unit. (Tr. at 98-

99). She ultimately discontinued physical therapy because it was causing her too much pain. (Tr. at 102).

On November 2, 2000, Rush was seen again because her condition had plateaued; however, her cervical spine was still very tender. (Tr. Ex. 5). Rush was prescribed nortriptyline for sleep and referred to Mayo's Pain Clinic for injection therapy. (Tr. at 102-104). She underwent another course of physical therapy in November 2000, but remained stiff, without much increase or decrease in her pain. (Tr. at 12-104).

On November 21, 2000, Rush was seen again in the Pain Clinic. She was prescribed nortriptyline and given lidoderm patches for superficial pain. (Tr. at 102-104). She discussed acupuncture with her physician and was told to come back in 6 weeks. (Tr. at 106). By November 30, 2000, Rush's pain had decreased substantially. (Trial Ex. 5). She began acupuncture treatments on December 19, 2000 and, by January 2, 2001, reported feeling much better. (Tr. at 106-108).

Rush continued acupuncture treatment until she was seen by Dr. Custodio in Mayo's Pain Management and Rehabilitation department on July 5, 2001. (Tr. at 113-14; Trial Ex. 5). Dr. Custodio noted that acupuncture treatments and trigger point injections had significantly improved Rush's pain. (Tr. at 113; Trial Ex. 5). Rush was taking 1-2 tablets of nortriptyline daily, utilized a TENS unit, and used lidocaine patches. (Trial Ex. 5). Her condition was reported as having plateaued and she was returned to physical therapy. (Tr. at 113-14; Trial Ex. 5).

On July 11, 2001 Ms. Rush reinitiated physical therapy. (Tr. at 114). She expressed pain with limited function. (Trial Ex. 5). Particularly, she experienced pain

while driving and golfing. Rush admitted that she had discontinued her home exercises because they caused her pain. (Tr. at 114; Trial Ex. 5).

By August 2001, Rush noticed some improvement in her condition; however, an acute exacerbation in mid-August set her back. (Tr. at 114; Trial Ex. 5). Rush continued in Physical Therapy until September 20, 2001, when she saw Dr. Custodio in Pain Management & Rehabilitation again. (Id.). Dr. Custodio noted Rush had continued tightness in the muscles with restricted range of motion. He concluded that she had experienced minimal improvement. (Trial Ex. 5). Dr. Custodio recommended continued use of the TENS unit, lidocaine and nortriptyline, and gave instructions to follow up in 1-2 months. (Id.).

Rush saw Dr. Custodio again on November 1, 2001. (Tr. at 123). Rush's symptoms had not changed, but she indicated that the medication allowed her to sufficiently manage her pain, until the Summer of 2002, when she underwent acupuncture again with Dr. Berger from June 12 through September 13, 2002. (Tr. at 124).

Rush continued to manage her pain with medication, until February 21, 2003, when just looking up at work caused a snap in her neck and a return to the extreme pain she had felt immediately after the motor vehicle accident. (Tr. at 125). Rush underwent x-rays and an MRI, which did not reveal any new damage. (Tr. at 125-26). She was prescribed Vioxx and codeine.

On April 10, 2003, Rush was referred back to Dr. Berger for acupuncture/local injections. (Tr. at 126). Rush saw Dr. Berger again on April 29, 2003. (Tr. at 126). At that time, Rush had a reasonable response to acupuncture. (Tr. at 126). Dr. Berger had

Rush perform specialized maneuvers of her neck, which revealed that Rush's pain seemed to originate from the C5-6 and C6-7 facet joints. (Tr. at 126). Rush underwent injections of cortisone and anesthesia into her facet joints, and experienced immediate pain relief. (Tr. at 126).

On October 9, 2003, Rush saw Dr. Uhm, a Mayo Physical Medicine Physician, for a neuro consult. (Tr.at 130-31; Uhm Tr. at 18). Dr. Uhm noted significant limited range of motion, which, he concluded was clearly related to the motor vehicle accident. (Uhm Tr. at 18-20; Trial Ex. 5). Dr. Uhm indicated that he was not 100% certain at that time that Rush's injury was permanent, but he concluded that her symptoms were not going to disappear over the next year or two. (Uhm Dep. Tr. at 20-26). Dr. Uhm concluded that Rush would require continued treatment, including injections, medication, and possible surgery. (Uhm Dep. Tr. at 24).

In January 2004, Rush saw Dr. Uhm to discuss the possibility of surgery. (Uhm Dep. Tr. at 24-26). Dr. Uhm referred her to Dr. Krauss, a Mayo neurosurgeon. (Uhm Dep. Tr. at 25). Dr. Krauss examined Ms. Rush and concluded that surgery was not her best option; rather, he opined that her pain would taper over time and that she should continue to receive injections at the Pain Clinic. (Dep. Tr. at 25-26).

On March 4, 2004, Rush underwent another round of facet joint and scapular injections. (Trial Ex. 5). Dr. Uhm concluded that Rush's condition was permanent, caused by the motor vehicle accident, and amenable to injections. (Uhm Dep. Tr. at 28). Dr. Uhm opined that Rush would benefit from injections 1-3 times per year in the future. (Uhm Dep. Tr. at 30-32).

During trial, Defendants used testimony from Dr. Stephen Kazi, an orthopedist, by means of a videotape taken one week before trial. (Trial Tr. at 197). Dr. Kazi had conducted an exam of Rush, at the request of her No-Fault carrier, Safeco Insurance Company, on March 13, 2001. Dr. Kazi's report to Safeco, relayed that Rush displayed two of five Waddell's signs and "probable presence of symptom magnification and functional overlay." (App. at 23). Waddell's signs are five in number and are considered signifiers of non-organic source of low back pain when three or more of the signs are present. (App. at 48-51). The record discloses no complaints of low back pain by Rush. (See Tr. Ex. 5).

Knowing what Kazi's opinion had been in the No-Fault exam, Defendants brought a motion to compel Rush to be examined again by Kazi again to that he could testify that he had recently examined her for trial purposes. Over the objections of Rush's attorneys that there was no evidence in the medical records that Rush's medical condition had changed since March 13, 2001 and that Dr. Kazi had already formed his medical opinion, the trial court ordered Rush to be adversely re-examined by Dr. Kazi. (App. at 35). The adverse medical exam was performed on June 3, 2004. (App. at 166). Upon this examination, Dr. Kazi reiterated his previous opinions and concluded that Rush now displayed one Waddell sign (i.e., she displayed superficial tenderness). (Kazi Tr. at 30).

At Dr. Kazi's deposition, defense counsel produced a copy of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), asked Dr. Kazi if he considered it to be a "learned treatise," read certain portions from the DSM-IV relating to malingering and asked Dr. Kazi if it was his

opinion, based upon the definitions found in the DSM-IV and his findings of Waddell's signs on previous examinations, that Rush was malingering or exaggerating her symptoms of pain. Dr. Kazi indicated that that was his opinion. (Kazi Tr. at 25-38; App. at 292).

**Failure to Disclose and Use of Unsupported Expert Testimony**

Following commencement of the action, Rush's attorneys served upon Defendants' attorneys standard discovery devices on July 17, 2002, including Interrogatories relating to expert witness identification and opinion and whether the defense of malingering or exaggeration of injuries would be raised. The defense responded to the Interrogatories with the following Answers:

17. Identify each person whom you expect to call as an expert witness at trial, stating the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, including but not limited to an identification and description of each document that the expert used or relied on in forming each opinion.
  - a. Identify by author, title, copyright date and publisher any document you claim to be a learned treatise upon which your expert may rely at trial in rendering his or her opinions. Identify separately any such documents you intend to call to the attention of any other expert witnesses upon cross-examination. Also identify, precisely, the exact language contained in such documents that you claim admissible to read into evidence. [emphasis supplied]

**ANSWER:** Experts have not yet been identified, however Defendant reserves the right to call any and all medical personnel who have seen, cared for or treated Plaintiff including an independent medical examination doctor. Discovery continuing.

21. Do you contend that Plaintiff is malingering or exaggerating her injuries? If so, state the following:

- a. The injury or condition you claim is being exaggerated or malingered.

- b. IDENTIFY each person known to you to have knowledge of any facts supporting your claim in this regard.
- c. All facts which you believe support your position in this regard.

**ANSWER:** Unknown. It is anticipated that there will be expert medical testimony concerning the nature and extent of Plaintiff's claimed injuries. [emphasis supplied]

(App. at 184-198).

On July 26, 2004, Rush's attorneys served upon Defendants a Request for Supplementation of all past discovery. (App. at 199-201). Defendants answered as follows:

1. All Answers to Interrogatories<sup>1</sup>

**ANSWER:** Defendant does not know what information she possesses which is impeaching until she sees what Plaintiff or other witnesses testify to at the time of trial. In addition, such Interrogatory requests the work product of the attorney. The information which Defendant will rely upon has been exchanged through discovery or obtained through authorizations provided by Plaintiff and therefore is available to Plaintiff for Plaintiff's review. Defendant is in possession of records from Mayo Clinic, St. Mary's Hospital, and Gold Cross Ambulance, Safeco Insurance Company of America, Department of Labor and Industry, and employment records from Mayo Clinic.

(App. at 202-203).

The videotaped deposition of Dr. Uhm, Rush's expert witness, was taken on August 31, 2004. Dr. Kazi's deposition was taken on September 1, 2004. Trial commenced on September 8, 2004.

The defense never advised Rush's counsel before Dr. Kazi's deposition that Dr. Kazi would be prepared to testify that his finding of one Waddell sign of non-organic low back pain would be a significant basis for Dr. Kazi's opinion that Rush did not have a

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<sup>1</sup> Defendants, in contradiction of the requirements of the Minnesota Rules of Civil Procedure, did not restate which questions to which they were responding.

neck injury. The defense never advised Rush's counsel before Dr. Kazi's deposition that Dr. Kazi would testify that Rush was malingering and exaggerating her symptoms for gain. The defense never advised Rush's counsel that it would use the DSM-IV as a learned treatise at Dr. Kazi's deposition. In asking Dr. Kazi if he considered the DSM-IV to be a learned treatise, the defense never inquired as to whether Dr. Kazi had training in psychiatry or psychology, whether he was qualified to make psychological or psychiatric evaluations using the DSM-IV, and whether he customarily used or consulted or even had access to the DSM-IV in his practice.

Lacking forthright, honest replies to the Interrogatories which Rush's counsel had propounded two and a half years before Dr. Kazi's deposition and which had been evasively supplemented by the defense shortly before trial, Rush's attorneys had no means of raising those issues with Rush's expert at his deposition nor adequately preparing for Dr. Kazi's deposition where the defense of Rush's claim, exaggeration of symptoms for gain and malingering, was revealed for the first time.

Rush's attorney brought a motion in limine to exclude Dr. Kazi's testimony regarding Waddell's signs and DSM-IV interpretation of those signs. (Tr. at 16-17; App. at 44). Plaintiff argued that Dr. Kazi misused the Waddell signs, which were developed to detect lumbar non-organic physical signs. (App. at 45-51). Plaintiff's counsel also brought to the Court's attention that Dr. Waddell himself had stated that a 3/5 Waddell sign finding was necessary to raise concerns of a non-organic cause of lumbar pain. (Id.; Tr. at 14-15). Indeed one of the Waddell tests (axial compression) would be totally inappropriate for a cervical lesion. (Tr. at 14-16). Defense counsel never disclosed Dr. Kazi's reliance on the DSM-IV prior to Dr. Kazi's deposition; and, defense counsel never

qualified Dr. Kazi, an orthopedist, as being qualified to testify from the DSM-IV. (App. at 184-203). Dr. Kazi never testified that he used and relied upon the DSM-IV in his practice. (See Kazi Tr.). All defense counsel asked Dr. Kazi was whether the DSM-IV was a “learned treatise.” (Kazi Tr. at 28). Plaintiff’s motions were denied, the jury heard Dr. Kazi’s testimony, and defense counsel used Dr. Kazi’s testimony and opinions as the basis for Defendants’ primary theory of the case: that Plaintiff was a malingerer or had a non-organic cause of her pain. (Tr. at 34, 248, 294, 295, 296, 299, 300, 301; Kazi Tr. at 28-30).

#### **Jury Instruction Regarding Insurance Payments**

During defense counsel’s cross-examination of Rush, defense counsel specifically asked Rush how much money she had obtained through her short term disability insurance benefits from her employer, Mayo Clinic. (Tr. at 237-40). Defense counsel also elicited from Rush, the amount of wage loss benefits she obtained through her auto insurance carrier. (Id. at 240).

Since the issue of insurance payments and possible duplication of benefits had been raised by the defense, Rush’s attorney requested the court give the following jury instruction at the close of evidence, over defense counsel’s objection:

Regarding the subject of medical bills, you need not worry about whether some of the medical bills were paid by other sources. As the judge, I will see to it that no one is paid twice for the same thing.

(App. at 38-41).

The court declined to give the foregoing instruction. (Tr. at 276-77). Predictably, during deliberations, the jury submitted the following question to the court: “[h]as the insurance company already paid for health care and diagnostic expenses?” (Tr. at 332). The Court did not respond directly to the juror’s concern. The Court instructed the jury that it was

to “decide what health care expenses and diagnostic expenses are directly related to the accident and the Court will handle everything else.” (Tr. at 332). The Court failed to properly instruct the jury that the Court would ensure no duplication of payments, although the jury was clearly concerned about insurance payments. (Id.).

### **Additur Facts**

The Court was aware, prior to trial, that the defense had evaluated Rush’s claim and made an offer of judgment in the amount of \$35,000.

The jury was presented with evidence that the cost of Rush’s past medical treatment totaled \$22,000; that her past diagnostic expenses totaled at least \$5,300; and that her past wage losses totaled at least \$3,193.50; and (See Tr. at 302; Trial Ex. 6, 10, 13, and 14). The jury was presented with evidence that the injections which Dr. Uhm suggested Ms. Rush would require each year, would cost \$1,800-1,900 per year. (Uhm Tr. at 33; See Trial Ex. 13, 14). The jury was also presented with ample evidence of Ms. Rush’s pain and suffering, countered only by the testimony of Dr. Stephen Kazi that she was malingering, exaggerating her symptoms for gain and that her expressions of pain had a non-organic basis. (Tr. at 107; 126-128).

On September 10, 2004, the jury returned its verdict, awarding the following damages: \$3,193.50 for past wage losses; \$22,000 for past health care expenses; \$5,300 for past diagnostic expenses; \$0 for past pain, suffering, and emotional distress; \$5,000 for future health care expenses; and, \$0 for future pain, suffering and emotional distress. (App. at 81). After deduction of collateral sources, Plaintiff’s net verdict was \$13,404.97. (App. at 112; Tr. at 333).

### **Collateral Sources Facts**

At the time of the accident, Plaintiff maintained insurance through her employer, Mayo Clinic, which provided her with health insurance and short-term disability benefits. (Tr. at 249-50). This insurance plan is governed by ERISA. Plaintiff's medical insurance plan paid \$6,877.82 toward her accident-related medical expenses and retains a first priority subrogation interest for that amount. (App. at 220). Mayo Clinic had no record of short-term disability payments it might have made to Rush for absences related to the auto accident. Therefore, the only collateral source offsets were Rush's PIP payments.

At the time of the accident, Rush maintained auto insurance, which provided her with no-fault benefits. Rush's auto insurer paid \$19,733 toward her accident-related medical expenses and \$1,666.35 toward her accident-related wage losses. (App. at 221). In the two-year period preceding the accident, Rush paid \$3,672.96 in premiums to maintain this coverage. (App. at 222-283).

The Court found that Rush had paid \$3,672.96 to secure automobile insurance in the two-year period immediately preceding the accident, of which \$118.40 was attributable to no-fault coverage. (App. at 112). The Court concluded that "Plaintiff is not entitled to recovery of her insurance premiums for her automobile coverage for the two-year period immediately preceding the accident." (App. at 112).

### **Costs & Disbursements**

Prior to trial, the defense made a Rule 68 Offer of Judgment to Rush. (App. at 36). The Offer of Judgment was for \$35,000, "including costs and disbursements." (Id.) (emphasis added). Rush did not accept the Offer of Judgment.

Following trial, both parties sought to tax their costs and disbursements. (App. at 91, 103). In its Findings, the Court indicated that “Defendants made an offer of judgment to Plaintiff in the amount of \$35,000.” (App. at 333). The Court concluded that since the net amount of the recovery was less than \$35,000, the defense had prevailed in the action. (App. at 334). The Court awarded Defendants their costs and disbursements. (Id.). The Court determined that Rush was not entitled to recover her costs and disbursements. (Id.).

## STANDARD OF REVIEW

A trial court's decision to deny a request for a new trial will be overturned for an abuse of discretion. Knuth v. Emergency Care Consultants, P.A., 644 N.W.2d 106, 113 (Minn. Ct. App. 2002); Pulkrabek v. Johnson, 418 N.W.2d 514 (Minn. Ct. App. 1988) *review denied* (Minn. May 4, 1988).

Jury instructions should convey to the jury a "clear and correct understanding of the law." Cameron v. Evans, 241 Minn. 200, 209, 62 N.W.2d 793, 798 (1954). A trial court's decision as to jury instructions will be reversed for abuse of discretion. Alholm v. Wilt, 394 N.W.2d 488, 490 (Minn. 1986).

"Statutory construction and the application of statutes to the undisputed facts of a case involve questions of law, which [the court] reviews de novo." American Family Ins. Group v. Keiss, 680 N.W.2d 552, 555 (Minn. Ct. App. 2004) (citations omitted).

## ARGUMENT

### **I. The trial court's admission of Dr. Kazi's testimony using the DSM-IV and Waddell's signs of non-organic source of low back pain to support Defendants' contention that Plaintiff was malingering, was prejudicial error.**

"Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 46 (Minn. 1997) (quotation omitted). The trial court has discretion to exclude expert testimony. Benson v. Northern Gopher Enters., 455 N.W.2d 444, 445-46 (Minn. 1990).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Minn. R. Ev. 702.

Minnesota adheres to the *Frye-Mack* standard for admission of evidence that is based on novel scientific techniques or principles. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814-15 (Minn. 2000). Under this two-prong standard, the scientific technique or principle at issue must be generally accepted within the relevant scientific community. *See id.* In addition, its foundation must be reliable. *See id.* at 815. Id. Foundational reliability ‘requires the ‘proponent of a \* \* \* test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.’ ” *State v. Moore*, 458 N.W.2d 90, 98 (Minn. 1990) (quoting *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977)).

Sentinel Management Company, et al. v. Aetna Casualty and Surety Company, et al., 615 N.W.2d 819, 824 (Minn. 2000).

Where a party’s failure to disclose evidence is inexcusable, that evidence should be suppressed if its admission would result in prejudice to the other party. Krech v. Erdman, 305 Minn. 215, 233 N.W.2d 555 (1975).

The DSM-IV provides that “[t]he essential feature of Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, obtaining drugs.”

Dr. Kazi’s testimony as to the DSM-IV and his ultimate diagnosis of malingering should have been excluded. The basis for Dr. Kazi’s testimony in which he applies the preceding DSM-IV passage to Mrs. Rush’s case, appears to be Dr. Kazi’s finding of two out of five positive Waddell signs in a 2001 PIP IME and only one Waddell sign in his June 3, 2004 examination of Ms. Rush.

Despite Dr. Kazi's representations, these signs are medically insignificant for two reasons. First, the Waddell test detects non-organic physical signs in low back pain, not cervical spine pain. There was no testimony that Waddell's signs may be legitimately used to determine a non-organic source of cervical pain. Indeed, one of the five tests, compression of the head eliciting complaints of low back pain, could not be used in a cervical case. Second, the display of one or two positive Waddell signs is clinically insignificant because a minimum of three positive Waddell signs must be displayed before the findings are considered clinically significant. (App. at 48).

Furthermore, malingering is a mental health diagnosis. Dr. Kazi is not a mental health specialist; rather, he is an orthopedist. Dr. Kazi was not qualified to give psychiatric diagnosis. Dr. Kazi testified that Rush displayed only one Waddell's sign during his adverse medical exam conducted on June 3, 2004. (Kazi Tr. at 30). While Dr. Kazi might have been entitled to express an opinion that he could find no physical basis for Rush's pain, there was no foundation laid to qualify Dr. Kazi to render psychiatric diagnosis, such as malingering, without conducting the underlying psychological or psychiatric evaluations which would allow a medical professional to render such a devastating accusation in the guise of a diagnosis.

Finally, the defense never disclosed an intent to claim Rush was malingering or its intent to use the DSM-IV as a learned treatise, although this information was specifically requested in Rush's discovery requests. Defense counsel deliberately sprang the malingering defense and used the DSM-IV at Dr. Kazi's deposition to catch Rush's attorney unaware, entirely contrary to the spirit and express provisions of the Minnesota Rules of Civil Procedure. Dr. Kazi's theory of malingering, buttressed with quoted cites

from the DSM-IV, was the central theme of the defense. As such, the admission of this evidence clearly prejudiced plaintiff.

In sum, Dr. Kazi relied on the clinically insignificant findings of a test used to detect non-organic physical signs in low back pain to support a conclusion that Ms. Rush intentionally exaggerated the level and degree of her cervical spine pain. Dr. Kazi was not qualified to render a psychiatric diagnosis. Dr. Kazi's opinions formed the central theme of the defense. Dr. Kazi's testimony about malingering using Waddell's signs and the DSM-IV was misleading and highly prejudicial to Plaintiff, and as such, should have been excluded. The trial court clearly abused its discretion when it admitted this highly prejudicial evidence.

**II. The trial court abused its discretion by not giving Plaintiff's proposed jury instruction with regard to payment of medical bills to the jury.**

Jury instructions should convey to the jury a "clear and correct understanding of the law." Cameron v. Evans, 241 Minn. 200, 209, 62 N.W.2d 793, 798 (1954). A trial court's decision as to jury instructions, will be reversed for abuse of discretion. Alholm v. Wilt, 394 N.W.2d 488, 490 (Minn. 1986).

The Court declined to give the following proposed jury instruction:

Regarding the subject of medical bills, you need not worry about whether some of the medical bills were paid by other sources. As the judge, I will see to it that no one is paid twice for the same thing.

One can only speculate as to the precise reasons why the jury reached such contradictory conclusions with regard to damages. However, the jury was clearly confused about its role in determining the reasonable value of Plaintiff's damages and was clearly tainted by testimony elicited by defense counsel as to prior compensation of

Rush by third parties. The jury's question as to whether an insurance company had paid Ms. Rush's medical bills indicates it misunderstood its duty, that jury members were trying to determine the amount of money Rush should receive rather than determine the value of Ms. Rush's damages. Without knowing that Rush would not receive duplicate compensation, the jury may have concluded that Rush's medical bills had been paid and that the value of her injury might best be matched by awarding her a sum equal to those medical bills. Plaintiff's proposed jury instruction would have provided clear guidance to the jury with respect to its duty and was necessary to cure the damage created by defense counsel's elicitation of third party reimbursement. The Court's curative instruction to the jury during its deliberation was inadequate and failed to fully explain the Court's role in ensuring non-duplicative awards. For the reasons set forth in Part III below, Plaintiff was clearly prejudiced by the jury's misunderstanding of the law.

**III. The jury's verdict was not supported by the evidence, but was the result of passion or prejudice; and, therefore, the trial court abused its discretion by not granting Plaintiff's Motion for New Trial.**

A new trial should be granted if "the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment." Lamb v. Jordan, 333 N.W.2d 852, 855-56 (Minn. 1983).

"If the damages awarded by the jury encompass only special damages when general damages such as pain and suffering and permanent disability have also been proven, the jury's damages are inadequate." Clark v. Johnson Bros. Constr., 370 N.W.2d 896, 900 (Minn. Ct. App. 1985) (citation omitted); See also Seydel v. Reuber, 254 Minn.

168, 94 N.W.2d 265 (1959); Walser v. Vinge, 275 Minn. 230, 146 N.W.2d 537 (1966). “Inadequacy of damages coupled with a finding of liability shows failure to give the case impartial and conscientious consideration.” Hurr v. Johnston, 242 Minn. 329, 65 N.W.2d 193, 336 (1954).

Liability was not an issue in this case and Ms. Rush did not cause the problems that befell her as a result of the accident. The jury’s sole task was to place values on certain measures of damages. Through its award of all of Ms. Rush’s past medical expenses and wage losses, the jury apparently believed that Ms. Rush had, in fact, been injured as a result of the accident, and that her treatment and loss of work were necessary. The jury’s failure to make award for past and future pain and suffering damages cannot be reconciled with its awards for past medical expenses and wage losses. The jury heard testimony about the degree to which Ms. Rush had suffered, how her injuries severely inhibited her daily life, and the painfulness of her treatments. Nonetheless, the jury determined that Ms. Rush had not suffered one bit by awarding her \$0 for past pain and suffering. To compound matters, the jury determined that Ms. Rush needed future medical care, contrary to Dr. Kazi’s assertion and in line with Dr. Uhm’s testimony. The jury awarded Plaintiff \$5,000 for future medical care and then awarded her nothing for the pain associated with the need for such care.

One can only speculate as to the precise reasons why the jury reached such contradictory conclusions with regard to damages. Unsupported, undisclosed allegations of malingering and non-organic causes of pain no doubt had their intended effect. Clearly the jury was confused about its role in determining the reasonable value of Plaintiff’s damages, as evidenced by its question asking whether an insurance company

had paid Ms. Rush's medical bills. The jury may have believed it was "giving" Ms. Rush \$35,493.50 when it made its award, based upon the Court's instruction following the jury's inquiry about insurance payments. The jury's question indicates it misunderstood its duty, and that it tried to determine the amount of money that it thought Ms. Rush should receive, rather than determine the value of Ms. Rush's damages.

The jury's inconsistent verdict was not supported by the evidence at trial, and its question to the Court indicates its decision was motivated by mistake, passion and/or prejudice. The trial court abused its discretion when it denied Plaintiff's request for a new trial.

**IV. The trial court abused its discretion by not granting conditional additur or a new trial in the face of a perverse verdict.**

The decision "to grant additur rests almost wholly within the trial court's discretion." Pulkrabek v. Johnson, 418 N.W.2d 514, 515 (Minn. Ct. App. 1988). The court may grant additur if the verdict is unreasonable. See Pulkrabek, 418 N.W.2d 514.

However, [i]f the jury's verdict is perverse and palpable contrary to the evidence, an appellate court will, and should, reverse." Reedon of Faribault, Inc. v. Faribault and Guaranty Insurance, Inc., 418 N.W.2d 488, 491 (Minn. 1988) (citations omitted). "The test is whether the answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences." Reese v. Henke, 277 Minn. 251, 152 N.W.2d 63 (1967). Special verdict answers that award damages to a plaintiff but do not find that the plaintiff suffered a permanent injury, are irreconcilable or perverse. Page v. Blake, 309 N.W.2d 802 (Minn. 1981); Carufel v. Steven, 293 N.W.2d 47, 48-49 (Minn. 1980). Under these circumstances, a new trial is necessary. Carufel, 293 N.W.2d at 48-49.

For the reasons set forth in Part III above, the damages awarded by the court were entirely inadequate or perverse, and the trial court, therefore, abused its discretion by denying additur or a new trial.

**V. The trial court erred when it made a Finding that Plaintiff paid \$118.40 to secure no-fault insurance in the two-year period immediately preceding the accident and a Conclusion of Law that Plaintiff was not entitled to recovery of her insurance premiums for her automobile coverage for the two-year period immediately preceding the accident.**

In a civil action... when liability is admitted or is determined by the trier of fact, ... the court shall determine: ... (2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff... for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.

Minn. Stat. § 548.36, subd. 2.

“The court shall ... offset any reduction in the award by the amounts determined under subdivision 2 clause (2).” Minn. Stat. § 548.36, subd. 3(a).

Despite finding that Ms. Rush paid \$3,672.96 to secure automobile insurance in the two-year period immediately before the accident, of which it found \$118.40 was directly attributable to no-fault coverage, the Court concluded that “Plaintiff is not entitled to recovery of her insurance premiums for her automobile coverage for the two-year period immediately preceding the accident.” The trial court completely disregarded the mandate of the statute and its decision was clearly erroneous.

Appellant paid \$3,672.96 to secure automobile insurance in the two-year period immediately before the accident. The statute does not require that the Court apply only that portion of the insurance premium attributable to PIP against collateral source deductions. Rush did not separately purchase PIP coverage. PIP coverage was available

only as a part of Rush's complete auto policy. Likewise, the statute does not allow a trial judge to arbitrarily decide not to offset any portion of a premium against collateral source deductions, unless, of course, the jury returns a defense verdict.

**VI. The trial court erred when it concluded that, since Plaintiff's net damages under the verdict were less than the \$35,000 Offer of Judgment, Defendants should be awarded their costs and disbursements and Plaintiff should be denied her costs and disbursements.**

At any time prior to 10 days before the trial begins, any party may serve upon an adverse party an offer to allow judgment to be entered to the effect specified in the offer or to pay or accept a specified sum of money, **with costs and disbursements then accrued**, either as to the claim of the offering party against the adverse party or as to the claim of the adverse party against the offering party. ... If the judgment finally entered is not more favorable to the offeree than the offer, the offeree must pay the offeror's costs and disbursements. [emphasis supplied]

Minn. R. Civ. P. 68.

According to the Rule's Advisory Committee Note, offers of judgment are intended to encourage settlement. An offeror is not entitled to the relief provided in Rule 68, if the offer of judgment does not meet the requirements of the Rule. (See App. at 284-292).

Before trial, Defendants presented Ms. Rush with a Rule 68 Offer of Judgment, which stated:

PLEASE TAKE NOTICE, that pursuant to Rule 68 of the Rules of Civil Procedure for the District Courts and pursuant to Minnesota Statute Section 549.09, defendants, Tasha Lee Jostock and Cindy Marie Jostock, by their attorney, hereby offer the following sum in full, complete and final settlement of the claims of plaintiff, Sherry Lea Rush, set forth herein, including costs and disbursements: the sum of Thirty-Five Thousand Dollars and Zero Cents (\$35,000).

The plain language of the Rule provides that the offer must be for a specific amount of money *in addition to* costs and disbursements then accrued. Defendants' Offer of Judgment is not for a specific amount of money *and* costs and disbursements then

accrued; rather, it is for a lump sum of money which includes costs and disbursements. This lack of specificity makes it impossible to compare defendant's offer with a judgment finally entered. In sum, Defendants' Offer of Judgment does not comply with the Rules of Civil Procedure and Defendants should not be afforded the relief under Rule 68.

Even if Defendants had made a valid Rule 68 Offer of Judgment, "the prevailing party in a lawsuit is entitled to recover his or her costs and disbursements." Luna v. Zeeb, 633 N.W.2d 540, 542 (Minn. Ct. App. 2001) (*citing* Minn. Stat. §§549.02, 549.04 (2000)). "In determining who qualifies as the prevailing party in an action, 'the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action.'" Borchert v. Maloney, 581 N.W.2d 838, 840 (Minn. 1998) (*quoting* Haugland v. Canton, 250 Minn. 245, 254, 84, N.W.2d 274, 280 (1975)). "The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." Borchert, 581 N.W.2d at 840 (*citing* U.S. v. Minneapolis, St. P. & S.S.M. Ry. Co., 235 F. 951, 955 (D. Minn. 1916)). A plaintiff in a personal injury action is the prevailing party if she is not at fault for the accident, and she is entitled to recover money damages awarded by the jury. *See* Borchert, 581 N.W.2d 838; Luna, 633 N.W.2d 540.

Prior to trial, the parties stipulated that Defendant Tasha Jostock was at fault for the July 18, 2000 accident, and that Sherry Rush was not at fault for the accident. The jury awarded Plaintiff \$35,493.50. The trial court determined that Plaintiff's net damages totaled \$13,404.97. The trial court was presented with only two options with respect to the parties' motions to tax costs and disbursements: 1) the trial court could have found the Rule 68 Offer of Judgment invalid and allowed only Plaintiff to tax her costs and

disbursements, since she was the prevailing party; or, 2) the trial court could have found the Rule 68 Offer of Judgment valid and allowed both parties to tax their respective costs and disbursements. Instead, the trial court ignored the Borchert decision and the plain, unambiguous statutory language, and allowed only the Defendants to tax their costs and disbursements.

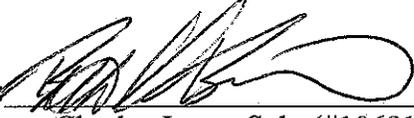
The trial court clearly erred. Rush is the only party who should be allowed to tax her costs since the Offer of Judgment did not comply with Rule 68. Alternatively, should this Court find that the Offer of Judgment did comply with Rule 68, then both parties ought to be allowed to tax their costs since Rush clearly prevailed in the action.

#### CONCLUSION

The trial of this matter was fraught with prejudicial errors from beginning to end which, not surprisingly, led to a perverse verdict by the jury. Appellant's motion for new trial or additur, should have been granted. Appellant is entitled to a new trial free of the errors and misconduct which collectively prejudiced her.

Dated this 7<sup>th</sup> day of June, 2005.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).