
State of Minnesota
In Court of Appeals

KARI RENSWICK,

Plaintiff/Respondent,

vs.

JASON WENZEL,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Appellant Jason Wenzel (hereinafter “Wenzel”) submitted three issues for appellate determination: (1) whether the trial court erred in denying Wenzel’s Rule 59.01 motion for a new trial; (2) whether Wenzel’s Rule 50.01 motion for judgment as a matter of law should have been granted; and (3) whether Respondent Kari Renswick’s (hereinafter “Respondent”) damage award should be reduced by the amount of collateral sources, including Medicare negotiated discounts, she received.

In her response Respondent misconstrues the issues and the applicable standards of review. With the exception of how it relates to her future pain and disability claim, Respondent fails to address Wenzel’s motion for a new trial. Wenzel’s request for appellate relief should be granted.

I. A NEW TRIAL SHOULD BE GRANTED PURSUANT TO MINN. R. CIV. P. 59.01.

Wenzel’s motion for a new trial should be granted because the jury was not properly charged. Respondent’s claim for future pain and disability should have been excluded and not submitted to the jury. The issue of primary assumption of the risk should have been submitted to the jury. Further, the jury should have been instructed Respondent’s admission of marijuana and methamphetamine consumption is negligence per se.

Contrary to Respondent’s assertion, a trial court’s denial of a motion for new trial is not reviewed for an abuse of discretion. Rather, on review the appellate court “merely

considers whether the trial court exercised reasonable discretion in denying the motion for a new trial.” Red River Spray Serv., Inc. v. Nelson, 404 N.W.2d 332, 334 (Minn. Ct. App. 1987) (citing Koenig v. Ludowese, 243 N.W.2d 29, 30 (Minn. 1976)). Governed by Minn. R. Civ. P. 59.01, a motion for a new trial may be granted where several small errors, each independently inadequate to require a new trial, can cumulatively result in sufficient prejudice as to require a new trial. Larson v. Belzer Clinic, 195 N.W.2d 416, 418-19 (Minn. 1972).

A. Respondent’s future pain and disability claim should not have been submitted to the jury.

Respondent contends the trial court did not err in determining the jury’s award of future damages was not based upon speculation and conjecture because it “was supported by [Respondent’s] testimony that she still suffered from pain related to the accident as of the trial.” (Resp. Br., p. 25.)

Contrary to Respondent’s assertion, a claim for future pain and disability cannot stand solely on a plaintiff’s testimony that she has pain at the time of trial. It is well-established damages for future pain and disability must be reasonably certain to occur. Derrick v. St. Paul C. R. Co., 89 N.W.2d 629, 633-34 (Minn. 1958). Damages which are remote, speculative, or conjectural are not recoverable. Pietrzak v. Eggen, 295 N.W.2d 504, 507 (Minn. 1980). To meet the “reasonably certain to occur” requirement in this case, medical expert testimony is necessary. Derrick, 89 N.W.2d at 633-34 (citation omitted).

Respondent relies upon Pagett v. N. Elec. Supply Co., 167 N.W.2d 58 (Minn. 1969) for the proposition that her testimony alone establishes future pain and disability related to her wrist injuries. (Resp. Br. p. 16.) However, Pagett is distinguishable from this case.

In Pagett, two of plaintiff's medical providers testified regarding injuries he sustained in an accident and both testified plaintiff's injuries were permanent. Id. at 61. In holding the trial court did not abuse its discretion in refusing to set aside the jury verdict for excessive future damages the Pagett court reasoned, as follows:

Considering the evidence that plaintiff's injuries to his left leg were permanent-20 to 25 percent; that his ability to continue working would be considerably restricted or completely eliminated; that his life expectancy was 10 years at the time of trial; and that he had to be helped on and off the stand and was in obvious pain and discomfort during the course of the trial, it does not appear that the trial court abused its discretion.

Id. at 65.

Here, Respondent offered no medical testimony to support a claim for future damages or to establish permanency. There was no evidence, other than Respondent's self-serving testimony, that she is reasonably certain to sustain future pain and disability. Importantly, Respondent's own medical expert, Dr. Hayden, testified she may not have any future impairment. (Trial Exh. 1, p. 34.)

Despite Dr. Hayden's clear refusal to offer an opinion regarding her future damages, Respondent relies on portions of Dr. Hayden's testimony taken out of context to support her contention that the jury's award was not based on speculation and conjecture. Specifically, Respondent claims "[Dr. Hayden] said he had no opinion about

whether [Respondent would] have any ongoing physical restrictions, but that she ‘would need to see an occupational therapist or anybody that had skills in rehabbing somebody who’s had hand surgery’”. (Resp. Br., p. 27.)

Respondent misrepresents Dr. Hayden’s testimony. Dr. Hayden did not testify Respondent will need to see an occupational therapist in the future. Dr. Hayden testified in response to Respondent’s questioning regarding her rehabilitation following hand surgery, as follows:

Q. Look at the next sentence: I told her that she could taper off occupational therapy over the next month. Was occupational therapy something that was prescribed for her?

A. Yes.

Q. Do you know where that was completed?

A. I don’t. I could, umh –

Q. Well, if I told you when she was discharged here, she was at the Sauer Nursing Home in Winona, Minnesota, for rehabilitative care, would that, in your opinion, have been the kind of rehabilitative care you would envision for a person having undergone the surgical procedure?

A. Basic – yeah, basically, she would need to see an occupational therapist or anybody that had the skills in rehabbing somebody who’s had hand surgery. But I, I don’t know where – it’s not, I don’t see it as listed as being here. Could have been, but I –

(Trial Exh. 1, pp. 36-37.)

Respondent failed to prove future damages are reasonably certain to occur and the trial court erred in denying Wenzel’s motion in limine and motion for a new trial on this issue. The jury’s award of future damages was based upon speculation and conjecture.

B. The issue of primary assumption of risk should have been submitted to the jury.

Respondent argues the trial court did not abuse its discretion in refusing to submit the issue of primary assumption of risk to the jury because the affirmative defense does not apply in this case. However, the issue on appeal is not whether the trial court abused its discretion relative to jury instructions. The issue is whether the trial court did not exercise reasonable discretion in denying Wenzel's motion for a new trial because the issue of primary assumption of risk should have been submitted to the jury.

Respondent contends primary assumption of the risk does not apply because “[a]s the trial court noted, ‘[e]ntering a back door to a residential home is not the type of inherently dangerous activity to which primary assumption of the risk applies.’” (Resp. Br., p. 20.) Respondent further contends the trial court would have erred in submitting primary assumption of risk to the jury “[s]ince the evidence established the hazard of the hidden stairway was not a known risk to the Plaintiff, she could not assume the risk of falling down it.” (Resp. Br., p. 21.)

Contrary to the trial court's conclusion and Respondent's contention, primary assumption of the risk is not limited to inherently dangerous activities. It is well-established that primary assumption of risk applies where “parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks.” Wagner v. Thomas J. Obert Enter., 396 N.W.2d 223, 226 (Minn.1986) (emphasis added). Well-known, incidental risks include “common-sense danger[s]” or a condition “that anyone observing it would see”. Prokop v. Indep. Sch. Dist. No. 625, 754 N.W.2d 709, 716

(Minn. Ct. App. 2008) (citing Snilsberg v. Lake Washington Club, 614 N.W.2d 738, 744 (Minn. Ct. App. 2000)).

Here, the trial court denied Wenzel's summary judgment motion acknowledging a question of fact existed regarding primary assumption of the risk. Despite this, the trial court, without explanation, refused to submit the issue to the jury. At a minimum, a question of fact exists regarding whether entering an unfamiliar and dimly-lit entryway involves well-known, incidental risks such as falling down a staircase. In refusing to submit the issue to the jury, the trial court precluded Wenzel from submitting one of his defenses for the jury's consideration.

C. The jury should have been instructed that Respondent's admitted consumption of marijuana and methamphetamine is negligence per se.

Respondent contends the trial court did not err in refusing to instruct the jury her consumption of marijuana is negligence per se because there is no indication Minnesota's illegal drug statute is intended to protect property owners from slip and fall claims and because Wenzel was allowed to argue Respondent's comparative fault. (Resp. Br., pp. 23-24.)

"Negligence per se is not liability per se because the defenses of assumption of risk, contributory negligence, and proximate cause remain, and negligence per se, once proved, does not differ in its legal consequences from negligence at common law." Seim v. Garavalia, 306 N.W.2d 806, 810 (Minn.1981). Importantly, a finding of negligence per se does not prohibit the jury's consideration of comparative negligence. Zorgdrager v. State Wide Sales, Inc., 489 N.W.2d 281, 284 (Minn.App.1992) (noting "we perceive

no reason why the jury would have problems with determining comparable fault applying negligence per se relative to common law negligence.”). Generally, violations of statutes, as negligence per se, permit consideration of contributory negligence. Scott v. Indep. Sch. Dist. 709, Duluth, 256 N.W.2d 485, 488 (Minn. 1977).

Here, the jury should have been instructed Respondent’s violation of Minn. Stat. § 152.021-025 was negligence per se regardless of whether Wenzel was allowed to argue Respondent’s comparative fault to the jury. Negligence per se is not a substitute for a comparative fault defense. As noted by the Zorgdrager court, “[j]uries in Minnesota commonly determine comparative fault by applying different standards to different parties.” 489 N.W.2d at 284. In refusing to instruct the jury on Respondent’s negligence per se the trial court prejudiced Wenzel because the jury was not permitted to properly consider Respondent’s contributory negligence. For this reason, the trial court erred in denying Wenzel’s motion for a new trial.

II. JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED PURSUANT TO MINN. R. CIV. P. 50.01.

Wenzel is entitled to judgment as a matter of law (“JMOL”) because there is no evidence to support an award of future pain and disability, Respondent assumed the risk of injury, Wenzel did not owe a duty of care to Respondent because the condition was open and obvious, and Respondent failed to establish a negligent act by Wenzel.

Respondent contends the trial court’s denial of Wenzel’s motion for JMOL is reviewed under an abuse of discretion standard. (Resp. Br., p. 15.) Contrary to

Respondent's assertion, a trial court's denial of a motion for JMOL is reviewed de novo. Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 919 (Minn. 2009).

Minn. R. Civ. P. 50.01 governs judgments as a matter of law and provides JMOL is appropriate when there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on an issue. Minn. R. Civ. P. 50.01. When all of the evidence will sustain "two or more inconsistent inferences so that one inference does not reasonably preponderate over the others," the court must direct a verdict because plaintiff has not sustained her burden of proof. Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 405-06 (1998) (quoting E.H. Renner & Sons v. Primus, Inc., 295 Minn. 240, 243 (1973)).

A. Wenzel is entitled to JMOL because there is no evidence to support an award of damages for future pain and disability.

As discussed above, Respondent failed to meet her burden to establish future pain and disability to a reasonable medical certainty. A jury's award of future damages is remote, speculative, or conjectural if a plaintiff fails to meet this burden. Pietrzak v. Eggen, 295 N.W.2d 504, 507 (Minn. 1980).

Respondent contends her complaints of ongoing wrist pain and Dr. Hayden's testimony "that pain in the area was a natural consequence of the serious fracture injuries she had sustained" "justified submission of the issue of future pain and disability to the jury." (Resp. Br., p. 18.) While this testimony may be evidence of Respondent's pain to the date of trial, it is insufficient to establish with reasonable certainty future pain and disability.

Again, Respondent offered no medical testimony to support her claim for future damages. Her own medical expert, Dr. Hayden, unequivocally refused to offer an opinion and testified she may have no future disability. Without evidence Respondent is reasonably certain to have future pain and disability, the jury's award was based upon speculation and conjecture and Wenzel's motion for JMOL should be granted.

B. Wenzel is entitled to JMOL because Respondent assumed the risk of injury.

Wenzel's motion for JMOL should be granted and Respondent's claims dismissed because Respondent voluntarily assumed well-known, incidental risks of entering an unfamiliar and dimly-lit entryway.

As discussed above, Respondent claims the trial court did not abuse its discretion in failing to submit the issue of primary assumption of the risk to the jury because the doctrine is inapplicable to this case. Respondent contends the doctrine does not apply because there are no well-known, incidental risks to entering a home's entryway and "[e]veryone who enters a ballfield recognizes the risk of being struck by a ball but not everyone who enters a home assumes that doing so may mean that they will fall down a hidden staircase." (Resp. Br., p. 20.) Respondent's contentions are unsupported by law or fact.

Again, the doctrine of primary assumption applies when a plaintiff voluntarily "assumes well-known, incidental risks" of a certain activity. Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974). When the facts are undisputed and reasonable minds can

draw only one conclusion, assumption of the risk is a question of law for the court.

Schroeder v. Jesco, Inc., 209 N.W.2d 414, 417 (Minn. 1973).

Here, Wenzel's motion for JMOL should be granted because Respondent assumed the risk of injury when she voluntarily proceeded forward into an unfamiliar and dark entryway after consuming a number of prescription medications, alcohol, marijuana and methamphetamine. Commonsense dictates there is an incidental risk of falling when proceeding through a dimly-lit and unfamiliar entryway. As established by her testimony, Respondent assumed this risk when she chose to move forward through the entryway.

Respondent proceeded forward through the dimly-lit entryway without any assistance, without thinking to ask for help, and without looking for additional light. In fact, Respondent felt the area was safe and sufficiently illuminated. Whether Respondent knew of the existence or location of a stairwell is immaterial to whether Respondent assumed the well-known and incidental risk of falling in a dimly-lit and unfamiliar entryway after consuming a number of prescription drugs, alcohol, and illegal drugs. Respondent knew and appreciated the risk of falling and injuring herself, yet she chose to encounter the risk. Wenzel's motion for JMOL should be granted.

C. Wenzel is entitled to JMOL because he did not owe a duty of care to Respondent and the condition was open and obvious.

Wenzel owed no duty of care to Respondent because the condition of the entryway was open and obvious. Wenzel's motion for JMOL should be granted.

A Minnesota landowner has no duty to warn or protect persons from hazardous conditions that are open and obvious. Wiseman v. Northern Pac. Ry. Co., 214 Minn. 101, 107 (1943). A condition is not “obvious” unless both the condition and the risk are apparent to and would be recognized by a reasonable man “in the position of the visitor, exercising ordinary perception, intelligence and judgment.” Louis v. Louis, 636 N.W.2d 314, 321 (Minn. 2001) (quoting Restatement (Second) of Torts § 343A, cmt. b (1965)).

Here, Respondent contends the trial court did not err in denying Wenzel’s motion for JMOL because Respondent was not in a position “as someone unfamiliar with the condition” to appreciate both the hazard of an unguarded stairwell “concealed by an unlit entryway” and the risk. (Resp. Br., p. 37.) Respondent’s argument fails.

The condition, i.e., the dimly-lit entryway, and the risk of falling in a dimly-lit and unfamiliar entryway are apparent to and would be recognized by a reasonable man exercising ordinary perception, intelligence and judgment. Respondent claims she was unfamiliar with the entryway and the lack of lighting presented the dangerous condition because she did not know an open stairwell existed. A reasonable man entering a dark and unfamiliar entryway would have located a light switch or asked for help proceeding forward. Respondent admits she did not think to do either.

The dangerous condition presented by the unlit and unfamiliar entryway was open and obvious. Wenzel was therefore relieved of any duty to warn Respondent and his motion for JMOL should be granted.

D. Wenzel is entitled to JMOL because Respondent failed to identify a negligent act by Wenzel.

Wenzel's motion for to JMOL should be granted because there is no evidence he was negligent. Respondent contends the trial court was correct in finding the evidence establishes a negligent act by Wenzel because the testimony showed Wenzel and his wife keep the door between the kitchen and rear entryway closed to prevent their children from going in that area and because immediately following the accident Wenzel and his wife questioned each other regarding whether they had left a light on in the entryway. (Resp. Br., p. 40.)

Contrary to the trial court's findings and Respondent's claims, the evidence does not establish a negligent act by Wenzel. Wenzel denied questioning his wife, Chelsea, regarding whether they had left a light on in the entryway and Chelsea does not recall making any statements regarding the lighting. (T. 46, 234.) The only person who testified regarding this alleged conversation between Wenzel and Chelsea is Respondent, who also testified at the time she was "screaming hysterically." (T. 162.)

Regardless of whether this conversation actually occurred, it is insufficient proof that some act by Wenzel caused Respondent to fall down the stairs. Similarly, the fact Wenzel and his wife keep the door between the kitchen and entryway closed to prevent the children from leaving the house is irrelevant and insufficient evidence of negligence by Wenzel, especially considering the door was closed when Respondent fell.

In denying Wenzel's motion for JMOL the trial court found "[w]hile other causes for Plaintiff's injury may exist, this does not eliminate proof of a negligent act by Defendant. The jury's verdict properly reflected its apportionment of negligence on the part of both Defendant and Plaintiff and was supported by the evidence at trial." (Add. 7-8.) The trial court's denial of Wenzel's motion for JMOL is erroneous because the issue is not whether the jury correctly apportioned fault. The issue is whether this case should have been submitted to the jury because there is no evidence any act by Wenzel caused Respondent's injury.

Additionally, the trial court erred in finding Respondent proved Wenzel "was at least somewhat negligent..." (Add. 7.) Importantly, when "the evidence shows that a purported theory of causation is no more plausible than another theory, the [plaintiff] has not established a prima facie case, and a directed verdict is proper." Sauer v. State Farm Mut. Auto. Ins. Co., 379 N.W.2d 213, 215 (Minn. Ct. App. 1985), review denied (Minn. Feb. 19, 1986) (citing Zinnel v. Berghuis Const. Co., 274 N.W.2d 495, 499 (Minn. 1979)).

Wenzel presented evidence to support his theory that Respondent's negligence alone caused her injuries. Namely, Dr. Apple testified the combination of prescription medications, alcohol, methamphetamine, and marijuana impaired Respondent's thinking, balance, ability to walk properly, and to navigate from point A to B, and was a substantial factor in the accident. Based upon the evidence presented, Wenzel's theory is more plausible than Respondent's claim that Wenzel was at fault. Wenzel's motion for JMOL should be granted.

III. MINNESOTA'S COLLATERAL SOURCE STATUTE INCLUDES PAYMENTS MADE PURSUANT TO A PUBLIC PROGRAM PROVIDING MEDICAL EXPENSES OR HEALTH INSURANCE WITHIN THE DEFINITION OF COLLATERAL SOURCES.

The trial court erred in awarding Respondent damages for Medicare negotiated discounts and in finding Medicare payments are a Social Security benefit excluded as a collateral source under Minnesota statute. Contrary to Respondent's contention and the trial court's finding, discounts for medical services negotiated by Respondent's health insurer, Medicare, are collateral sources.¹

Minn. Stat. § 548.251, subd. 1 (1) provides payments made pursuant to a "public program providing medical expenses, disability payments, or similar benefits" are collateral sources. Subdivision 1(2) provides payments made pursuant to health insurance are collateral sources. Minn. Stat. § 548.251, subd. 1(2). Subdivision 2 includes the following language, which Respondent contends excludes Medicare payments as collateral sources:

except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;

Minn. Stat. § 548.251, subd. 1(2) (emphasis added).

The collateral source statute is ambiguous because it could be interpreted to mean both payments made pursuant to the Social Security Act and payments made pursuant to a public program providing medical expenses and a form of health insurance for the elderly.

However, when considering the statute’s legislative purpose (to avoid double recoveries to plaintiffs), and application of Medicare as a provider of medical benefits that routinely negotiates discounts on behalf of its participants, it is clear Medicare payments are collateral sources. Medicare operates in the same manner as private insurance. Medicare Parts A and B are health insurance plans and public programs providing medical expenses to participants. Pursuant to the statutory definition, Medicare payments are included as collateral sources.

Respondent relies upon Frumkin v. Mayo Clinic, 965 F.2d 620, 628 (8th Cir. 1992) to support her argument that payments made pursuant to the Social Security Act include “any disability benefit and not just retirement benefits.” (Resp. Br., p. 46.) Respondent’s reliance on Frumkin is misplaced.

The issue in Frumkin was whether social security disability benefits are collateral sources. 965 F.2d at 628. The issue was not whether Medicare medical expense benefits are collateral sources. Id. The court did not identify any language in the collateral source statute that would include social security disability benefits as collateral sources. Id. Rather, the court determined the statutory language was unambiguous and rejected the proposition that the exclusionary language related to the Social Security Act was limited to retirement benefits. Id.

¹For an in-depth analysis of this issue, please see the appellate briefing in the Johnson v. Mid-American Auction Co., Inc., Appellate Court Case No. A11-301.

Here, the Eighth Circuit's decision in Frumkin is inapplicable because unlike social security disability payments, Medicare payments fall within two statutory provisions that include them as collateral sources. Minn. Stat. § 548.251, subd. 1(1), (2).

Respondent further relies upon Oregon's collateral source statute and an Oregon case to support her position that Medicare benefits are not collateral sources. (Resp. Br., pp. 46-47.) Importantly, Swanson v. Brewster, advises against reliance on foreign jurisdictions. 784 N.W.2d at 271. As noted by the Swanson court: "When faced with determining whether negotiated discounts are recoverable by plaintiffs, courts in states that have collateral-source statutes have interpreted their statutes and have endeavored to render decisions that are consistent with legislative intent." Id. (emphasis added) (citing Goble v. Frohman, 901 So.2d 830, 833 (Fla. 2005); White v. Jubitz Corp., 219 P.3d 566, 580-83 (2009)).

In fact, the Oregon Supreme Court in White expressly rejected an attempt to refer to foreign statutes to aid the interpretation of Oregon's collateral source statute. 219 P.3d at 576 (noting "[n]either defendant's citation to other state statutes nor the legislative history of O.R.S. § 31.580 convinces us that paragraph (d) of that statute is ambiguous").

Similarly, Respondent's reliance on Oregon's collateral source statute and case law is misplaced because the foreign statute and case law are irrelevant to this Court's interpretation of Minnesota's collateral source statute.

In sum, interpreting Minnesota's collateral source statute to include Medicare negotiated discounts as collateral sources comports with the legislative intent of the statute; namely, to prevent double recoveries by plaintiffs. If Medicare payments are not

collateral sources, plaintiffs will recover money based upon a portion of medical bills they never paid and never will have to pay. There is no reason, and Respondent has not provided any, why medical expenses paid by Medicare should be treated differently than all other medical payments.

Respondent does not explain why she should receive a double recovery for Medicare payments despite the statute's purpose of preventing a double recovery to her. Simply stated, Medicare is a public program providing medical expenses and health insurance and it is included within Minnesota's statutory definition of collateral sources. The judgment in Respondent's favor is subject to collateral source reduction.

CONCLUSION

Based upon the foregoing discussion and the discussion in his initial Brief, Appellant Jason Wenzel's Motion for a New Trial should be granted pursuant to Minn. R. Civ. P. 59.01. Alternatively, Appellant's Motion for Judgment as a Matter of Law should be granted pursuant to Minn. R. Civ. P. 50.01. Finally, Respondent Kari Renswick's damage award should be reduced by the amount of collateral sources, including Medicare negotiated-discounts, she received.

Dated: November 23, 2011.

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STATE OF MINNESOTA
IN COURT OF APPEALS

JASON WENZEL,

CASE NO. A11-1719

Appellant,

CERTIFICATION OF BRIEF LENGTH

vs.

KARI RENSWICK,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,710 words. This brief was prepared using Microsoft Office Word 2010.

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