STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1991

Steven C. Schmidt,
Respondent,

vs.

Lewis Marion Oaks, III, et al.,
Appellants.

Filed August 12, 2013
Affirmed
Larkin, Judge

Crow Wing County District Court
File No. 18-CV-10-5211

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Priscilla Faris, Jennifer E. Olson, Lord & Faris Law Office, Minneapolis, Minnesota (for respondent)

James A. Wade, Michele Miller, Johnson, Killen & Seiler, P.A., Duluth, Minnesota (for appellants)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Stauber, Judge.

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

LARKIN, Judge

In this appeal following a jury verdict, appellants challenge (1) the district court's denial of their motion for judgment as a matter of law, (2) the district court's admission of testimony regarding a government agency's intent in granting an easement, and (3) the district court's denial of their motion for a new trial. We affirm.

FACTS

This case arises from a collision that occurred on February 2, 2006, involving respondent Steven C. Schmidt, who was driving a snowmobile, and appellant Lewis Marion Oaks III who was driving a truck owned by appellant Minnesota Power Company (MPC). After a six-day trial, a jury found that Oaks was negligent in the operation of the truck and that his negligence was the direct cause of the collision, which occurred at the intersection of the Paul Bunyan Trail (trail) and Rosewood Street (Rosewood) in Crow Wing County. The jury also found Schmidt negligent in the operation of his snowmobile. The jury apportioned 70% of the fault to Oaks and 30% to Schmidt.

The trail is owned and operated by the Minnesota Department of Natural Resources (DNR). The DNR placed stop signs at the intersection directing traffic on Rosewood to stop for the trail. On March 18, 2005, the DNR granted to the City of Jenkins (city) "an easement and right of way for road or trail purposes" for the portion of the trail that crosses Rosewood. The collision occurred when Schmidt's snowmobile, which was traveling north on the trail, struck the rear of Oak's truck as it crossed the trail traveling west.

Prior to trial, appellants moved the district court under Minn. R. Evid. 201 "[f]or an [o]rder of the [c]ourt taking judicial notice that Rosewood Street, from Highway 371 to its end as platted in 2004, was a public road on February 2, 2006, and instructing the jury accordingly." The district court ruled that whether or not the portion of Rosewood that crossed the trail was public was a question of fact for the jury.

At trial, Schmidt called several witnesses including two DNR employees. One DNR witness testified that Rosewood was not developed at the time of the collision. He further testified that the easement was not finalized until the city passed a resolution, which occurred after the collision date. The other DNR witness testified that the road did not become public until the city passed a resolution adopting the road and that the distinction between private and public roads is important to the DNR because it determines the trail signage: private roads yield to the trail, whereas the trail yields to public roads.

Schmidt also called Seth Bayer, an accident reconstructionist, to testify. Bayer concluded that Oaks's truck was traveling between 18 and 19 miles per hour at the time of impact and that the truck could not have reached that speed if Oaks had stopped at the intersection. Bayer also concluded that Schmidt's snowmobile was traveling between 46 and 51 miles per hour at the time of impact. Bayer testified that the driver of the truck should have stopped before crossing the trail and if he could not see down the trail because of obstructions, the driver should have pulled out slowly, inch by inch, to look down the trail.

Schmidt testified that he did not know if he exceeded the 50 mile-per-hour speed limit on the trail but that he was operating his snowmobile at a proper speed when he saw a truck come out in front of him and struck the left rear of the truck. He did not know if he applied his brakes.

At the close of Schmidt's case, appellants moved for judgment as a matter of law, and the district court denied the motion. Appellants proceeded with their case and called the following witnesses.

Steven Lusk was an MPC employee and Oaks's passenger during the collision. Lusk testified that he and Oaks had a procedure at the intersection whereby Oaks would stop at the trail and look south and Lusk would look north. Lusk testified that Oaks stopped at the intersection prior to the collision, though he did not recall seeing the stop sign. As they crossed the intersection, he glanced south and did not see any oncoming traffic.

Oaks testified that, when he arrived at the intersection, he stopped at the DNR's stop sign and looked both ways. He did not see anything on the trail, so he proceeded across. As he drove across the intersection, he heard a loud crash and the truck spun.

Kent Brothen was driving a van on a highway parallel to the trail immediately prior to the collision. He testified that he saw the snowmobile on the trail. He further testified that he was travelling 60 to 65 miles per hour and that the snowmobile was pulling away from him.

Appellants also called Donald Rudny, a mechanical engineer who specializes in accident reconstruction. Rudny concluded that the physical evidence from the collision

was consistent with the testimony that Oaks stopped before crossing the trail and that Schmidt was speeding when he hit the truck. Rudny testified that if Oaks had pulled out slowly, the result may have been the same. But Rudny conceded that pulling out slowly may have benefited traffic on the trail.

The jury found damages in the amount of $2,410,084.67. After the jury returned its verdict, appellants moved for judgment as a matter of law or a new trial. The district court denied the motion, adjusted the amount of damages to reflect the jury's apportionment of fault, made collateral-source deductions, and entered judgment in the amount of $1,629,223.33. This appeal follows.

D E C I S I O N

I.

Appellants argue that the district court erred in denying their motion for judgment as a matter of law. "Judgment as a matter of law is appropriate when a jury's verdict has no reasonable support in fact or is contrary to law." *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855, 861 (Minn. App. 2008), *aff'd*, 784 N.W.2d 220 (Minn. 2010). "Courts must view the evidence in the light most favorable to the nonmoving party and determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to judgment as a matter of law." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007) (quotation omitted). "The jury's verdict will not be set aside if it can be sustained on any reasonable theory of the evidence." *Id.* (quotation omitted). In applying this standard, "the court may not weigh the evidence or judge the credibility of the witnesses." *Lamb v. Jordan*, 333 N.W.2d 852,

855 (Minn. 1983). "The denial of a motion for judgment as a matter of law presents a legal question, which is subject to de novo review." *Kidwell*, 749 N.W.2d at 861.

"The basic elements necessary to maintain a claim for negligence are (1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury." *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954).

In this case, Schmidt presented evidence to the jury that Oaks did not stop at the intersection and that he should have under the circumstances. That evidence was sufficient for the jury to find that Oaks breached a duty of care and caused Schmidt's injuries. Appellants' only argument is that "there was no competent evidence" that Oaks was negligent and that "[t]he only evidence [that Oaks] did not stop at the stop sign prior to crossing the [t]rail was . . . Bayer's unscientific conjecture that he might not have stopped." Appellants in effect urge this court to weigh the evidence and assess Bayer's credibility. But we do not judge credibility on appellate review. *See Agner v. Bourn*, 281 Minn. 385, 399, 161 N.W.2d 813, 822 (1968) (stating that "the credibility of the witnesses is a matter for the [district] court or the jury to determine").

In sum, the district court did not err in denying appellants' motion for judgment as a matter of law.

II.

Appellants argue that the district court erred in allowing the testimony of the DNR witnesses regarding the DNR's intent in granting the easement because "the

unambiguous language of the easement expresses and confirms the DNR's intent by requiring it to be open to the public."

"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). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id*. at 46.

Appellants moved the district court under Minn. R. Evid. 201 "[f]or an [o]rder of the [c]ourt taking judicial notice that Rosewood Street, from Highway 371 to its end as platted in 2004, was a public road on February 2, 2006, and instructing the jury accordingly." Appellants argued that the relevant portion of the road became public by common-law dedication and that the requisite DNR "intent to dedicate the portion of Rosewood Street which crosses the [snowmobile] [t]rail is evident from the granting of the [e]asement to the [c]ity explicitly for public road or trail purposes." The district court concluded that the DNR's intent was not clear and that it could not

> take judicial notice that this portion of Rosewood Street was a public road on the date of the collision because it is not a fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, nor is it generally known within Crow Wing County.

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the [district] court or (2) capable of accurate and ready determination by resort to sources whose accuracy

cannot reasonably be questioned." Minn. R. Evid. 201(b). "To prove common law dedication, one must show the property owner's express or implied intent to devote land to public use and the public's acceptance of that use." *Sackett v. Storm*, 480 N.W.2d 377, 379 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992). "Ordinarily, whether the owner intended to dedicate the land and whether the public accepted the dedication are questions of fact." *Id.*

Appellants argue that in this case the DNR's intent was not a question of fact because the easement unambiguously established that the relevant portion of the road was public on the date of the collision. "When the terms of an easement grant are unclear, extrinsic evidence may be used to aid in the interpretation of the easement grant; however, when the language granting the easement is clear and unambiguous, the court's power to determine the extent of the easement granted is limited." *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997). The express grant that creates an easement is a contract and an initial determination as to whether it is ambiguous is a question of law. *Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). We review questions of law de novo. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). "A contract is ambiguous if it is reasonably susceptible of more than one meaning." *Lindberg*, 667 N.W.2d at 487. "Where a contract is ambiguous, the interpretation of the contract is a question of fact, and extrinsic evidence may be considered." *Id.*

Here, the document creating the easement is ambiguous as to when the conveyed right-of-way was to become public. The document states that the DNR "does hereby grant and convey unto the [city], from and after the 18th of March, 2005, an easement and right of way for road or trail purposes." It further states that "[t]he right-of-way hereby conveyed shall be open to the general public." But the document also states that the city "shall construct and maintain said right-of-way at its own expense." The document specifies that the city is to protect and preserve the soil and vegetation during construction and that the DNR shall not be liable "for any injuries or damages to person or property arising from construction . . . of said right-of-way." Thus, even if it is reasonable to read the document to mean that the right-of-way is public on the date of conveyance, it is also reasonable to interpret the document as meaning that the right-of-way becomes public only after the city builds something on it to make it usable to the public (i.e., constructs a "right-of-way"). Thus the language of the easement conveyance is ambiguous. Because it is ambiguous, interpretation of intent was a question of fact, and consideration of extrinsic evidence was proper.

In sum, the district court did not abuse its discretion in allowing testimony on the issue of the DNR's intent in granting the easement.

III.

Appellants argue that the district court abused its discretion in denying their motion for a new trial because (1) the jury's verdict "is not supported by the great weight of the evidence," (2) the district court erred "in denying [their] pretrial motion requesting the [c]ourt determine as a matter of law that the portion of Rosewood between Highway

371 and the [t]rail was a public road," and (3) "[t]he [d]istrict [c]ourt committed errors of law in instructing the jury."

The district court may grant a new trial based on "[e]rrors of law occurring at the trial" or because "[t]he verdict, decision, or report is not justified by the evidence, or is contrary to law." Minn. R. Civ. P. 59.01(f), (g). "[A]n appellate court reviewing a district court's denial of a motion for a new trial asks only whether the district court abused its discretion." *Stoebe v. Merastar Ins. Co.*, 554 N.W.2d 733, 735 (Minn. 1996).

Weight of the Evidence

"A district court is in a better position than an appellate court to assess whether the evidence justifies the verdict and [appellate courts] usually defer to that court's exercise of the authority to grant a new trial." *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004). "The applicable test for granting a new trial on the basis that the evidence does not justify the verdict is whether the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence, or acted under some mistake." *Id.* (quotation omitted).

In denying appellants' motion for a new trial, the district court reasoned that "[t]he jury was presented with evidence that . . . Oaks failed to stop before crossing the trail and that he was traveling in excess of 10 miles per hour at the time of the collision. They were also presented with evidence that [Schmidt] was speeding." The court concluded that "[t]he jury's apportionment of fault demonstrates that they did consider all of the evidence and were not operating upon a mistake." Appellants argue that "[t]he only evidence . . . Oaks might not have stopped prior to proceeding across the [t]rail was . . .

Bayer's unscientific opinion conjecture that he might not have stopped." But regardless of how appellants choose to characterize Bayer's testimony, it was the jury's province to determine his credibility. *See Agner*, 281 Minn. at 399, 161 N.W.2d at 822 (stating that "the credibility of the witnesses is a matter for the [district] court or the jury to determine").

Appellants also argue that a new trial should be granted because "it cannot be determined whether the jury's verdict was based upon a valid or invalid theory of negligence." *See Raymond v. Baehr*, 282 Minn. 102, 109, 163 N.W.2d 54, 58 (1968). Specifically, appellants argue that Schmidt offered a second theory of negligence that even if Oaks stopped at the intersection he should have "inched out slowly." Appellants further argue that there is no duty under the law to "inch out." But the jury was not instructed that Oaks had a duty to "inch out." The district court instructed the jury that Oaks had a duty to use reasonable care, which it defined as "the care a reasonable person would use in the same or similar circumstances." During closing, Schmidt argued that when "you come to a snow bank at an intersection and everyone, every reasonable person stops, and if they can't see to the right or they can't see to the left, they inch out until they can." Thus, Schmidt did not fabricate a theory "based on a non-existent standard" as appellants claim. Rather, Schmidt properly argued that Oaks's course of action did not satisfy the duty of reasonable care. *See Domagala v. Rolland*, 805 N.W.2d 14, 28-29 (Minn. 2011) ("Whether a defendant's chosen course of action satisfies the duty of reasonable care is a question for the jury.").

Pretrial Motion

Appellants argue that the district court "erred by not finding as a matter of law that Rosewood across the [t]rail was public by way of the easement." But appellants did not ask for judgment as a matter of law that the relevant portion of the road was public. They moved the district court under Minn. R. Evid. 201 "[f]or an [o]rder of the [c]ourt taking judicial notice" that the trail crossing was a public road. Because Rule 201 applies to undisputed facts and not legal determinations, it simply does not provide the relief appellants claim the district court should have granted. *See* Minn. R. Evid. 201(a) ("This rule governs only judicial notice of adjudicative facts in civil cases.").

Jury Instructions

When reviewing jury instructions on appeal, this court considers the following:

> Jury instructions must be construed as a whole and tested from the standpoint of total impact on the jury. Errors are 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. The granting of a motion for a new trial on the ground of erroneous instructions to the jury rests largely in the sound discretion of the court, and its decision will not be disturbed on appeal unless there has been a clear abuse of that discretion. In the absence of an objection, an error in the instruction may be assigned as a ground for a new trial only if the error is one of fundamental law or controlling principle.

Larson v. Powder Ridge Ski Corp., 432 N.W.2d 774, 775-76 (Minn. App. 1988) (quotations omitted).

Appellants first argue that "the [district] [c]ourt erred by failing to instruct the jury [that] Schmidt had an absolute duty under Minn. Stat. § 84.87, subd. 1(c) to make a

complete stop before crossing Rosewood" because "Rosewood was a public road on February 2, 2006." *See* Minn. Stat. §§ 84.87, subd. 1(c)(2) (stating that a "snowmobile may make a direct crossing of a street or highway" if, among other things, it "is brought to a complete stop before crossing the shoulder or main traveled way of the highway"), 169.011, subd. 81 (2012) (defining "street" or "highway" as "the entire width between boundary lines of any way or place when any part thereof is open to the use of the public, as a matter of right, for the purposes of vehicular traffic"). But, as discussed above, the district court correctly concluded that whether or not Rosewood was a public road was a question of fact for the jury to decide. Furthermore, the district court instructed the jury that Schmidt had a duty to stop if it found that the relevant portion of Rosewood was public at the time of the collision.

Appellants next argue that the district court "failed to instruct the jury that . . . Oaks had no legal duty to stop at the DNR stop sign." Appellants cite *Stewart v. Koenig*, which held that "an easement-user who crosses a state trail . . . is not a trail user" within the meaning of DNR rules and is therefore not subject to DNR traffic regulations. 783 N.W.2d 164, 168 (Minn. 2010) (quotation omitted). Appellants contend that Oaks was not a trail user and that the jury therefore should have been instructed that he had no duty to stop at the DNR stop sign.

In *Stewart*, the plaintiff argued that "the district court erred in failing to instruct the jury that [the defendant-motorist] was a 'trail user' under applicable DNR rules, that [the defendant] violated a DNR rule when he failed to yield the right of way to [the plaintiff], and therefore [the defendant] was negligent per se." *Id*. at 166. The supreme

court rejected that argument and concluded that the district court correctly instructed the jury on common-law negligence. *Id*. at 168. Thus, *Stewart* demonstrates that a motorist who does not violate a traffic regulation can nonetheless be found negligent under the common-law standard. *See id.* at 165 n.1 (referencing the standard jury instruction that describes a driver's duty of reasonable care); *see also Berg v. Nelson*, 559 N.W.2d 722, 724 (Minn. App. 1997) ("All drivers owe a duty to exercise ordinary or reasonable care in the operation of their vehicles."), *review denied* (Minn. May 13, 1997). Contrary to appellants' argument, *Stewart* does not stand for the principle that Oaks had no duty to stop at the trail. Even if Oaks was not obligated to stop under DNR traffic regulations, it was within the jury's province to determine if he should have stopped under the common-law duty of reasonable care. Thus, appellants have not demonstrated that the district court abused its discretion by failing to instruct that Oaks had no "legal duty" to stop.

Appellants argue that, because the jury heard DNR personnel testify that "they did not consider Rosewood a public road because the [c]ity had not yet officially accepted or maintained it as a public road," the district court erred by failing to instruct that "official acceptance and maintenance was not necessary" to perfect common-law dedication.

"Jury instructions must convey a clear and correct understanding of the law of the case as it relates to all the parties involved." *Domagala*, 805 N.W.2d at 29 (quotation omitted). "A jury instruction is erroneous if, when read as a whole, the instruction materially misstates the law or is apt to confuse and mislead the jury." *Id*. (citation and quotation omitted). A misstatement of the law occurs when key language is omitted. *Id*. at 30.

Appellants argue that omission of "key language"—stating that official governmental acceptance and maintenance was not necessary to make the road public—constituted a misstatement of the law. But the district court instructed the jury that "[p]roof of acceptance by the public may be shown by public use. While evidence of common use is the best evidence tending to establish acceptance, said acceptance may also be established by use by a relatively small number of people." Thus, the district court's jury instructions made it clear that official acceptance and maintenance was not necessary to constitute public acceptance under common-law dedication.

Appellants also assert that "the [district] [c]ourt should have further instructed the jury that under common law dedication, 'it is the right of travel by all the world, and not the exercise of the right, which constitutes a road a public highway.'" But appellants provide no argument as to why this alleged omission is erroneous or prejudicial. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (stating that "on appeal error is never presumed" and "the burden of showing error rests upon the one who relies upon it" (quotation omitted)).

In sum, appellants have not demonstrated that the district court abused its discretion by denying their motion for a new trial.

IV.

Lastly, appellants raise a new issue in their reply brief regarding Bayer's testimony. Although appellants challenged the persuasive weight of Bayer's testimony in their opening brief, appellants go much further in their reply brief, arguing that portions of Bayer's testimony constitute "inadmissible speculation" that was "improper" and

"prejudicial." Appellants further argue that "[a]dmission of improper expert testimony is grounds for reversal." We do not consider whether Bayer's testimony was erroneously admitted because the issue is not properly before us. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not raised or argued in appellant's brief "have been waived and cannot be revived by addressing them in the reply brief"), *review denied* (Minn. Sept. 28, 1990).

Affirmed.