STATE OF MINNESOTA
IN COURT OF APPEALS
A10-206

Faye G. Peterson,
Appellant,

vs.

Progressive Contractors, Inc.,
Respondent.

Filed December 7, 2010
Affirmed
Lansing, Judge

Sherburne County District Court
File No. 71-CV-07-1295

Robert Edwards, Robert N. Edwards, Chtd., Anoka, Minnesota; and

Scott Wilson, Shorewood, Minnesota (for appellant)

Bruce P. Candlin, John G. Ness & Associates, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

This appeal from judgment and posttrial motions in a personal-injury action challenges the district court's evidentiary rulings, the form of the jury verdict, and the sufficiency of the evidence to support the jury's determination on liability and damages. Because the evidentiary rulings and the form of the verdict were within the district court's discretion and the evidence supports the jury's determination on both liability and damages, we affirm.

F A C T S

Faye Peterson was driving a pickup truck on School Street near its intersection with Highway 169 in Elk River on August 18, 2000. Gary Foster, an employee of Progressive Contractors, Inc., was driving his employer's truck on the same street and stopped behind Peterson at the red light that controlled entry onto Highway 169. After Peterson stopped, she moved her pickup forward in anticipation of making a right-hand turn to merge onto Highway 169. Foster, in turn, moved forward and, when Peterson again stopped before entering traffic, Foster struck the back of her pickup. Following the collision, Peterson experienced headaches and neck-and-shoulder pain. She sued Progressive, alleging that Foster's driving conduct was negligent, and the case was tried to a jury in February 2009.

To establish damages, Peterson presented testimony from Troy Schomaker, a chiropractor who had treated her neck-and-shoulder pain. During cross-examination of Schomaker, Progressive inquired about reports provided by Robert Thatcher that were

included in Schomaker's medical records for Peterson. Thatcher is a chiropractor who had treated Peterson for similar injuries following a motor-vehicle accident in 1992. In response to Peterson's objections, the district court excluded Thatcher's reports from evidence but allowed Progressive to ask questions about the contents of one of the reports.

Peterson also presented testimony from Thomas Cohn, a medical doctor employed by Medical Advanced Pain Specialists (MAPS). Peterson consulted with Cohn in 2005, when her extended chiropractic treatment did not resolve her neck-and-shoulder pain. Cohn recommended radiofrequency neurotomy (RFN), a procedure that damages targeted nerve endings to stop the sensory signals that create the sensation of pain. This treatment provides temporary relief for an average of 270 days, until the nerve heals and again transmits sensory signals.

Peterson's first RFN in September 2005 relieved her neck-and-shoulder pain for about a year. She had a second RFN in September 2006, a third in December 2007, and a fourth in January 2009. According to Peterson, each of the repeated RFNs resulted in pain relief. The district court permitted Cohn to testify about the RFNs that Peterson had received, but excluded Cohn's testimony about Peterson's future indefinite need for RFNs. The exclusion was based on the district court's pretrial ruling in response to Progressive's motion to exclude all testimony from Cohn that related to RFNs. The pretrial ruling rested, in part, on MAPS's five-year billing data indicating that MAPS patients had a very limited number of repeat RFNs.

Peterson also presented deposition testimony of her ex-husband, Robert Peterson. The testimony, which was read to the jury, included comments made by Robert Peterson's mother, deceased at the time of trial, who was a passenger in Peterson's pickup and not injured in the accident. The comments related to his mother's reaction to the accident and her physical condition after the crash. Peterson contends that these statements should not have been admitted and that both statements were prejudicial—the first because it suggested that she stopped abruptly rather than yielded gradually to oncoming traffic on Highway 169, and the second because the absence of injury to her passenger undermined the seriousness of the injury to Peterson.

Peterson requested a special-verdict form that required the jury to itemize each past medical expense according to the provider. But the district court did not use Peterson's form. Instead, it used the form for comparative negligence actions contained in the Civil Jury Instruction Guide that asks the jury to determine past medical expenses as a lump sum.

The jury returned a verdict in favor of Peterson, finding that she and Foster were each fifty percent at fault, that she suffered a temporary disability, and that her damages amounted to $19,591.15 for past medical expenses and $4,500 for lost earnings. The jury further found that Peterson had not sustained a permanent injury and did not allow damages for past pain and suffering, future pain and suffering, or future medical expenses.

Progressive brought a posttrial motion under Minnesota Statutes sections 548.251 and 65B.51 to reduce the verdict by the amount of collateral-source benefits. The district

court granted the motion and determined the offsets. At the time of the verdict, Peterson had received $19,464.54 in medical benefits and $4,917.53 in wage-loss benefits from her no-fault carrier. Consequently, her wage loss was totally offset and the offset for medical benefits reduced her damages to $126.61. Because the jury found Peterson fifty percent at fault, the amount was further reduced by fifty percent, leaving Peterson with a judgment against Progressive for $63.31.

Asserting multiple grounds, Peterson moved for a new trial under Minn. R. Civ. Pro. 59.01. The district court denied her motion and she appeals.

D E C I S I O N

In appealing the district court's denial of her new-trial motion, Peterson raises evidentiary and sufficiency-of-the-evidence challenges to the jury's liability determination; and raises evidentiary, sufficiency-of-the-evidence, and propriety-of-the-verdict-form challenges to the determination of damages. We analyze the claims in the context in which they are raised.

I

On the issue of liability, Peterson first argues that a new trial is necessary because the district court improperly admitted a hearsay statement in Robert Peterson's deposition testimony that repeated a comment of his deceased mother. She contends that the statement that Robert Peterson's mother "braced herself" suggests that Peterson stopped abruptly rather than yielded gradually.

A ruling on the admissibility of evidence is reversible only if the district court abused its discretion and that abuse of discretion resulted in prejudice to the objecting

party. *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006); *Johnson v. Wash. Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994). An evidentiary error is prejudicial if the error might reasonably have influenced the jury and changed the result of the trial. *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W. 2d 46, 51 (Minn. 1998).

Peterson's evidentiary objection does not provide a basis for reversal. Robert Peterson's statement that his mother told him she "braced herself" at the time of the accident does not necessarily imply that Peterson stopped abruptly. It is equally probable that she might have seen Foster's truck accelerating toward them or that she braced herself in response to the impact of Foster's truck. At least one of these alternate implications is supported by Peterson's further testimony that his mother's bracing herself was "just a habit with her. She was in [a prior] accident." And "[W]hen she felt the hit from the back, her hands just automatically go out towards the dash. She's always done that." Because the "braced herself" statement has only ambiguous significance, it was not likely to have affected the jury's determination on liability or changed the outcome of the trial. Thus, any error in admitting the statement was not prejudicial.

Peterson's remaining challenge to the jury's liability determination is that the allocation of fault is not justified by the evidence. A verdict is not supported by the evidence when it is "manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Wash. Cnty. Sch.,* 652 N.W.2d 9, 21 (Minn. 2002). When reasonable minds could differ, questions of due care and the exercise of due care are questions for the jury. *Ryan v. Griffin*, 241 Minn. 91, 95, 62 N.W.2d 504, 507 (1954). The apportionment of negligence between drivers is an

issue that is squarely within the province of the jury. *Riley v. Lake*, 295 Minn. 43, 58, 203 N.W.2d 331, 340 (1972).

The evidence at trial focused on whether Peterson cautiously eased out into the moving traffic on Highway 169 or whether she stopped abruptly. Peterson testified that, as she was moving forward, she saw a large truck proceeding in the right-hand lane and the speed of the truck required her to come to a stop. Foster testified that he stopped behind Peterson, saw a break in oncoming traffic, and Peterson "took off like she was leaving." He stated that both Peterson's pickup and his truck had time to merge onto Highway 169, and she had begun to do so when she unexpectedly stopped. Although he applied his brakes, he struck the back of Peterson's pickup.

Because the testimony conflicted on the relative movement of the vehicles, the jury was required to make determinations on credibility and on the accuracy of the witnesses' perceptions. Taking into account all of the evidence in the record, a jury could reasonably find that Peterson began to make the turn onto Highway 169 but stopped suddenly. Viewing the facts in the light most favorable to the verdict, the jury's apportionment of fifty-percent fault to Peterson is not manifestly and palpably contrary to the evidence.

II

On the issue of damages, Peterson challenges the district court's evidentiary rulings, the amount of the jury's damages determination, and the district court's use of a special-verdict form that did not require the itemization of past medical expenses.

In reviewing the evidentiary rulings relating to damages, we start from the same principles that we applied to the objections to the evidentiary rulings relating to liability. The district court has broad discretion in evidentiary rulings and, absent an abuse of that discretion or an erroneous interpretation of the law, the rulings will be sustained. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). A new trial will be granted only if an evidentiary ruling was improper and resulted in prejudice. *Id.*

Peterson's evidentiary challenges directed at damages are three-fold. First, she asserts prejudicial error in the district court's preclusion of Cohn's testimony that Peterson has a future indefinite need for RFNs. The admissibility of scientific evidence is governed by both Minn. R. Evid. 702 and the *Frey-Mack* standard. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). The *Frey-Mack* standard, which governs admissibility of novel scientific evidence, does not apply; neither Peterson nor Progressive contends that their argument over Peterson's future need for RFNs relies on novel scientific evidence. *See id.* at 809 (applying *Frey-Mack* standard to novel scientific evidence).

Applying Minn. R. Evid. 702, the district court ruled that Cohn's testimony about Peterson's indefinite need for future RFNs was inadmissible because it lacked "foundational reliability." *See* Minn. R. Evid. 702 (requiring opinions based on scientific or technical knowledge to have foundational reliability to be admissible). In a written order, the district court observed that the medical literature that had been submitted did not address the long-term success rate of repetitive RFNs. It also cited a report noting the absence of any published study on that issue. The district court concluded that Peterson

"failed to show that RFN is a reliable form of long-term pain relief." In response to a request for reconsideration at the outset of the trial, the district court reaffirmed its ruling. The court noted that additional evidence in the record, consisting of the MAPS billing data that identified the low rate of repeat RFNs, provided further support for the district court's ruling. The district court's exclusion of Cohn's testimony about Peterson's future indefinite need for RFNs is supported by the record and does not amount to an abuse of discretion.

Subsidiary to this argument, Peterson contends that the district court erred in its admission and consideration of the MAPS billing data because it was epidemiological evidence with no foundational reliability. We disagree. Progressive introduced the MAPS billing data in its cross-examination of Cohn. The data itemized the number of RFNs and repeat RFNs performed over a five-year period. In that period, less than two percent of patients had more than two RFNs and less than one percent had more than three RFNs. Unlike the cases that Peterson cites in support of her argument for excluding the MAPS evidence, the MAPS data is based on the actual number of RFNs conducted on MAPS's patients and not on statistical probabilities. Cohn testified that he was familiar with the data, that it was from his office, and that it was prepared for submission to a district court in a different case. The data's foundational reliability was properly established, and the district court's admission of this evidence was within its discretion.

Peterson's second evidentiary challenge on damages-related testimony is her objection to Progressive's cross-examination of Schomaker on the contents of his file, which included Thatcher's chiropractic reports detailing Peterson's physical impairments

and limited range of motion from her previous accident. Although the district court ruled that Thatcher's reports were not independently admissible under the business-records exception to the hearsay rule, it permitted Progressive to cross-examine Schomaker about information in the reports because they were part of Peterson's medical records. *See* Minn. R. Evid. 802 (stating that hearsay is inadmissible absent exception); Minn. R. Evid. 803(6) (identifying business-records exception). Minn. R. Evid. 703(a) does not require that the sources on which an expert bases an opinion be independently admissible. Only that the sources are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.* And significantly, rule 703(b) does not restrict inquiries into underlying expert data on cross-examination. *Id.* Schomaker testified that he had copies of the reports in his chart, that he reviewed the reports as part of his treatment of Peterson, and about their content—assessments Thatcher had made about Peterson's physical impairments and limited range of motion. Because the district court properly restricted cross-examination to documents that Schomaker relied on in the normal course of business that pertained to Peterson's health, it did not abuse its discretion by permitting Progressive's cross-examination of Schomaker on the contents of one of Thatcher's reports.

Peterson's final evidentiary challenge is to Robert Peterson's statement about his mother not being injured in the accident. During Robert Peterson's deposition, Progressive asked him, "And, to the best of your knowledge, your mother was not injured in the car accident?" To which he responded, "No." A witness may testify to matters on which that witness has personal knowledge. Minn. R. Evid. 602. The deposition

testimony confirms Robert Peterson's interaction with his mother over the period of time during which the accident occurred. Because Robert Peterson's answer was based on his personal knowledge, the district court did not err by admitting this statement.

On the issue of damages, Peterson's primary challenge is to the amount. She contends that the limited amount of damages does not adequately reflect her injuries, and therefore the amount was influenced by passion and prejudice. On appeal from a district court's denial of a motion for a new trial, "[a] jury verdict will not be set aside unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Roemer v. Martin*, 440 N.W.2d 122, 124 (Minn. 1989) (quotation omitted). We will sustain a jury's special-verdict determination if the answers "can be reconciled on *any* theory." *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984). The jury's verdict is given "great deference" when there is conflicting medical testimony about the injury. *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999).

Peterson asserts that the verdict was contrary to the evidence and that the jury's special-verdict responses conflict because the jury assessed damages for past medical expenses and wage loss but no damages for past pain and suffering. Zero damages for past pain and suffering, she contends, is also inconsistent with the jury's finding that she sustained a temporary disability.

Peterson claims that as a result of the accident she suffered from neck-and-back pain and severe headaches. She was treated by Schomaker from 2000-2005. Schomaker testified that due to the accident Peterson suffers from cervical sprain or strain and experiences residual flare-ups. He attributed her ongoing pain to the injury she suffered

in the accident. Dr. Bruce Mack, who conducted an independent medical examination that was offered into evidence by Progressive, testified that Peterson had suffered a modest injury and had recovered from that injury within three months of the accident. He also testified that she did not suffer a disability for more than sixty days and that no medical treatment was needed after the three-month period. Additionally, there was testimony that, before the accident, Peterson had suffered from neck-and-back injuries, had been assessed with having a limited range of motion, and was treated by Schomaker for neck-and-back pain at various times beginning in 1998. There was also testimony that after the accident, but before trial, Peterson fell down a flight of stairs, which aggravated her physical condition.

Based on this evidence, the jury could reasonably have determined that Peterson's prior injuries contributed to the injury and pain that resulted from the accident, and that Peterson sustained a temporary injury. The jury could reasonably have believed that the amount provided for wage loss and past medical expenses was adequate for the temporary disability Peterson experienced. Consequently, the jury's answers to the special-verdict questions were not inconsistent and were supported by the evidence.

Finally, Peterson argues that the district court abused its discretion by failing to use her proposed special-verdict form. When selecting the language of jury instructions, district courts have considerable latitude and a district court's decision will stand unless it constitutes an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Included in this latitude is the framing of questions on special-verdict forms. *Dang v.*

St. Paul Ramsey Med. Ctr., Inc., 490 N.W. 2d 653, 658 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992).

Peterson offered a special-verdict form that required the jury to itemize the damages for medical expenses by provider. The district court's failure to use this form, Peterson argues, "deprived the court of any coherent basis for its later collateral source offset order" because without the itemization, "there was no way for the court to determine . . . which of the past medical expenses [assessed] by the jury had been compensated by no-fault and which had not." Based on this premise Peterson alleges that the district court erred by deducting all of the no-fault payments.

The primary objective of the collateral-source statute is to prevent plaintiffs from the windfalls of double recoveries. *Do v. Am. Family Mut. Ins. Co.*, 779 N.W.2d 853, 858 (Minn. 2010). This is accomplished through a party's posttrial motion requesting a collateral-source-offset reduction of the jury's damages determination. Minn. Stat. § 548.251, subd. 2 (2008). The collateral-source statute provides that the court, not the jury, determines the amounts the collateral sources paid and makes the reduction. *Id.* Importantly, the legislature ensured that this determination be made by courts because the statute "prohibits the parties from informing the jury that the plaintiff has received compensation from another individual or entity." *Swanson v. Brewster*, 784 N.W.2d 264, 269-70 (Minn. 2010).

In *Tuenge v. Konetski*, 320 N.W.2d 420, 422-23 (Minn. 1982), the supreme court held that in order to ensure that the offset does not operate as a penalty, the offset provision must not be applied to the total verdict. Instead, the court held, the offset must

be applied only against the part of the special verdict that represents the same item of damage. *Id.* This properly avoids a duplicate recovery but does not impose a penalty. *Id.*

In compliance with *Tuenge* and sections 548.251, subdivision 3 and 65B.51, subdivision 1, the district court applied the wage-loss and medical-expense benefits paid by Peterson's no-fault carrier to offset the jury's damages determination. On the date of the verdict Peterson's no-fault carrier had paid $4,917.53 in lost-wages benefits and $19,694.54 in medical-expense benefits. The jury determined that Peterson had damages of $4,500 for lost wages and $19,591.15 for past medical expenses. Because Peterson's no-fault carrier had paid more in wage-loss benefits than the special-verdict amount, the wage loss was entirely offset. The amount for past medical expenses, after the offset was applied, was reduced to $126.61.

Peterson alleges she may have been penalized by the offset because she paid for some medical expenses and the jury did not identify which of the past medical expenses were included in the damages determination. This argument is not supported by section 548.251 or the record. First, section 548.251, subdivision 2 only requires that, when a damages determination compensates a party for losses that have been offset by collateral sources, the court determine the collateral sources and apply the offset to reduce the verdict. Applying the offset properly does not necessitate itemization of the medical damages and the statue does not require it.

Second, nothing in the record supports Peterson's claim that she paid for medical expenses. And a penalty is impossible because the district court properly limited the

offset to the amount that her no-fault carrier had actually paid. Accordingly, the collateral offset did not penalize Peterson but only operated to prevent a double recovery. The district court did not abuse its discretion by denying Peterson's request for itemized medical damages on the special-verdict form.

Affirmed.