STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2173

Daniel Ansha,
Appellant,

vs.

G-8, Inc., f/d/b/a Dukem Ethiopian Bar & Restaurant, et al.,
Respondents.

Filed June 4, 2012
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CV-10-3879

James R. Behrenbrinker, Minneapolis, Minnesota (for appellant)

Lawrence M. Rocheford, Michael P. Goodwin, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Lansing, Judge.*

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

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

BJORKMAN, Judge

Appealing from a judgment and order denying judgment as a matter of law or a new trial in a personal-injury action, appellant argues that (1) the district court erred in denying his posttrial motion as untimely, (2) the verdict is manifestly contrary to the evidence, and (3) the district court made prejudicial evidentiary errors. We affirm.

FACTS

This case arises from a fight between appellant Daniel Ansha and S.F. that occurred at Dukem Ethiopian Bar & Restaurant. Appellant sued respondent G-8, Inc., which held the liquor and restaurant licenses for Dukem, and respondent Patrick Scanlon, the sole-shareholder of G-8, under a theory of innkeeper liability.

Prior to trial, appellant moved to exclude evidence that respondents were not the proprietors of the bar and to admit evidence that respondents obtained liability insurance for the bar, indicating their proprietorship. Respondents opposed both motions but argued that if the insurance application was admitted, respondents should be permitted to testify that they had no coverage for the incident involving appellant. Additionally, respondents moved the district court to exclude deposition testimony obtained in other lawsuits involving the bar. The district court ruled in favor of admitting all of the challenged evidence, permitted respondents to offer evidence of the insurer's coverage denial, and limited admission of evidence regarding prior lawsuits for impeachment purposes.

Appellant's counsel did not comment on the challenged evidence during his opening statement. Respondents' counsel discussed the prior lawsuits, respondents' application for insurance for the bar, and the fact that the insurer denied coverage for appellant's claims. The district court overruled appellant's objections to these statements and denied appellant's request for a curative instruction. Appellant then moved for a mistrial based on counsel's references to prior lawsuits, which the district court denied.

The jury found that (1) respondents and Dukem were not negligent, (2) appellant's negligence was the direct and sole cause of the incident that led to his injuries, and (3) G-8 did not operate a joint venture or joint enterprise with Dukem.[1] The district court issued an order for judgment on May 19, 2011.

On May 20, respondents mailed notice of the filing of the order to appellant. On June 8, appellant filed a notice of motion and motion requesting JMOL or, alternatively, a new trial, citing rules of civil procedure 50 and 59. Appellant simultaneously filed a motion requesting extension of the briefing schedule and the hearing date for good cause, which the district court granted. On August 5, appellant filed an amended notice of motion and a memorandum of law in support of its motion, arguing that the jury's verdict was against the overwhelming evidence and asserting numerous evidentiary errors.

After a hearing on September 14, the district court denied appellant's JMOL/new trial motion on the grounds that (1) the motion was untimely because the June 8 submission failed to state the specific grounds for relief, (2) the jury's verdict was not

[1] The jury also calculated $80,570 in damages.

manifestly contrary to the evidence, and (3) appellant's claims of evidentiary error lacked merit. This appeal follows.

D E C I S I O N

I. Appellant's posttrial motion was timely.

Whether appellant's posttrial motion was timely hinges on an interpretation of the rules of civil procedure, which we review de novo. *See Stocke v. Berryman*, 632 N.W.2d 242, 246 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). A party must file a notice of motion for JMOL or a new trial within 30 days after "a general verdict or service of notice by a party of the filing of the decision or order." Minn. R. Civ. P. 59.03; *accord* Minn. R. Civ. P. 50.02. The motion must specify the alleged errors that form the grounds for posttrial relief. *City of E. Bethel v. Anoka Cnty. Hous. & Redevelopment Auth.*, 798 N.W.2d 375, 378 (Minn. App. 2011). But a motion that fails to do so is nevertheless proper if it is supported by a memorandum of law that specifically alleges the basis on which posttrial relief is sought and the nonmoving party has an opportunity to respond. *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172, 176 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991). The memorandum need not be filed before the 30-day deadline to render the motion proper and timely. *Id.*; *see also* Minn. R. Civ. P. 59.03 (applying the deadline only to the notice of motion).

Appellant argues that his posttrial motion was timely. We agree. The June 8 notice of motion and motion was filed within 30 days after service of the notice of filing of the order. Although the motion did not identify the basis for the motion with the required specificity, the supporting memorandum of law, which appellant filed within the

schedule the district court established, specifically alleged that the verdict was contrary to the evidence and that the district court made specific evidentiary errors that appellant objected to before and during trial. Respondents had 14 days to respond to the memorandum. Because the notice of motion was timely and the memorandum of law was specific and filed within the court-ordered briefing schedule, the district court erred by concluding appellant's motion was untimely.

II. Appellant is not entitled to JMOL because the jury's verdict was not manifestly contrary to the evidence.

A district court must grant JMOL if the verdict is manifestly contrary to the entire evidence. *Navarre v. S. Wash. Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002). We review the denial of JMOL de novo and will affirm if "in considering the evidence in the record in the light most favorable to the prevailing party, there is any competent evidence reasonably tending to sustain the verdict." *Id.* (quotation omitted).

Appellant challenges two aspects of the jury's verdict. First, he asserts that the jury's negligence findings are wholly unsupported by the evidence. Second, he argues that the jury's determinations that respondents did not operate Dukem as a joint enterprise or joint venture are manifestly contrary to the evidence. We address each argument in turn.

To prevail on a negligence claim based on innkeeper liability, a party must prove that the defendant (1) was a proprietor of the bar, (2) was on notice of the offending party's vicious or dangerous propensities, (3) had an adequate opportunity to protect the claimant, (4) failed to take reasonable steps to protect the claimant and (5) could

reasonably foresee the claimant's injuries. *See Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997).

Appellant argues that no evidence supports the jury's findings that respondents were not negligent. We disagree. The bartender testified that he saw appellant smash a beer bottle on S.F.'s face without any provocation; that the bartender and the deejay immediately tried to break up the fight but S.F. ran away; and that S.F. hit appellant in the head with a pool cue while the bartender was on the phone calling 911. The deejay similarly testified that he saw one of appellant's friends take an unsuccessful swing at S.F.; that appellant then smashed a beer bottle on S.F.'s face; that the deejay, the bartender, and the bouncer immediately jumped in to break up the fight; that S.F. escaped and returned to hit appellant on the head with a pool cue before anyone could stop him; that the deejay then pushed S.F. away from appellant, but S.F. picked up a beer bottle and threw it at appellant; and that the deejay and the bouncer then picked appellant up off the floor, and the violence stopped. While there is merit to appellant's assertion that the testimony of the bartender and deejay was not wholly consistent, the jury was entitled to weigh the credibility of these witnesses. On this record, the jury could reasonably conclude that appellant was solely negligent because he initiated the fight, respondents had no notice of S.F.'s dangerous propensities, and the bar staff took reasonable steps to stop the fight.

We next consider appellant's challenge to the jury's finding that G-8 did not operate a joint enterprise or a joint venture with Dukem. We note that these doctrines are invoked to hold a party responsible for another's act. *See Stelling v. Hanson Silo Co.*,

563 N.W.2d 286, 290 (Minn. App. 1997) (courts apply the joint venture or joint enterprise doctrine "when necessary to impute negligence between two entities that otherwise have no legal relationship"). Because the jury did not find anyone but appellant negligent, the issue of imputing negligence does not arise. Accordingly, we need not address the jury's findings regarding joint venture and joint enterprise.

III. Appellant is not entitled to a new trial based on the district court's evidentiary rulings.

We review evidentiary determinations for an abuse of discretion and will not grant a new trial unless the district court's abuse of discretion is prejudicial. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

A. Evidence that respondents were not proprietors of the bar

Appellant argues that the district court abused its discretion by permitting respondents to offer evidence that they were not proprietors of the bar because respondents did not assert this defense prior to trial or produce this evidence during discovery. Both arguments are unavailing. First, consistent with Minn. R. Civ. P. 12.02, respondents denied having a proprietorship interest in the bar in their answer. Second, the record does not support exclusion of the challenged evidence as a discovery sanction. A party who fails to comply with a court order compelling discovery may be subject to sanctions, including an order "prohibiting that party from introducing designated matters in evidence." Minn. R. Civ. P. 37.02(b)(2). But appellant never sought, and the district court did not issue, an order compelling respondents to respond to discovery regarding the issue of proprietorship. On this record, we discern no abuse of discretion.

B. Evidence of respondents' lack of insurance coverage for this lawsuit

Appellant contends that the district court abused its discretion by admitting evidence that respondents had no insurance coverage for this lawsuit. We are unpersuaded. Although evidence of insurance "is not admissible upon the issue whether the person acted negligently or otherwise wrongfully," it is admissible for other purposes. Minn. R. Evid. 411. At appellant's request, the district court permitted evidence that respondents obtained insurance for Dukem as probative of respondents' proprietary interest in the bar. The district court allowed respondents to present evidence that the insurer denied coverage not to demonstrate absence of negligence, but to *prevent* appellant from unfairly implying that the jury should find respondents negligent because they had liability insurance:

> And it seemed to me that it was appropriate to make sure that there was a balanced presentation and not unfair prejudice to [respondents]. That if the fact of insurance was out there, no matter how I tried to limit the use for which that evidence could be put by the jury, that there was a chance that they would be tainted or improperly inclined to consider the insurance in making a decision in the case. So I thought, for balance, [respondents] should be allowed to indicate that they've been advised by the carrier there would be no defense or indemnification.

We discern no abuse of discretion occasioned by the district court's analysis and ruling.

Appellant also argues that the district court abused its discretion by overruling his objections and denying a curative instruction after respondents' counsel stated:

> You will hear testimony that notwithstanding the applications [Scanlon] filled out, all coverage for this loss was denied.
>
> [Objection overruled.]
>
> He's here naked with me.

For the reasons explained above, the district court did not abuse its discretion by permitting respondents' counsel to comment on the insurer's denial of coverage in his opening statement. And the district court's refusal to give a curative instruction, which would have only highlighted the brief improper statement—"He's here naked with me"—to the jury, was well within the court's discretion. Moreover, the entire comment was so brief and vague that there is no reasonable likelihood that it affected the jury's verdict.[2]

C. References to other lawsuits in respondents' opening statement

Appellant argues that references to other lawsuits involving Dukem were irrelevant and unfairly prejudicial. Counsel may only discuss admissible evidence in opening statements. 3A David F. Herr, *Minnesota Practice* § 8.2 (2011 ed.). "Evidence which is not relevant is not admissible." Minn. R. Evid. 402. And relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403.

In his opening statement, respondents' counsel mentioned two other cases involving assaults at Dukem to explain why respondents obtained liability insurance for Dukem:

[2]Appellant also challenges the district court's refusal to grant a mistrial based on this insurance reference. But because appellant did not request a mistrial on this basis, he has waived the issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

> Following the May 2008 incident, Mr. Zemedhin, through attorney Behrenbrinker, brought a suit. He brought suit not against G-8 and Pat Scanlon, he sued G-8, Pat Scanlon, Dukem Ethiopian Restaurant and all of these people for the client, Mr. Zemedhin, who got assaulted in May of '08. He took depositions in that case, and that case was eventually resolved.
>
> During that case, Mr. Scanlon will tell you that he was told by the insurance company that they weren't going to indemnify him.
>
> . . . .
>
> Which scared the daylights out of him. Mr. Scanlon will tell you that he has got a building he's selling. That he owes money on a contract for deed holder that has to be insured in case of fire and so forth. And he wants to be insured in case there is another Zemhedhin case.
>
> So when the insurance came up the next time, he made certain T-Squared was listed on the policy and G-8 was listed on the policy, and he was, and these Dukem fellows got their names and their entities listed on the policy. He did that to protect himself.

The district court ruled, prior to trial, the parties could introduce evidence about insurance and the prior lawsuits. And although certain of the references to the other cases were confusing, appellant does not explain how this confusion prejudiced him. Because the challenged references related to relevant evidence that is not prejudicial, we conclude that appellant is not entitled to relief on this basis.

D. Admission of improper documents into evidence

In his reply brief, appellant contends that the district court erred by admitting documents into evidence for which no proper foundation was laid. "If an argument is raised in a reply brief but not raised in an appellant's main brief, and it exceeds the scope

of the respondent's brief, it is not properly before this court . . . ." *Wood v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704, 707 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Feb. 26, 2003). Because appellant did not challenge the admission of these documents in his main brief, and respondents did not present the issue, we decline to review the matter.

Affirmed.