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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0297**

Steven Vacik, et al.,
Appellants,

vs.

Park Nicollet Clinic,
Respondent.

**Filed August 26, 2013
Affirmed
Chutich, Judge**

Hennepin County District Court
File No. 27-CV-11-2862

Teresa Fariss McClain, Hallberg & McClain, P.A., St. Paul, Minnesota (for appellants)

William M. Hart, Rodger A. Hagen, Damon L. Highly, Meagher & Geer, P.L.L.P.,
Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Chutich, Judge; and
Harten, Judge. *

UNPUBLISHED OPINION

CHUTICH, Judge

In this medical-negligence action, appellants Steven and Dawn Vacik challenge
the district court's denial of their motion for a new trial following a jury verdict in favor

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

of respondent Park Nicollet Clinic. The Vaciks contend that the district court abused its discretion by prohibiting closing argument concerning a medical record admitted into evidence. Because no abuse of discretion occurred, we affirm.

FACTS

In 2006, appellant Steven Vacik suffered from chronic sinus infections and sought treatment from Dr. Steven Connelly, an otolaryngologist employed by Park Nicollet Clinic. Dr. Connelly discovered that Vacik's sinuses were completely blocked, but neither his visual examination nor later CT scans showed any nasal polyps.¹ Dr. Connelly recommended that Vacik undergo functional endoscopic sinus surgery to clear his sinuses.

Immediately after surgery, Vacik experienced pain and restricted vision in his right eye and numbness from his right lower eyelid down to his mouth. One week later he was still experiencing double vision and restricted movement of his right eye along with facial numbness and sensitivity to light. Vacik underwent another surgery that revealed a large defect in his orbital floor and found that a "large amount of orbital fat" had prolapsed into the hole. In other words, there was a large hole in the thin bone separating Vacik's eye socket from his maxillary sinus, and tissue surrounding the eye had fallen through the hole. An ophthalmologist repaired the bone but Vacik "continued to experience double vision, blurry vision, infraorbital nerve anesthesia, and significant pain."

¹ Polyps are non-cancerous, benign growths that can hang down into the nasal airway and obstruct the nostrils and sinuses.

Vacik sued Park Nicollet Clinic, claiming that Dr. Connelly negligently performed the endoscopic sinus surgery and that this negligence caused the problems he experienced with his eye. Vacik's wife, appellant Dawn Vacik, asserted a claim for loss of consortium. The district court held a jury trial in September 2012.

Dr. Connelly did not recall the details of Vacik's case or the specifics of the surgery that occurred more than six years before trial, but testified based solely upon his review of Vacik's medical records. Dr. Connelly described his routine practice in performing endoscopic sinus surgeries that do not involve polyps, such as the one he performed on Vacik, and stated that he had no reason to believe that he departed from his normal routine in performing Vacik's surgery.

To access Vacik's maxillary sinus cavity, Dr. Connelly used a surgical tool called a "Xomed," which is "a motorized shaving device with a blade, that spins around and cuts out tissue." The Vaciks' expert witness, Dr. Terrence Davidson, opined that Dr. Connelly was using the Xomed to clear Vacik's sinus cavity and lost control of the tool, causing the hole in Vacik's orbital floor and ripping the infraorbital nerve. Dr. Connelly testified, however, that his practice is to not use the Xomed after accessing the maxillary sinus cavity unless the patient has polyps that need to be removed. Instead, Dr. Connelly uses forceps and suction to complete the procedure.

Dr. Connelly opined that the hole in Vacik's orbital floor, and the consequent prolapse of orbital fat, was caused by a natural dehiscence, which is a "hole in the orbital floor that occur[s] naturally." He testified that the "thickened and tenacious mucous" in Vacik's maxillary sinus adhered to the naturally occurring dehiscences in the orbital

floor, and when he removed that mucous it further pulled and caused the larger hole. Throughout trial, it was undisputed that Vacik had no polyps in his nasal cavity and that Dr. Connelly did not perform a polypectomy, or removal of polyps, with the Xomed. Dr. Davidson also testified, based on his review of the documents, that Vacik did not have polyps.

The only mention of a polypectomy was in a postoperative progress note, handwritten by Dr. Connelly on the day of the surgery, stating that he performed “FESS [functional endoscopic sinus surgery] for polypectomy/chronic sinusitis.” This progress note was admitted into evidence along with several other records stipulated to by the parties. The progress note was shown to the jury and the Vaciks’ attorney asked Dr. Connelly questions about the note but did not specifically question him about the reference to a polypectomy. In her closing argument, however, counsel for the Vaciks argued that Dr. Connelly used the Xomed to remove polyps from Vacik’s sinus cavity and bumped the orbital floor with the tool while doing so.

Counsel for Park Nicollet Clinic objected, arguing that the Vaciks’ attorney misstated the evidence. After hearing arguments from counsel outside of the presence of the jury, the district court ordered that the Vaciks’ attorney could “refer to the [postoperative progress note] and point out what it says to the jury, making no comment on it, period.” Counsel followed these instructions.

The jury found that Dr. Connelly was not negligent in performing Vacik’s surgery, and the district court entered judgment for Park Nicollet Clinic. The Vaciks moved for a new trial. They contended, in part, that the district court erred in precluding their

attorney from arguing in closing about the inconsistencies in the medical records, and specifically about the postoperative progress note concerning the reference to a polypectomy. The district court denied the new-trial motion and the Vaciks appealed.

D E C I S I O N

We review the district court's denial of a motion for a new trial for an abuse of discretion. *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 625 (Minn. 2012). The district court may grant a new trial because of “[i]rregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial.” Minn. R. Civ. P. 59.01(a). To prevail on their motion for a new trial under rule 59.01(a), the Vaciks had to show not only that the district court abused its discretion such that they were denied a fair trial, but also that they suffered actual prejudice from the ruling. *See Torchwood Props., LLC v. McKinnon*, 784 N.W.2d 416, 419 (Minn. App. 2010) (stating that “prejudice is the primary consideration in determining whether to grant a new trial” (quotation omitted)).

The Vaciks contend that the district court abused its discretion in prohibiting their attorney from commenting during closing argument on Dr. Connelly's progress note stating that Vacik underwent “FESS for polypectomy/chronic sinusitis.” The Vaciks argue that counsel was using the document “to point out the inconsistency in the medical records regarding the specific surgical procedure documented to have been performed by Dr. Connelly, which would cast doubt on the testimony by Dr. Connelly, and potentially impeach [Park Nicollet Clinic's] central defense.”

We afford counsel considerable latitude in making closing arguments to the jury. *Connolly v. Nicollet Hotel*, 258 Minn. 405, 420, 104 N.W.2d 721, 732 (1960). This latitude is not unlimited, however, and arguments must be “borne out by the record.” *Id.* As the supreme court has stated, “[c]ounsel have the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom. If they are borne out by the record, they cannot be deemed prejudicial.” *Id.* “Appellate courts rarely disturb a district court’s response to improper remarks in closing arguments.” *Poston v. Colestock*, 540 N.W.2d 92, 94 (Minn. App. 1995), *review denied* (Minn. Jan. 25, 1996).

As Park Nicollet Clinic notes, the closing argument that Dr. Connelly performed a polypectomy shifted the Vaciks’ theory of the case. Their original theory, as suggested by Dr. Davidson’s expert testimony, was that Dr. Connelly was using the Xomed to clear infected tissue from Vacik’s maxillary sinus and inadvertently bumped the orbital floor with the tool, causing the hole through which Vacik’s orbital fat prolapsed. Dr. Davidson was testifying under the assumption that Vacik did not have polyps and that Dr. Connelly did not perform a polypectomy. Only after Dr. Connelly testified that he never used the Xomed after accessing the maxillary sinus unless polyps were present did counsel for the Vaciks argue in closing that the doctor was indeed performing a polypectomy, which would have involved further use of the Xomed.

As a general rule, “[a] party may not try his case on one theory, and upon motion for a new trial or appeal shift to another.” *People’s State Bank of Cleveland v. Dickie*, 191 Minn. 558, 560, 254 N.W. 782, 783 (1934). Because the nonexistence of polyps was

an accepted fact before and during trial, Park Nicollet Clinic was unprepared to defend the claim that Dr. Connelly performed a polypectomy and could not do so when the Vaciks' attorney raised the theory for the first time in her closing argument.

Further, Dr. Connelly was never asked at trial to interpret the progress note or to explain why it stated that Vacik received a polypectomy when all other evidence at trial showed that Vacik did not have polyps. The note was not self-explanatory because it referenced what may be two different surgical procedures—a functional endoscopic sinus surgery and a polypectomy. *See Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998) (stating that expert testimony is necessary to explain technical medical evidence that “is outside the realm of common knowledge”). The attorney’s attempt to use the progress note to argue that Dr. Connelly performed a polypectomy, without any testimony explaining the note, is therefore not “borne out by the record” and the district court properly exercised its discretion in precluding counsel from using the record to draw the inference for the jury that a polypectomy occurred. *Connolly*, 258 Minn. at 420, 104 N.W.2d at 732; *see Poston*, 540 N.W.2d at 94 (“An attorney may not introduce statements or conclusions unsupported by the evidence in closing argument.”).

Moreover, the Vaciks cannot show any actual prejudice requiring a new trial. “An error is prejudicial if it might reasonably have changed the result.” *Torchwood Props.*, 784 N.W.2d at 419 (quotation omitted). Because no other evidence or testimony at trial suggested that Vacik had polyps or that Dr. Connelly performed a polypectomy, even if the district court allowed counsel to argue, from one cryptic note, that a polypectomy occurred, this evidence would not have changed the result.

Dr. Connelly gave an opinion as to the cause of Vacik's injuries that did not involve negligence and the jury credited that testimony. The doctor further testified that the Xomed could not have caused the injury by explaining that significant bleeding, which was not seen during Vacik's surgery, would have occurred if the Xomed had bumped the orbital floor. Moreover, evidence of the natural dehiscences found in both the left and the right orbital floors also supports the verdict. Any possible error in limiting counsel's closing argument was therefore not prejudicial because it would not have reasonably changed the jury's verdict. In sum, the district court properly exercised its discretion in denying the Vaciks' motion for a new trial and they received a fair trial.

Affirmed.