

NO. A05-0714

State of Minnesota
In Court of Appeals

Sherry Lea Rush,

Appellant,

v.

Tasha Lee Jostock and Cindy Marie Jostock,

Respondents.

RESPONDENT'S BRIEF AND APPENDIX

Lee L. La Bore (#59274)
LaBORE, GIULIANI, COSGRIFF
& VILTOFT, LTD.
P.O. Box 70
Hopkins, MN 55343-0070
(952) 933-3371

Attorney for Respondents

Charles James Suk (#106914)
Beth K. Bussian (#302326)
SUK LAW FIRM, LTD.
5 East Center Street
Suite 200
Rochester, MN 55904
(507) 281-0000

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Legal Issues.....	1
Statement of the Case and Facts.....	1
Legal Argument.....	7
I. Standard of Review	7
II. The Trial Court properly denied Appellant’s motion for a new trial on the grounds that it did not commit any errors of law that occurred to deny Appellant a fair trial	8
A. Dr. Kazi was properly qualified to testify as to his diagnosis of malingering	8
B. The trial court properly refused to give Plaintiff’s requested jury instruction	12
II. The jury’s finding on damages was fully supported by the evidence, with no evidence of passion or prejudice being presented	14
IV. The Trial Court properly refused to grant a conditional additur where the jury verdict was not unreasonable	16
V. Respondents concur that Appellant is entitled to recover the \$118.40 she paid to secure no-fault insurance in the two-year period preceding this accident	16
VI. The Trial Court properly exercised its discretion in determining collateral source offsets and in awarding to Respondents their costs and disbursements	18
Conclusion.....	20

TABLE OF AUTHORITIES

Minnesota Appellate Court Cases:

<i>Hauenstein v. Loctite Corp.</i> , 347 N.W.2d 272, 275 (Minn. 1984).....	7
<i>Alevizos v. Metropolitan Airports Commission</i> , 452 N.W.2d 492, 499 (Minn.Ct.App. 1990).....	7
<i>Baker v. Amtrak National Railroad Passenger Corporation</i> , 588 N.W.2d 749, 753 (Minn.Ct.App.1999).....	8
<i>Jurgensen v. Schirmer Transportation Co.</i> , 242 Minn. 157, 161-62, 64 N.W.2d 530, 533 (1954).....	8
<i>Reinhardt v. Colton</i> , 337 N.W.2d 88, 92 n. 1 (Minn. 1983).....	9,10
<i>Kastner v. Wermerskirschen</i> , 295 Minn. 391, 394, 205 N.W.2d 336, 338 (1973).....	10
<i>State Farm Fire & Cas. Co. v. Short</i> , 459 N.W.2d 111, 113 (Minn. 1990).....	13
<i>Benson v. Northwest Airlines, Inc.</i> , 561 N.W.2d 530, 537 (Minn.App. 1997), rev. denied (Minn. June 11, 1997).....	13
<i>Seivert v. Bass</i> , 288 Minn. 457, 181 N.W.2d 888 (1970).....	13
<i>Lundgren v. Fultz</i> , 385 N.W.2d 378 (Minn.App. 1986).....	13
<i>Ruppert v. Yaeger</i> , 414 N.W.2d 419, 422 (Minn.App. 1987).....	14,15
<i>Vadnais v. American Family Mut. Ins. Co.</i> , 243 N.W.2d 45 (Minn. 1976).....	15
<i>Pulkrabek v. Johnson</i> , 418 N.W.2d 514, 516 (Minn.App. 1988).....	16
<i>Romain v. Pebble Creek Partners</i> , 310 N.W.2d 118, 123-24 (Minn. 1981).....	19

Quade & Sons Refrigeration v. 3M, 510 N.W.2d 256 (Minn.App. 1994)
(citing *Jostens, Inc. v. National Computer Systems*, 318 N.W.2d 6951, 704
(Minn. 1982)).....19

Benigni v. County of St. Louis, 585 N.W.2d 51, 54-55 (Minn. 1998)..... 19

Minnesota Statutes and Rules:

Minn.R.Evid. 702.....9

2 D. Herr & R. Haydock, *Minnesota Practice*, § 26.20 (1985).....11

Rule 59.01.....15

Minnesota Statute 548.36, Subd. 2.....16

Rule 68 Offer of Judgment.....18

Minn. Stat. §549.04.....18

Minn.R.Civ.P. 54.04.....19

Minn.R.Civ.P. 68.....20

LEGAL ISSUES

I. WERE THERE ANY ERRORS OF LAW COMMITTED BY THE TRIAL COURT SUCH AS TO ALTER THE OUTCOME OF THIS TRIAL?

The Trial Court held in the negative.

II. WAS THE JURY'S FINDING ON DAMAGES FULLY SUPPORTED BY THE EVIDENCE, WITH NO EVIDENCE OF PASSION OR PREJUDICE BEING PRESENTED?

The Trial Court held in the affirmative.

III. DID THE TRIAL COURT PROPERLY REFUSE TO GRANT A CONDITIONAL ADDITUR WHERE THE JURY VERDICT WAS NOT UNREASONABLE?

The Trial Court properly denied this motion.

III. DID THE TRIAL COURT CORRECTLY DETERMINE THAT APPELLANT HAD PAID \$118.40 TO SECURE NO-FAULT INSURANCE IN THE TWO-YEAR PERIOD PRECEDING THIS ACCIDENT?

The Trial Court correctly made this Finding, but failed to award this amount to Appellant as a credit against the collateral source offsets.

IV. DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION IN DETERMING COLLATERAL SOURCE OFFSETS AND IN AWARDING TO DEFENDANTS THEIR COSTS AND DISBURSEMENTS?

The Trial Court properly ruled on these post-trial issues.

STATEMENT OF THE CASE AND FACTS

This Appeal arises out of an automobile accident that occurred on July 18, 2000.

The Appellant, Sherry Rush (hereinafter "Appellant") was the driver of a vehicle that was involved in an automobile accident with Respondent Tasha Jostock (hereinafter "Respondent"). Following the automobile accident, Appellant alleged personal injuries,

and pursued the present lawsuit against Tasha Jostock and her mother, Cindy Jostock, the registered owner of the vehicle driven by Tasha at the time of the accident.

Prior to trial, on August 26, 2004, Respondents served upon Appellant a Rule 68 Offer of Judgment in the amount of \$35,000. Appellant failed to accept this offer.

This matter tried to a jury from September 8 -10, 2004 before the Hon. Jodi L. Williamson, at the Olmsted County Courthouse. Liability was stipulated to, and the only issue before the jury was that of damages. The jury determined that Appellant had not sustained a permanent injury, and the net verdict on damages to Appellant was \$13,404.97. Appellant brought post-trial motions on numerous issues, all of which were denied by the trial court. Appellant now appeals from the District Court's Order denying her motions for JNOV and/or a new trial.

Prior to trial, each party brought pre-trial motions, which included Respondents' motion to exclude evidence of facet injections Appellant received during the course of her medical treatment, and Appellant's motion to exclude testimony from Dr. Kazi, Respondents' expert witness, concerning his findings of Waddell signs during his examination, the use of the DSM-IV, and Dr. Kazi's testimony about functional overlay. The facts surrounding the motion involving Dr. Kazi's testimony include the fact that Appellant was furnished with Dr. Kazi's updated report on July 16, 2004. This report specifically mentioned that Dr. Kazi found a positive Waddell's sign, indicating some degree of functional overlay. *See* Appellant's Appendix, pp. 28, 30. Appellant's counsel was in receipt of Dr. Kazi's report at least one and one-half months prior to Dr. Kazi's deposition was taken September 1, 2004, and two months prior to trial.

The trial court ruled on both of these motions prior to trial, denying them both in their entirety. (T.34-37).¹ With regard to both of these motions, the court found that the issue was not the admissibility of the subjects at issue, but rather the weight to be given to such testimony. With regard to Dr. Kazi's testimony concerning malingering, the court stated, "...[T]he idea that there may have been some functional overlay or there may have been malingering should've been no surprise to you or your client based upon my understanding of the medical records and the reports of the doctors previously given..." (T.35). Finally, the court heard Respondents' motion to exclude Dr. Uhm's testimony concerning future facet injections, on the grounds that Dr. Uhm's testimony did not meet the legal standard for admissibility of his opinions on this subject. The court denied this motion as well. (T. 41).

The jury was required to sort through voluminous medical evidence presented at trial. The jury heard testimony from Dr. Joon Uhm, Appellant's treating doctor, as well as Dr. Stephen Kazi, who conducted an examination of Appellant at the request of her No-Fault carrier, Safeco Insurance Company. At trial, Dr. Uhm testified that his own examination of Appellant did not reveal any neurological abnormalities. *See Depo. Transcript of Dr. Uhm*, p. 44. Further Dr. Uhm agreed that Dr. Krauss, a neurosurgeon to whom he had referred Appellant, also did not find any abnormalities on his neurological examination of appellant. *Id.* Dr. Uhm testified that x-rays and an MRI scan taken of appellant's cervical spine were read as being normal. *Id.* Dr. Uhm also testified about an EMG that was done on appellant one month after the accident which showed that all of the

¹ References to T. ___ are references to the trial transcript.

muscles were normal. *Id.* at 49. Dr. Uhm testified, “And therefore, by inference we infer that the nerves that come down to those muscles must also be functioning normally as well.” *Id.* Finally, the jury heard testimony from Dr. Uhm that prior to this automobile accident, appellant was under restrictions relating to her mid back and low back that included no lifting more than 10 pounds and no sitting for prolonged periods of time or twisting.

The jury was presented with numerous medical records relating to Appellant’s medical treatment both before and after this automobile accident. For instance, the jury had the records from the emergency room visit at St. Mary’s hospital following this accident, which showed x-rays to be normal and appellant to have a normal neurological examination. The jury also had before them a record from the Mayo Clinic dated August 3, 2000 that was offered into evidence. This record details a visit Appellant had with Dr. Littrell. Dr. Littrell notes in this record that she did not find any deficits on physical examination of Appellant, so she had Dr. Robert Spinner come and evaluate Appellant. Dr. Littrell notes that Dr. Spinner also could not find any deficits on physical exam. He recommended that Appellant have an MRI of her cervical spine, which was done and was read as being normal.

On August 9, 2000, Appellant was seen by Dr. Wijdicks, a neurologist, at the Mayo Clinic. Dr. Wijdicks’ record, which was also introduced into evidence, notes that he finds no abnormalities on neurological examination. On April 10, 2003, Appellant was again seen by Dr. Robert Spinner, a neurosurgeon at Mayo Clinic. On examination, Dr. Spinner noted a completely normal exam, with normal range of motion of the neck, no neck

spasm, and a normal neurological examination. He referred Appellant to see Dr. Uhm at that time for a 2 mm intracranial aneurysm, which Dr. Uhm later testified was unrelated to this accident.

Further, the jury heard evidence relating to a visit Appellant had with Dr. William Krauss, a “spine ultraspecialist,” to whom she was referred by Dr. Kazi. When Appellant was examined by Dr. Krauss, Dr. Krauss did not find any abnormalities, he noted the MRI and cervical spine films were within normal limits, and he found no abnormalities on flexion, extension or rotation of Appellant’s cervical spine. Dr. Krauss advised Appellant he didn’t believe she needed further treatment, and he advised her of his belief that she would get better no matter what she did.

In addition to the above medical testimony, the jury was able to hear firsthand the testimony of the various witnesses, including Appellant herself, and judge these witnesses’ credibility for themselves. For instance, the jury heard from appellant’s twin sister, Terri Fields, who described her relationship to the Appellant as being “extremely close.” However, upon cross-examination, it was evident that Ms. Fields did not know details concerning appellant’s medical treatment, her doctors, or the various injuries she was complaining of. Ms. Fields was not aware of the headaches Appellant had been having in the years prior to the accident. (T. 175). While Ms. Fields testified she was aware that Appellant had a lot of doctor appointments, she admitted, “I don’t know who she saw when or what dates.” (T. 175). She also admitted that she could not recall talking to Appellant about her various appointments, stating, “I don’t recall a lot of specifics...” (T. 176).

Appellant was also impeached concerning her testimony about their lake home, that she claimed she had to sell because she couldn't keep it up after the accident. However, it was later learned from Appellant's father, Larry Vonch, that he lives in the near vicinity to this lake home, and had done considerable work on the property for the Appellant. Mr. Vonch admitted that he had been contributing in the care of the property, helping Appellant and her husband mow the lawn and pick up. (T. 185). He stated, "...[O]f course when it rains a lot and the grass gets out of hand, Jim can't keep up with it so I just naturally go down there and do it without even asking and I just do it because I know that, you know, he doesn't have the time." (T. 185).

Appellant herself was impeached numerous times concerning numerous subjects. For instance, when asked in her deposition, taken prior to trial, about prior back pain, Appellant admitted one incident that occurred in 1993 wherein she injured her back. (T. 240-241). However, on cross-examination, she was questioned about back pain that was documented in her medical records in September of 1991, in April of 1996, and back problems that occurred for about three years when Appellant was younger. (T. 241-242). In addition, Appellant denied telling one of her treating doctors, Dr. Spinner, that she had been rear-ended by a car going 10 miles an hour, despite the fact that this statement is documented in her medical records. (T. 246-247). Appellant did not have an explanation for this discrepancy, other than to claim, "I do not recall telling anybody at any time that it was a ten mile an hour collision." (T. 247). She did admit, however, that this statement is repeated numerous times in her medical records, specifically in the Mayo Clinic records. (T. 247-248).

Appellant was also questioned about her visit to Dr. Krauss, an ultra spine specialist. She admitted that Dr. Krauss examined her, and advised her that all of his tests had been normal, and that his exam was normal. (T. 249). Appellant also admitted that Dr. Krauss told her she did not need surgery, and he told her that she would improve no matter what she did. (T. 250).

The jury had available to it the big picture concerning this individual Appellant. Essentially, the jury, by its verdict, agreed with the defense argument that this individual had many subjective complaints, but her treating doctors were not able to detect anything in terms of objective evidence to support these subjective complaints. Further, the jury heard evidence of the many other problems taking place in Appellant's life, including prior depression issues and problems Appellant had in her home life, unrelated to this automobile accident.

The trial court properly denied Appellant's motion for a new trial on all bases, and this ruling should now be upheld by this Court.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

When the jury verdict resolves conflicts in the evidence, a reviewing court is required to consider the evidence in the light most favorable to the verdict and sustain the verdict if possible on any reasonable theory of evidence. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984). A jury's verdict should not be set aside unless it is manifestly and palpably contrary to the evidence. *Alevizos v. Metropolitan Airports Commission*, 452 N.W.2d 492, 499 (Minn.Ct.App. 1990).

“An appellate court will substitute its judgment for that of the jury only if there is no evidence reasonably tending to sustain the verdict or if the verdict is manifestly and palpably against the weight of the evidence.” *Baker v. Amtrak National Railroad Passenger Corporation*, 588 N.W.2d 749, 753 (Minn.Ct.App. 1999). The prevailing party “is entitled to the benefit of every reasonable inference” that can be drawn from the evidence and “the determination of the jury must stand unless manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable” to the verdict. *Jurgensen v. Schirmer Transportation Co.*, 242 Minn. 157, 161-62, 64 N.W.2d 530, 533 (1954).

II. THE TRIAL COURT PROPERLY DENIED APPELLANT’S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT IT DID NOT COMMIT ANY ERRORS OF LAW THAT OCCURRED TO DENY APPELLANT A FAIR TRIAL.

A. Dr. Kazi was properly qualified to testify as to his diagnosis of malingering.

Appellant contends that it was an error of law for the court to allow Dr. Kazi to testify as to his diagnosis of malingering and the DSM-IV. However, Appellant’s counsel had Dr. Kazi’s report well in advance of trial, which detailed Dr. Kazi’s findings of positive Waddell’s signs. Appellant’s counsel also had adequate opportunity to cross-examine Dr. Kazi concerning these areas in his deposition, and also had the opportunity to retain his own expert, or to question his own experts, concerning Dr. Kazi’s findings of positive Waddell signs. Appellant did neither, and cannot now contend that Appellant failed to timely disclose these opinions, or that Dr. Kazi’s findings are “medically insignificant” as grounds for claiming the trial court committed prejudicial error.

As previously noted, Dr. Kazi examined Appellant on June 3, 2004. Appellant's counsel was furnished with Dr. Kazi's report on July 16, 2004. This report specifically mentioned that Dr. Kazi found a positive Waddell's sign, indicating some degree of functional overlay. See Appellant's Appendix, pp. 28, 30. Appellant's counsel was in receipt of Dr. Kazi's report at least one and one-half months prior to Dr. Kazi's deposition was taken, and two months prior to trial in September of 2004. Appellant's counsel had ample time to inform his own doctor of Dr. Kazi's findings on malingering and to get prepared to cross-examine Dr. Kazi on these findings during Dr. Kazi's deposition. Appellant's claim that Respondents "failed to disclose evidence" simply does not coincide with the facts presented here.

Dr. Kazi testified that he is board certified in both orthopedic surgery and in neurologic surgery. Dr. Kazi depo., p. 7. He testified that one of the tests he administers to patients during the course of an examination such as the one he performed on plaintiff is the Waddell tests, and Dr. Kazi went on to describe what these tests are and his findings therefrom. *Id.* at 25-27. Based upon Dr. Kazi's qualifications and experience, he was well qualified to render the opinions he did concerning malingering.

The district court has "considerable discretion in determining the sufficiency of foundation laid for expert opinion." *Reinhardt v. Colton*, 337 N.W.2d 88, 92 n. 1 (Minn. 1983). Expert opinion is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the "witness is qualified as an expert by knowledge, skill, experience, training, or education." Minn.R.Evid. 702. The knowledge requirement may be satisfied by either

formal education or sufficient occupational experience. *Kastner v. Wermerskirschen*, 295 Minn. 391, 394, 205 N.W.2d 336, 338 (1973). The competency of an expert witness to provide a medical opinion depends on both the degree of the witness's scientific knowledge and the extent of the witness's practical experience with the subject of the offered opinion. *Reinhardt*, 337 N.W.2d at 93.

Dr. Kazi's opinions concerning the Waddell tests he had performed on Appellant were well outlined in his reports, and given that Dr. Kazi has achieved two board certifications, along with his medical training and practical experience, certainly qualifies him to render the opinions he did in this case. Dr. Kazi's opinions concerning malingering are derived directly from the reports he wrote (*See Appellant's Appendix at pp. 23-32*), the updated version of which was provided to Appellant's counsel on July 16, 2004. This date was well in advance of Dr. Kazi's deposition scheduled on September 1, 2004 and of trial held on September 8-10, 2004.

Further, Appellant's own medical records demonstrate evidence to support Dr. Kazi's opinion of malingering. For example, on a visit of August 9, 2000 to Dr. Wall at the Mayo Clinic, Dr. Wall records indicate that Appellant has a questionable psychogenic exacerbation of her pain symptoms and that he questions secondary gain.

As the trial court noted to Appellant's counsel in denying this motion,

...[T]he idea that there may have been some functional overlay or there may have been malingering should've been no surprise to you or your client based upon my understanding of the medical records and the reports of the doctors previously given...

(T.35).

Appellant also asserts that allowing Dr. Kazi's use of the DSM-IV was prejudicial error, as this wasn't disclosed by Respondents prior to Dr. Kazi's deposition. Minnesota courts have stated that suppression of expert testimony is a serious sanction and should be imposed only in the most compelling circumstances. See 2 D. Herr & R. Haydock, Minnesota Practice, § 26.20 (1985). In addition, the courts set forth a number of factors which need to be considered, including whether a party intentionally and willfully failed to disclose the existence of a trial expert or their opinions, and whether the opposing party sought a continuance or other remedy. *Id.* This simply is not the case here. As previously noted, Dr. Kazi's findings concerning the Waddell tests he performed were contained in his reports, and it is these findings upon which he based his opinions concerning plaintiff's malingering and the DSM-IV. Dr. Kazi's report was provided to Appellant on July 16, 2004, at which time Appellant's counsel was put on notice that the positive Waddell's sign was one of the findings Dr. Kazi made in his examination. Appellant has not demonstrated any prejudice by Dr. Kazi's opinions or his use of the DSM-IV, and these opinions certainly could not have come as a surprise to Appellant, when her own doctors held the same opinions concerning malingering.

Finally, Respondents would like to point out to Appellant and this court that in addition to the trial court allowing Dr. Kazi's opinions in, the court also allowed in testimony and evidence concerning the facet injections Appellant received, despite Respondents' motion in limine to exclude such evidence. This evidence was allowed despite the fact that the method used to diagnose Appellant's alleged facet injury was not scientifically acceptable.

Dr. Kazi was very qualified to render the opinions he did concerning Appellant's malingering. Further, Appellant cannot now claim that the tests performed by Dr. Kazi are medically insignificant, when she has no medical testimony from her own experts to support such an allegation. Finally, Appellant cannot claim that she was surprised by Dr. Kazi's opinions, as his opinions were based upon testing done at the time of his examination, the results of which were outlined in his reports, and Appellant's own treating doctors have expressed the same opinions about her condition. The trial court's decision denying Appellant's motion for a new trial on this basis should be affirmed.

B. The trial court properly refused to give Appellant's requested jury instruction.

With regard to medical expenses, the jury was instructed according to the jury instructions. Specifically, they were advised according to CIV JIG 90.20, and told they were to decide the amount of money that would fairly and adequately compensate Appellant for her past and future injury, and that they were to award damages if the evidence showed that they resulted from the accident. With regard to past medical expenses, the jury was advised, in accordance with CIV JIG 91.15, that they could award past damages for health care expenses for medical supplies, hospitalization and health care services of every kind necessary for treatment up to the time of the verdict. Appellant, however, requested yet an additional instruction on medical expenses, relating to whether the bills had been paid by outside sources. To give this instruction, however, would have been an error, as it would have invaded the realm of insurance issues and collateral source issues, both of which are to be kept from the jury.

The district court has broad discretion in determining jury instructions. *State Farm Fire & Cas. Co. v. Short*, 459 N.W.2d 111, 113 (Minn. 1990). A new trial is warranted only if erroneous jury instructions destroy the substantial correctness of the charge, cause a miscarriage of justice, or result in substantial prejudice. *Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530, 537 (Minn.App. 1997), *rev. denied* (Minn. June 11, 1997). The standard of review in analyzing a Court's jury instruction is that the instructions of the Court must be read in their entirety and all that is required is that it convey to the jury a clear and correct understanding of the law; it is unnecessary that every possible opportunity for misapprehension be guarded against. *Seivert v. Bass*, 288 Minn. 457, 181 N.W.2d 888 (1970).

Here, Appellant cites no support for her requested instruction as to outside payments of the medical expenses. Appellant contends that the jury was confused, given that they asked a question during their deliberations. However, the trial court appropriately responded to this question, and advised the jury that it should not consider whether Appellant's bills had been paid by any other sources. This is, in essence, what Appellant was requesting with her special instruction. One cannot impeach a jury's verdict by showing that the jury misapprehended the evidence, did not understand the jury instructions, or misconceived the legal effect of the fact finding as to negligence. *Lundgren v. Fultz*, 385 N.W.2d 378 (Minn.App. 1986).

Further, Appellant cannot cite to any prejudice that arose with the jury's verdict because of the court's failure to give this requested instruction. As Appellant has previously pointed out to the court, the jury was presented with "unrefuted evidence" that

the cost of Appellant's past medical treatment totaled \$22,000. This is identical to the amount the jury awarded for past health care expenses. Further, Appellant cites to the fact that she presented the jury with, again, "unrefuted evidence" that her past diagnostic expenses totaled at least \$5,300. Again, the jury awarded the sum of \$5,300 for past diagnostic expenses to appellant. While Appellant contends that it was an error of law for the trial court to decline giving Appellant's requested jury instruction, she cannot cite to any prejudice that occurred because of this alleged error.

The jury instructions as read to the jury by the court conveyed a "clear and correct understanding of the law" to them. This is exactly what the jury instructions are meant to do. It was not an error for the court to refuse to give Appellant's requested instruction concerning past medical expenses, and, even if it was, Appellant has not pointed to any prejudice that occurred because of this omission. The trial court properly denied Appellant's request for a new trial on this issue.

III. THE JURY'S FINDING ON DAMAGES WAS FULLY SUPPORTED BY THE EVIDENCE, WITH NO EVIDENCE OF PASSION OR PREJUDICE BEING PRESENTED.

Appellant has made an allegation that the jury's verdict must be the result of passion or prejudice. She has further made arguments that various errors of law or other statements to the jury resulted in prejudice to her. However, Appellant has provided no specific evidence of such. All of Appellant's arguments are based on mere speculation of these influences.

"A trial court has the broadest possible discretion in determining the adequacy of damages and the influence of passion and prejudice on a jury." *Ruppert v. Yaeger*, 414

N.W.2d 419, 422 (Minn.App. 1987). In *Vadnais v. American Family Mut. Ins. Co.*, 243 N.W.2d 45 (Minn. 1976), the Supreme Court reversed the holding of the district court, which determined the verdict was the result of passion or prejudice. The Court stated:

The trial court also held that the jury's verdict was a result of passion and prejudice. It appears that the trial court was only speculating as to the possibility of prejudice. No specific examples or instances of prejudice are cited. There is no specific provision in Rule 59.01 permitting a trial court to order a new trial on the basis of suspected jury prejudice in the absence of evidence of alleged misconduct or an excessive or insufficient damage award. Here, jury prejudice seems to be only a makeweight for finding the evidence insufficient.

Id. at 49.

Similarly, Appellant here makes many allegations of passion and prejudice. These include Appellant's contention that the jury was confused in its role as to Appellant's damages, given the question it posed as to outside payments of Appellant's medical expenses. If confusion was the issue, given that the jury determined Appellant did not sustain a permanent injury, it would likely not have awarded any damages to Appellant. On the contrary, however, the jury awarded damages they believed were consistent with the evidence presented at trial.

Appellant does not provide specific evidence to back up these allegations, making them just that, allegations based upon speculation. In fact, Appellant herself asserts that, "One can only speculate as to the precise reasons why the jury reached such contradictory conclusions with regard to damages." See Appellant's Brief, p. 21. Appellant's contention of passion or prejudice is just that: speculation. Appellant has not proven that the jury's verdict in this instance was the result of passion or prejudice, or that any of the

specific instances of conduct complained of resulted in prejudice to Appellant. The verdict must therefore stand.

IV. THE TRIAL COURT PROPERLY REFUSED TO GRANT A CONDITIONAL ADDITUR WHERE THE JURY VERDICT WAS NOT UNREASONABLE.

A district court may not grant additur unless the verdict is unreasonable. *See Pulkrabek v. Johnson*, 418 N.W.2d 514, 516 (Minn.App. 1988) (jury's decision entitled to wide deference as long as it is within range of reasonable awards), *review denied* (Minn. May 4, 1988). The decision "whether to grant additur rests almost wholly within the trial court's discretion." *Id.* (citation omitted). The district court "cannot grant **additur** unless grounds for a **new trial** on damages exist, since the court is, in effect, conditionally granting a **new trial**." *Id.*

In the present case, the jury's verdict was not unreasonable. Nor have there been proven sufficient grounds for a new trial on damages. For all of the reasons as set forth above, Respondents assert that the trial court's refusal to grant conditional additur was appropriate.

V. THE TRIAL COURT APPROPRIATELY MADE A FINDING THAT APPELLANT PAID \$118.40 TO SECURE NO-FAULT INSURANCE IN THE TWO-YEAR PERIOD PRECEDING THIS ACCIDENT; RESPONDENTS CONCEDE THAT APPELLANT IS ENTITLED TO AN OFFSET IN THIS AMOUNT AGAINST THE COLLATERAL SOURCE DEDUCTIONS.

Minnesota Statute 548.36 provides, in relevant part:

Subd. 2. The Court shall determine: (1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and

(2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family 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.**

(Emphasis added).

The collateral sources at issue in the present case relate to the no-fault benefits Appellant received from her insurance company.. Appellant argues that she is entitled to offset not only just the premium she paid to receive the no-fault benefits, the only collateral source benefit at issue, but her entire insurance premium of \$3,672.96. Depending upon the type of coverage purchased by Appellant, this could include a premium for liability insurance, underinsured and uninsured motorist coverage, collision insurance and/or comprehensive insurance. Appellant argues that she can choose to have as many different types of coverages as she wants, one of which is the mandatory no-fault coverage, and still get the benefit of offsetting the entire amount of her premium, whatever that may be.

Contrary to Appellant's argument, the plain language of the statute indicates that Appellant is entitled to offset the amount she paid to receive the no-fault benefits. This does not include the full amount of her liability insurance, underinsured and uninsured motorist coverage, collision coverage, or whatever other coverages Appellant has been paying for. Respondents do not dispute that Appellant is entitled to recoup the amount she paid to receive no-fault benefits for the two-year period prior to this accident, \$118.40. Respondents do, however, dispute Appellant's contention that she is entitled to get an offset for the entire amount of their insurance premium. The proper offset, per the plain

language of the statute, is for the amount Appellant paid to receive the no-fault benefits, the collateral source for which an offset was provided.

VI. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING COLLATERAL SOURCE OFFSETS AND IN AWARDING TO RESPONDENTS THEIR COSTS AND DISBURSEMENTS.

The trial court properly determined that Respondents were the prevailing party at trial, and awarded to them their costs and disbursement.

Rule 68 of the Minnesota Rules of Civil Procedure states:

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. Acceptance of the offer shall be made by service of written notice of acceptance within 10 days after service of the offer. If the offer is not accepted within the 10-day period, it is deemed withdrawn. During the 10-day period the offer is irrevocable. If the offer is accepted, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and thereupon the court administrator shall enter judgment. An offer not accepted is not admissible, except in a proceeding to determine costs and disbursements. **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.** The fact that an offer is made but not accepted does not preclude a subsequent offer.

(Emphasis added). Minn. Stat. §549.04 provides that “In every action in a district court, the prevailing party * * * shall be allowed reasonable disbursements paid or incurred...”

Here, Respondents made a Rule 68 Offer of Judgment in the amount of \$35,000 on August 26, 2004. This Offer was in excess of costs and disbursements, and in excess of the medical and no-fault benefits paid. After the appropriate deductions were taken off the verdict, the net verdict to Appellant was \$13,404.97. This amount is certainly less than the \$35,000 that was offered by Respondents prior to trial.

Under Minnesota law, the awarding of costs to the prevailing party lies within the discretion of the trial court. *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 123-24 (Minn.1981). The trial court does not have discretion to deny costs and disbursements to the prevailing party. *Quade & Sons Refrigeration v. 3M*, 510 N.W.2d 256 (Minn.App. 1994)(citing *Jostens, Inc. v. National Computer Systems*, 318 N.W.2d 691, 704 (Minn. 1982)). In this case, the only finding by the court was an award of costs to the Respondents. The District Court has discretion to determine which party, if any, qualifies as a prevailing party. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54-55 (Minn.1998).

In the trial court's Findings of Fact, Conclusions of Law and Order for Judgment, included in Appellant's Appendix at page 110, Respondents were awarded recovery of their costs and disbursements from the Appellant, pursuant to the Offer of Judgment. The Order makes no mention of Appellant being entitled to recover her costs or disbursements.

Appellant's position that Respondents should not have been considered the "prevailing party" is contrary to the law, is contrary to Minnesota statute, and is contrary to the trial court's Order specifically allowing Respondents to tax their costs and disbursements. Appellant's position as to why Respondents are not entitled to this amount would make Rule 68 Offers of Judgment or Settlement moot, as it concerns the recovery of costs. With regard to the drafters of the rule, the only comment concerning costs states, "The principal effect of making an offer of settlement under Rule 68 is to shift the burden of paying costs properly taxable under Minn.R.Civ.P. 54.04." Advisory Committee Note - 1985 to Minn.R.Civ.P. 68. This comment makes clear that the intent is for all costs

properly taxable per the rules, which includes common costs such as filing fees and costs for the collection of records, to be recoverable.

The trial court properly ruled that per Minnesota law, Respondents were considered the prevailing party at trial. The net verdict to Appellant falls well below the Offer of Judgment made by Respondents, thus entitling Respondents to their costs and disbursements. Therefore, the trial court's decision in this regard should stand, and Appellant's appeal should be denied in its entirety.

CONCLUSION

For all the reasons as set forth above, Respondents respectfully request that this Court affirm the district court's denial of Appellant's motions for a new trial and/or J.N.O.V.

Dated: 7/8/05

Respectfully submitted,

LA BORE, GIULIANI, COSGRIFF &
VILTOFT, LTD.



Lee L. La Bore (59274)
Attorney for Respondents
P.O. Box 70
Hopkins, MN 55343-0070
(952) 933-3371

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).