STATE OF MINNESOTA
IN COURT OF APPEALS
A10-253

Ricky Cobb,
Appellant,

vs.

Soo Line Railroad Company,
d/b/a Canadian Pacific Railway,
Respondent.

Filed December 7, 2010
Affirmed
Wright, Judge

Anoka County District Court
File No. 02-C0-05-012958

Michael F. Tello, Michael P. McReynolds, Tello Law Firm, Anoka, Minnesota (for appellant)

Alfonse J. Cocchiarella, Scott H. Rauser, Diane P. Gerth, Ricke & Sweeney, P.A., 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

WRIGHT, Judge

Appellant seeks a new trial, arguing that (1) the district court abused its discretion by instructing the jury on contributory negligence despite the lack of evidence supporting such an instruction; (2) the jury's verdict was contradictory and against the weight of the

evidence; and (3) respondent's counsel committed a pattern of prejudicial misconduct. We affirm.

FACTS

On February 6, 2003, appellant Ricky Cobb, a locomotive engineer for respondent Canadian Pacific Railway Company (Canadian Pacific), slipped and fell at the Canadian Pacific yard office in Glenwood. Cobb had operated a train from St. Paul to Glenwood during the day and was scheduled to return to St. Paul that evening. At approximately 11:05 p.m., a Canadian Pacific employee picked up Cobb in a Canadian Pacific vehicle and transported him from the motel where Canadian Pacific had quartered him to the Canadian Pacific yard office. As Cobb was exiting the vehicle at the yard office, he stepped onto a gravel-covered area and observed snow on the ground. After stepping sideways to close the door of the vehicle, Cobb slipped. As Cobb attempted to grab the luggage rack on top of the vehicle, his back struck the side of the vehicle and he landed on the ground.

Cobb experienced soreness and increasing pain in the days following his fall. On February 9, Cobb went to the emergency room where he was prescribed pain medication and diagnosed with acute lower back pain and a possible herniated disk. A subsequently administered MRI scan revealed a bulging disk in Cobb's spine. When pain developed in both legs, he consulted a neurologist. Between February 2003 and June 2009, Cobb had 54 appointments with his primary physician to treat his back pain. And he underwent back surgery in December 2008.

Cobb brought an action against Canadian Pacific claiming damages under the Federal Employers' Liability Act (FELA). The case proceeded to a jury trial during which Cobb testified that the pain "at points became unbearable." Canadian Pacific's medical expert, Dr. Elmer Salovich, testified that Cobb suffered a temporary aggravation of a preexisting degenerative disk disease. But for Cobb's preexisting condition, Dr. Salovich testified, the temporary strain would have resolved within six to ten weeks.

The jury returned a verdict finding no liability on the part of Canadian Pacific, but it determined that Cobb incurred $50,000 in lost wages. Cobb moved for judgment as a matter of law and a new trial, which the district court denied. This appeal followed.

D E C I S I O N

I.

Cobb argues that he is entitled to a new trial because the district court erroneously instructed the jury on contributory negligence despite the absence of any evidence supporting a contributory-negligence defense. Absent an abuse of discretion, the district court's decision regarding jury instructions will not be disturbed on appeal. *Rush v. Jostock*, 710 N.W.2d 570, 576 (Minn. App. 2006) (citing *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986)), *review denied* (Minn. May 24, 2006). But the existence of a fundamental error in the jury instructions warrants reversal and a new trial. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974). "Errors are likely to be considered fundamental or controlling if they destroy the substantial correctness of the charge as a whole, cause a miscarriage of justice, or result in substantial prejudice." *Id.* (quotations omitted).

Under FELA, the burden of proving contributory negligence rests on the railroad. *Narusiewicz v. Burlington N. R.R. Co.*, 391 N.W.2d 895, 897 (Minn. App. 1986). If there is no evidence in the record from which the jury could properly find that the employee exercised a lack of due care, "it is fundamental error to instruct the jury on contributory negligence." *Id.* (citing *Wilson v. Burlington N., Inc.*, 670 F.2d 780, 782 (8th Cir. 1982)).

Our decision in *Narusiewicz* informs our analysis of whether the jury instruction on contributory negligence properly was given here. In *Narusiewicz*, a Burlington Northern railroad employee was asked to respike a switch in the middle of the night. *Id.* at 896. The employee was not instructed on how to respike the switch and, although he told his supervisor that it was not within his job responsibilities, he was ordered to perform the task. *Id.* After the employee injured his back while repairing the switch, he brought a FELA action. At trial, a Burlington Northern witness testified that respiking the switch was a "relatively easy job" that "required no special training." *Id.* The employee testified that the switch was dislocated and bent, which made his task more difficult. *Id.* The district court instructed the jury on contributory negligence, and the jury found that the employee was 75 percent negligent. *Id.* at 897.

On appeal, the employee argued that the district court erred by instructing the jury on contributory negligence absent any direct evidence that the employee failed to exercise due care. *Id.* We disagreed and held that the jury could have concluded that the employee respiked the switch in a negligent manner. *Id.* at 898. Because the employee was the only person with direct knowledge of the incident, we explained that "[t]he

railroad could not be expected to produce *direct* evidence of the position of the run-through switch." *Id.* at 897 (emphasis added). But we reasoned that the *circumstantial* evidence was sufficient to warrant the instruction. *See id.* at 898 (finding that contributory-negligence instruction was proper when defendant demonstrated evidence beyond plaintiff's lack of credibility).

Similarly here, Canadian Pacific provided circumstantial evidence that Cobb was contributorily negligent. Cobb's co-worker, who was getting into the same vehicle that Cobb had just exited, testified that the surface conditions were not slippery, there was enough light for him to see the ground, and he did not observe any ice on the ground. Cobb's supervisor testified that he inspected the area between 6:30 and 6:45 a.m. on the morning after Cobb fell and saw "[l]ight snow cover, some compacted snow, and lots of salt and sand distributed through the entire area." Cobb's supervisor also testified that his initial report in February 2003 attributed "at least a portion of the cause to Mr. Cobb," and he concluded that Cobb had violated two of Canadian Pacific's general safety rules that require employees to be alert, attentive, and careful to prevent injuries. Canadian Pacific's evidence, while circumstantial, provided a basis for the jury to determine that ground conditions were normal and not slippery on the night of Cobb's fall, that salt and sand had been spread as a safety precaution, and that many employees walked across the area daily without falling. Thus, the record reflects an evidentiary basis other than Cobb's lack of credibility to support the contributory-negligence instruction.

Cobb also argues that the contributory-negligence instruction improperly invited the jury to speculate that, when exiting the vehicle, Cobb assumed the risk—a defense

that is barred under FELA. We rejected a similar argument in *Narusiewicz* and distinguished between the inherent risks of the task and the added risk created by the employee's method of carrying out that task. *Id.* at 898. Similarly, the jury reasonably could have concluded that Cobb's fall was, at least in part, a result of his careless act or omission.

Because Canadian Pacific produced sufficient evidence to support a contributory-negligence defense, the district court did not abuse its discretion by instructing the jury on that defense theory.

II.

Cobb next argues that he is entitled to a new trial because the verdict reflects the jury's passion or prejudice. In support of this argument, he relies on two apparent contradictions reflected in the jury's special verdict form. First, the jury awarded $0 for past pain, disability, and emotional distress, but $50,000 for past wage loss. Second, notwithstanding undisputed evidence that Cobb suffered at least some pain from the fall, the jury awarded $0 for past pain, disability, and emotional distress.

We "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless 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. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). If the jury's answers can be reconciled on any theory, the verdict should stand. *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999).

A damage award that is less than the proven damages may be reversed as the product of passion or prejudice unless the jury also determined that the defendant is not liable and that determination is supported by credible evidence. *Radloff v. Jans*, 428 N.W.2d 112, 115-16 (Minn. App. 1988) (citing *Wefel by Wefel v. Norman*, 296 Minn. 506, 507-08, 207 N.W.2d 340, 341 (1973)), *review denied* (Minn. Oct. 26, 1988); *see also Hernandez by Hernandez v. Renville Pub. Sch. Dist. No. 654*, 542 N.W.2d 671, 675 (Minn. App. 1996) ("[I]f a jury's conclusion that a defendant is not liable is supported by credible evidence, the jury's determination of inadequate damages to a plaintiff does not warrant a new trial."), *review denied* (Minn. Mar. 28, 1996). As reflected in the special verdict and our review of the evidence deemed credible by the jury, Cobb failed to prove Canadian Pacific's liability.

In contrast to the cases Cobb cites to support his argument that the lack of past pain, disability, and emotional distress damages goes against the weight of the evidence, *Levienn v. Metro. Transit Comm'n*, 297 N.W.2d 272, 273-74 (Minn. 1980); *Carnahan v. Walsh*, 416 N.W.2d 187, 188-89 (Minn. App. 1987), *review denied* (Minn. Feb. 12, 1988), Canadian Pacific submitted evidence in support of an alternative theory for the source of Cobb's pain—namely, Cobb's preexisting degenerative disk disease. Canadian Pacific also presented evidence that Cobb exaggerated his pain. Thus, the jury was free to attribute Cobb's pain and suffering to his preexisting disease or to discredit it as an exaggeration.

The jury also awarded lost wages despite finding that Canadian Pacific was not negligent. However, when viewed in the context of the special verdict form's

instructions, that determination is not inconsistent. The special verdict form directed the jury to determine, "[w]ithout reducing damages for [Cobb's] negligence, if any, what amount of money will fairly and adequately compensate Ricky Cobb for damages he experienced as a result of the February 6, 2003 accident . . . ." Canadian Pacific's expert testified that Cobb suffered a back strain that would require six to ten weeks of recovery. Cobb did not return to work until October 2003. The jury reasonably could attribute Cobb's pain and suffering to the preexisting disk disease or exaggeration, yet still calculate that Cobb's wage loss was $50,000 during the period when he was not working.

Because the jury verdict is supported by a credible theory and is not against the weight of the evidence, Cobb is not entitled to a new trial on the ground that the jury verdict is founded on the jury's passion or prejudice.

III.

Finally, Cobb argues that he is entitled to a new trial because counsel for Canadian Pacific engaged in a pattern of prejudicial misconduct at trial. Cobb identifies three specific instances of misconduct. First, Canadian Pacific's counsel addressed an individual juror during counsel's opening statement and misstated the standard of proof. Second, Canadian Pacific's counsel asked a witness about personal-injury claims that he had against Canadian Pacific without first obtaining permission to do so, in violation of the district court's prior ruling. Third, Canadian Pacific's counsel violated another district court ruling by asking a witness whether Canadian Pacific ever employed workers who had lifting restrictions, thereby implicitly raising the issue of Cobb's 2006

termination from Canadian Pacific. Cobb argues that this clear and deliberate pattern of misconduct prejudiced the jury against him and denied him a fair trial.

The decision to grant a new trial based on attorney misconduct rests within the district court's discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). Because the district court is in the best position to decide whether attorney misconduct tainted the jury's verdict, we review the district court's decision to deny a new trial for an abuse of discretion. *Id.*

The first instance of misconduct occurred during Canadian Pacific's opening statement when counsel for Canadian Pacific mischaracterized the legal standard in a FELA case as being "not much different than a regular liability case" and referred to a specific juror by stating, "I know one of you has been on a civil jury." Following Cobb's objection, the district court agreed that counsel's comment was improper, observed that "the comment was so fleeting in nature it didn't amount to much," and immediately gave a curative instruction to the jury. Our review of the record establishes that this misconduct was not so extreme that the corrective instruction failed to alleviate any resulting prejudice. Accordingly, the district court's decision to deny a new trial based on this instance of misconduct was well within the sound exercise of its discretion.

The second instance of misconduct occurred during the cross-examination of an eyewitness. In a pretrial ruling, the district court ordered counsel to pre-clear any questions referring to open claims against Canadian Pacific outside the presence of the jury. When Canadian Pacific's counsel began to ask about a witness's claim against

Canadian Pacific, Cobb's counsel interrupted the question with a timely objection. After a bench conference, the district court permitted the question. Because the district court ruled the question admissible before it was fully posed, this instance of misconduct was not prejudicial. A new trial on this ground is unwarranted.

Canadian Pacific's counsel committed a third incident of misconduct during the direct examination of Cobb's supervisor. In its pretrial ruling, the district court excluded any reference to Cobb's termination of employment, thereby precluding Cobb from having to address his unemployed status. Canadian Pacific's counsel elicited testimony that Canadian Pacific had allowed engineers to return to work with a 25-pound lifting restriction.[1] Cobb argues that this testimony invited the jury to speculate that Cobb's failure to return to work was attributable to laziness.

Outside the presence of the jury, the district court denied the request of Cobb's attorney to ask follow-up questions. Cobb moved for a mistrial, which the district court denied. Concluding that the questioning improperly implicated Cobb's employment status with Canadian Pacific, however, the district court agreed to give the jury a cautionary instruction. Cobb renewed his motion for a mistrial, which the district court again denied. The district court then modified the cautionary instruction and offered it as Cobb's only remedial option. After rejecting an additional modification that Cobb sought, the district court read the following instruction to the jury:

> The fact that a locomotive engineer may have returned to work for a period of time with only a 25-pound lifting

[1] The evidence established that, because of Cobb's back condition, his doctors recommended a lifting restriction of 25 to 35 pounds.

> restriction does not necessarily mean Mr. Cobb could return to work at [Canadian Pacific] with his restrictions.

"A new trial is not warranted unless the misconduct of counsel clearly resulted in prejudice to the losing party." *Sather v. Snedigar*, 372 N.W.2d 836, 839 (Minn. App. 1985). Although the reference in this instance was improper, it did not clearly prejudice Cobb. The lifting restriction was independently relevant to the mitigation of damages, and the district court reasoned that the question might have been otherwise admissible if it had been phrased as a hypothetical. Moreover, jurors are presumed to follow the district court's curative instructions. *Johnson v. Washington Cnty.*, 506 N.W.2d 632, 639 (Minn. App. 1993) (citing *Flatin v. Lampert Lumber Co.*, 298 Minn. 577, 580 n.3, 215 N.W.2d 783, 785 n.3 (1974)), *aff'd*, 518 N.W.2d 594 (Minn. June 30, 1994). And there is no basis in the record to conclude that the jury failed to do so here.

Although Cobb cites multiple instances of conduct which the district court itself identified as improper, none rises to the level of prejudice that requires a new trial. Accordingly, the district court's exercise of its discretion in denying Cobb's motions for a new trial was sound.

Affirmed.