STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2185

Catherine Dakinah,
Appellant,

vs.

John Sullivan,
Respondent.

Filed September 26, 2011
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-09-29481

Christopher O. Obasi, Samuel A. McIntosh, Sr., Brooklyn Center, Minnesota (for appellant)

Linc S. Deter, Brett W. Olander & Associates, St. Paul, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Ross, Judge.

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

WORKE, Judge

On appeal after a jury returned a verdict in favor of respondent on a negligence claim, appellant argues that the district court abused its discretion by: (1) denying her posttrial motion; (2) admitting medical-expert depositions into evidence; (3) ordering her

to submit to an independent-medical examination; and (4) issuing a discovery sanction. We affirm.

D E C I S I O N

Posttrial Motion

Appellant Catherine Dakinah was injured in an automobile accident when the vehicle in which she was a passenger was struck by a vehicle operated by respondent John Sullivan. Appellant sued respondent for negligence, the jury returned a verdict in favor of respondent, and the district court denied appellant's posttrial motion for a new trial or, alternatively, judgment as a matter of law (JMOL).

New Trial

Appellant first challenges the district court's denial of her motion for a new trial. A district court may grant a party a new trial upon a showing of misconduct by the prevailing party, accident or surprise that could not have been prevented by ordinary prudence, or errors of law made by the court at trial. Minn. R. Civ. P. 59.01 (b), (c), (f). We review a district court's decision on a motion for a new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

Appellant argues that the district court abused its discretion by giving the jury the emergency-rule instruction. The district court has broad discretion in determining jury instructions and will not be reversed absent an abuse of discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). When an instruction fairly and correctly states the law, we will not grant a new trial. *Id.* But when an erroneous jury instruction

"destroy[s] the substantial correctness of the charge . . . , cause[s] a miscarriage of justice, or results in substantial prejudice," a new trial is warranted. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974) (quotation omitted).

The emergency-rule instruction provides that "[i]f there was an emergency that a person did not cause, that person is not negligent if he or she acted in a way a reasonable person would have acted." 4 *Minnesota Practice*, CIVJIG 25.16 (2010). The instruction further states that the reasonableness determination is based on: (1) "[t]he circumstances of the emergency"; and (2) "[w]hat the person did or did not do." *Id.* The emergency-rule instruction should only be given upon the request by a party where the evidence would sustain a finding that the party was "confronted with a sudden peril or emergency and acted under . . . stress." *Byrns v. St. Louis County*, 295 N.W.2d 517, 519 (Minn. 1980). In the context of an auto accident, the emergency-rule instruction "operates only to relieve a driver from liability for errors in judgment which the ordinarily prudent [person] might make under similar circumstances." *Brady v. Kroll*, 244 Minn. 525, 530, 70 N.W.2d 354, 358 (1955). The emergency-rule instruction applies to "situations where the [driver] either has no time to act deliberately or has such limited time that he cannot be expected to act with the same dispatch as usually would be required of him." *Minder v. Peterson*, 254 Minn. 82, 89, 93 N.W.2d 699, 705 (1958).

Appellant argues that there was an insufficient evidentiary basis to support the instruction: respondent admitted that the road conditions were not problematic at the time of the accident, that he saw the vehicle in which appellant was riding as a passenger

activate its brake lights, and that he was able to maintain control over his vehicle when he noticed the car behind him simultaneously moving towards the shoulder as he did. Appellant asserts that, under these conditions, a reasonable person would have prevented the accident from occurring. Accordingly, appellant claims the district court abused its discretion by giving the instruction and, consequently, abused its discretion by denying her motion for a new trial.

This argument is unconvincing. Respondent testified that, immediately prior to the accident, he saw a tire roll across the freeway. Respondent also testified that the errant tire rolling through traffic occurred during a busy commuting time. And respondent claimed to have collided with the vehicle in which appellant was riding because he was trying to avoid being hit by the vehicle following him. There was sufficient evidence presented for the district court to submit the issue of the emergency-rule to the jury, and the district court did not abuse its discretion in giving the emergency-rule instruction. Accordingly, the district court did not abuse its discretion by denying appellant's motion for a new trial.

JMOL

Appellant also argues that the district court erred by denying her JMOL motion. Minn. R. Civ. P. 50.01 empowers a district court to grant a JMOL motion when a party "has been fully heard on the issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." A district court's JMOL decision is reviewed de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

Appellant asserts that the evidence was insufficient to support the jury's finding that respondent was not negligently operating his vehicle at the time of the accident. We disagree. The jury was instructed on the emergency rule, and there was sufficient evidence for the jury to find that respondent was attempting to avoid being struck by the vehicle traveling behind him when he collided with the vehicle in which appellant was a passenger. The district court did not err in denying appellant's JMOL motion.

Admission of Depositions

Appellant next challenges the district court's admission of respondent's medical-expert depositions. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted).

Appellant argues that the district court abused its discretion by admitting medical-expert depositions because the depositions were conducted after the deadline for discovery. But appellant cites to no caselaw or other authority in support of this position and, instead, relies on mere assertions. Accordingly, this issue is waived on appeal. *See State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue absent adequate briefing); *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (stating that an assignment of error based on mere assertion and unsupported by argument or authority is waived unless prejudicial error is obvious).

Rule 35 Examination

Appellant also challenges the district court's decision requiring her to submit to an independent medical examination pursuant to Minn. R. Civ. P. 35. The decision to order a party to submit to a rule 35 examination is within the district court's discretion and will not be reversed absent an abuse of that discretion. *Loveland v. Kremer*, 464 N.W.2d 306, 308 (Minn. App. 1990).

Appellant appears to argue that respondent should have brought a formal rule 35 motion instead of requesting the exam during a phone conference; without a formal motion on which to rule, appellant asserts that the district court abused its discretion by ordering the exam to occur via phone conference. But appellant did not raise this procedural objection during the phone hearing and also failed to argue the issue in her posttrial motion. Because appellant's objection was not timely made during the phone conference and was never asserted in her posttrial motion, the issue was never properly presented to the district court; therefore, this argument is also waived on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that issues not properly raised before and ruled on by the district court may not be considered on appeal); *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) (stating that the general rule is that "evidentiary rulings . . . are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error").

Attorney's Fees

Finally, appellant challenges the district court's award of $627 in costs for the independent medical examination which was cancelled by the examining physician after

appellant's counsel insisted on being present. We review the imposition of discovery sanctions for an abuse of discretion. *Hornberger v. Wendel*, 764 N.W.2d 371, 377 (Minn. App. 2009).

Appellant asserts that there was no basis for the district court to order sanctions because she was attending an adverse medical examination, not an independent medical examination, and was allowed to have her attorney present during the exam. But the district court clearly ordered the examination to occur pursuant to rule 35, which applies to independent medical examinations. *See* Minn. R. Civ. P. 35.01. Thus, there was no reason for appellant to believe that she was attending an adverse examination, and her present argument is unavailing. Moreover, the presence of an attorney during an independent medical examination undermines the integrity of the proceeding, and appellant's counsel should have known this. The district court did not abuse its discretion by requiring appellant to pay the costs of the cancelled examination.

Affirmed.