STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1161

Fatima Kamara, individually and as parent
and natural guardian of Abdul Kamara,
Appellant,

vs.

Shante Evon Sutton, et al.,
Respondents.

Filed April 22, 2013
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CV-10-10727

Scott A. Wilson, Minneapolis, Minnesota (for appellant)

Karen R. Cote, David M. Werwie & Associates, St. Paul, Minnesota (for respondents)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

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

HOOTEN, Judge

Appellant challenges the district court's decision to deny her motion for a new trial, arguing that the jury's verdict is irreconcilable with the evidence, that a critical component of respondent's case was based on inadmissible hearsay, and that the district court failed to instruct the jury on the effect of the presence of children on the duty of

reasonable care. Because we do not agree that the verdict is irreconcilable with the evidence, and because appellant's other assertions are procedurally barred and without merit, we affirm.

FACTS

At about 5:30 p.m. on April 30, 2009, an accident occurred at the intersection of Upper Afton Road and Cutler Road in Saint Paul. Cutler Road extends north from a "T" intersection with Upper Afton Road, which runs east-west. Respondent Shante Sutton, who was 16 years old and had a learner's permit at the time, was driving westbound on Upper Afton Road when her vehicle hit Abdul Kamara at or near the intersection of Cutler Road and Upper Afton Road. Just prior to the accident, Abdul, who was eight years old at the time, entered the westbound lane of Upper Afton Road on foot, heading south toward his school, which is located on the south side of Upper Afton Road. As a result of Abdul's personal injuries from the accident, Abdul's mother, appellant Fatima Kamara, commenced a negligence action against respondent for damages. The parties, with the approval of the district court, agreed to bifurcate the trial and try the issue of liability first.

Abdul, who was 11 years old and in fifth grade at the time of the trial, testified that, to get to the school, he "crossed, like, the streets, so I can go through the crosswalk. Then, I looked left and right, like, I saw one car, it was, like, far, far away, so I started walking. Then, it started coming closer. Then, I started, like, running." Abdul testified that he typically used the crosswalk to get to the school from a family friend's house. On this occasion, Abdul testified that, prior to the accident, he only saw one car parked on

Upper Afton Road, which was near the northwest corner of the intersection. Abdul stated that, when the accident occurred, he was in the crosswalk connecting the northwest corner with the south side of Upper Afton Road.

In contrast, respondent testified that there were several cars parked along Upper Afton Road, and that there was no crossing guard or children in the crosswalk at the intersection. Respondent testified that she was going under the posted 30-mile-per-hour speed limit because she was a beginning driver and was focused on staying in her lane and away from the cars parked on the right side of the road. Respondent testified that she was looking straight ahead, and that, "[a]ll of a sudden, a boy ran through two parked cars." She explained that, "before that happened[,] my Grandpa yelled 'Stop', which, like, scared me, so I hit the brakes. And then by that time, I didn't stop quick enough, so he hit my side, by the headlight, and then, he went to the east lane, diagonally from me." Respondent indicated that Abdul was not in the crosswalk at the intersection, but that he was slightly west of the northwest corner of the intersection. On cross-examination, respondent testified that she did not see Abdul come from between the cars, but that she was confident that that was where he came from because her grandfather saw him come from between the cars and because "there's nowhere else he could have came through."

In addition to the parties, the jury heard testimony from the first police officer to respond to the scene. The officer indicated that when he and his partner arrived, a crowd of people, including respondent, had gathered around Abdul as he lay on the street. The officer testified that there was either a baseball or soccer game taking place on the recreational fields next to the school and that there were vehicles parked on both sides of

the road. The officer stated that he spoke to respondent and her grandfather, who, he believed, identified the two cars Abdul came from and who told him that they did not have time to stop before the impact. On cross-examination, the officer indicated that he did not speak to Abdul because none of the information he had received from the witnesses at the scene was conflicting. Later in the officer's testimony, appellant's attorney and the officer had the following exchange:

> Q [Appellant's Attorney]: I'm asking you the question that if—if [respondent] told you that she saw the child in front of her car and could not stop in time and hit the child, in your police investigative experience, would she have seen the child coming from in between two cars? That's what I'm asking for your investigative police opinion?
> A [Officer]: You want my opinion?
> Q: Yes, sir.
> A: This accident could have happened to any one of us in this room. She was driving down the road, and somebody ran out in front of her, be it a child, a dog, or anything, and she hit the brakes as fast as she possibly could, based on her driving experience, her ability that day, or whatever she was feeling that day, and it was an unfortunate accident. That's my opinion, and that's what I viewed at that accident scene and what I gathered that day.

The jury also heard testimony from a witness who testified that, at the time of the accident, he was driving eastbound on Upper Afton Road when he saw Abdul crossing the street. The witness stated that Abdul "was walking when—when he turn[ed] like this (indicating) and saw the car and wanted to run, it was the time they hit him by there, by the driver's side is where they hit him." In reviewing an aerial photograph of the accident scene, the witness confirmed at trial that Abdul was not in the crosswalk when he was hit, but was west of the crosswalk, near the walkway to the first house on the

northwest corner of the intersection.[1] The witness also testified that the right front driver's side of respondent's car collided with Abdul, throwing him into the eastbound lane. The witness stated in a deposition that he told police that he saw Abdul crossing the street and the car hit him, but at trial the witness claimed that he was only asked for his driver's license and was not asked what happened. However, the police officer testified that he reported after the accident that the witness corroborated respondent's version of the events at the scene, indicating that Abdul was not in the crosswalk, that Abdul "ran out into the street and got hit," and that "there was nothing unusual about the driver's conduct."

Both parties also offered testimony from their respective accident-reconstruction experts. Appellant's expert testified that he reviewed photographs of the accident scene taken after the accident, the police reports, deposition testimony, and aerial and street-level photographs. However, appellant's expert testified that, because of the discrepancies in testimony and because there were no skid marks, measurements of the accident scene, or photographs of the physical evidence or the scene at the time of the accident, he was not able to reconstruct the accident.

Respondent's expert, in contrast, testified that he reviewed all the relevant evidence and visited the accident scene to take measurements regarding the placement of the physical evidence shown in the pictures. Respondent's expert testified that he

[1] On cross-examination, the witness indicated that his markings on the aerial photograph actually showed the part of the car that hit Abdul, not where the impact took place. He acknowledged, however, that he answered "yes" when he was asked at the time he made the markings whether these markings reflected where the impact took place.

determined that Abdul was thrown between 25 and 42 feet from the point of impact, based on Abdul's size, the only reported speed of respondent's vehicle, and other physical evidence. He also testified that, hypothetically, respondent's vehicle would have been going about 50 miles per hour in order for Abdul to have travelled the 116 feet from the crosswalk to the location of the bloodspot on the pavement where he ultimately landed. Thus, respondent's expert testified that he believed the impact occurred some distance west of the intersection and not in the crosswalk. Moreover, respondent's expert opined that Abdul must have been running when he was struck by respondent's vehicle, because he was about 16 feet off of the curb at the point of impact and because of the trajectory he took after the impact. Finally, respondent's expert testified that based on his calculation of respondent's speed, respondent had a second or less to react to Abdul's presence in the road and therefore could not have avoided the accident.

Following the close of testimony, the district court indicated that it made several changes to the jury instructions, including eliminating an instruction regarding the effect of comparative fault and an instruction regarding the careless-driving statute. Appellant's attorney only objected to the removal of the careless-driving statute instruction. Following closing arguments, the district court read the jury instructions, and appellant's attorney did not object. Finally, the district court asked the attorneys if there was anything that they wanted to put on the record, and both replied that they did not. After deliberation, the jury returned a verdict that found neither party negligent.

Appellant moved for judgment as a matter of law or, alternatively, for a new trial. Appellant argued that the evidence did not sustain the verdict because respondent was

negligent in operating her motor vehicle, and that, in the alternative, the district court should grant a new trial on the basis that the evidence did not sustain the verdict and the district court failed to give a careless-driving instruction. Respondent argued that there was no evidence that she was negligent, and the district court did not erroneously instruct the jury by excluding the careless-driving instruction. After a hearing, the district court denied appellant's motions, and ordered judgment be entered.

D E C I S I O N

A new trial may be granted if there were "[e]rrors of law occurring at the trial, and objected to at the time," or if "[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 motion for a new trial should be cautiously and sparingly granted by a trial court." *Baker v. Amtrak Nat. R.R. Passenger Corp.*, 588 N.W.2d 749, 753 (Minn. App. 1999). "Because the decision to grant or deny a motion for a new trial rests largely within the discretion of the district court, we review the district court's decision for clear abuse of discretion." *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 625 (Minn. 2012) (citing *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010)). Moreover, "reversal is warranted only when the district court's decision involves a violation of a clear legal right or a manifest abuse of discretion." *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 387 (Minn. App. 2001).

This court "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.*

Washington Cnty. Schs., 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted). "The verdict should stand if the answers can be reconciled on any theory." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999). The possibility that impaneling another jury and conducting a new trial may bring about an opposite result is not grounds for a new trial. *Heggestad v. Dubke*, 304 Minn. 129, 132, 229 N.W.2d 34, 36 (1975).

A jury's "answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Moorhead Econ. Dev. Auth.*, 789 N.W.2d at 888 (quotation omitted). "The test is whether the special verdict answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences. If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed." *Dunn v. Nat'l Beverage Corp*., 745 N.W.2d 549, 555 (Minn. 2008) (quotation and citation omitted). Credibility determinations "are exclusively the province of the factfinder," and we defer to those determinations even when they are made implicitly. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (quotation omitted).

I.

Appellant argues that the district court erred in denying her motion for a new trial because the jury's verdict is irreconcilable with the evidence. Specifically, appellant argues that "[e]ither Abdul Kamara crossed in a manner that deprived [respondent] of any opportunity to see and avoid him, in which case he was negligent, or he crossed in a manner that did allow her the opportunity to see and avoid him, in which case

[respondent] was negligent (and possibly Abdul as well, if he was outside the crosswalk)." This is an enticing proposition: that the case must be resolved wholly by one of the parties' arguments, and that the jury's verdict must be wrong because it did not exactly track either parties' theory of the case. But the jury's verdict is not wrong simply because it does not follow either parties' arguments. Rather, if there is any reasonable construction of the evidence that fits the jury's verdict, it must be upheld.

Abdul testified that he saw respondent's car coming toward him as he was walking toward the street, and that, as he was walking in the crosswalk, he realized that the car was close and started running. A witness corroborated this part of Abdul's testimony, though the witness's testimony was not clear as to whether Abdul was in the crosswalk. Abdul testified that there was one car parked on the side of the road. Respondent testified that she believed Abdul came from between two cars and that she first saw him right in front of her vehicle, with too little time to react. Respondent's expert testified that Abdul could not have been in the crosswalk and that respondent did not have enough time to react.

Based on this evidence, it would not have been unreasonable for the jury to believe that Abdul saw the car while he was shielded from respondent's view by a parked car, but crossed the street because he thought that he could cross the street before respondent's vehicle got to him. That Abdul apparently misjudged the speed and/or distance of respondent's vehicle may not result from his negligence, but may simply indicate that he possessed and used the experience and ability of an eight-year-old boy. In fact, the jury was instructed to consider the care "a reasonable child" of the "same age,

intelligence, training, and experience" would have used. *See also* 4A *Minnesota Practice*, CIVJIG 70.15 (2006). In this construction of the evidence, respondent's failure to see Abdul enter the road would not have been negligent, as he would have been obstructed from view by a parked car. Disregarding Abdul's testimony that he crossed the road at the crosswalk was within the jury's purview, and to the extent that this involved a credibility determination, this court defers to the jury. Thus, because this appears to be a reasonable construction of the evidence presented through testimony, the jury's verdict is not irreconcilable with the evidence, and the district court did not err in denying appellant's motion for a new trial on that basis.

II.

Appellant also argues that the district court erred by denying her motion for a new trial because the assertion that Abdul "darted out from between two cars" was based on hearsay evidence and because the district court erroneously failed to give a requested jury instruction on the effect of the presence of children on respondent's duty of care. Respondent, however, correctly points out that appellant raises these arguments for the first time on appeal, because appellant's attorney failed to object to these alleged errors during the trial itself and failed to raise them in the motion for a new trial. Thus, appellant's arguments are barred for two reasons.

First, there is a longstanding "general rule that matters such as trial procedure, evidentiary rulings and jury instructions 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." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986); *see also Alpha Real Estate Co. v.*

Delta Dental Plan of Minn., 664 N.W.2d 303, 309–10 (Minn. 2003) (explaining *Sauter* and its progeny); *Markowitz v. Ness*, 413 N.W.2d 843, 846 (Minn. App. 1987) (declaring appellant's claimed errors in the jury instructions barred, without further explanation, because "[s]he did not object to either the instructions or the explanation at trial, and did not raise this issue in her motion for a new trial"). Second, "[a] reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Further, a party may not "obtain review by raising the same general issue litigated below but under a different theory." *Id.*

Appellant argues that these assertions are nonetheless reviewable as plain error, relying on *Frazier*, 811 N.W.2d at 626–27 and Minn. R. Evid. 103(d). But appellant's reliance is misplaced. As to the allegedly erroneous jury instruction, the appellant in *Frazier* made a motion for a new trial on the appealed issue, thus preserving that issue for appeal under the *Sauter* rule. 811 N.W.2d at 624. As to the alleged improper use of hearsay evidence, "[i]n civil cases in Minnesota to preserve the evidentiary ruling for appeal, in addition to a timely and specific objection, the claim also must be included in a motion for new trial." Minn. R. Evid. 103(a) 2006 comm. cmt. Further, while this court typically "may review" an issue "as the interest of justice may require," the "scope of review afforded may be affected by whether proper steps have been taken to preserve issues for review on appeal, including the existence of timely and proper post-trial motions." Minn. R. Civ. App. P. 103.04. That phrase includes the failure to preserve an issue of alleged error in the trial proceedings under the *Sauter* rule. *See* Minn. R. Civ.

App. P. 103.04 1998 comm. cmt. (citing *Sauter* and stating that "[t]he conduct of the trial proceedings will affect the scope of review on appeal"). Finally, appellant has presented no authority indicating that this court may review for plain error arguments that are barred under *Sauter* and *Thiele*. *See Moen v. Sunstone Hotel Props., Inc.*, 818 N.W.2d 573, 581–82 (Minn. App. 2012) (applying the *Sauter* rule to completely bar consideration of alleged errors of trial procedure), *review denied* (Minn. Oct. 16, 2012).

In addition to concluding that they are procedurally barred, we find that these assertions of error are without merit. First, to the extent that hearsay evidence was erroneously admitted to indicate that Abdul ran into the street from between two cars, addressing that error is not required "to ensure fairness and the integrity of the judicial proceedings." *Frazier*, 811 N.W.2d at 626 (quotation omitted). This is because the hearsay evidence appellant complains of, namely the police officer's recitation of a statement by respondent's grandfather that Abdul entered the road from between two cars, was fully consistent with other admissible evidence on the same point. Respondent herself testified that, because Abdul appeared in front of her car and because of the cars parked along the road, he must have come from between two cars. Respondent's expert testified that, based on his calculations, Abdul could not have been in the crosswalk at the time of the impact. There was also evidence from a witness that Abdul was not in the crosswalk when he was hit, but was crossing further west of the crosswalk. Even without the hearsay statement, there is substantial evidence to support the jury's apparent finding that Abdul was not in the crosswalk when the accident occurred. Thus, we conclude that addressing this issue is not required in the interest of fairness and integrity.

Second, the district court did not err by declining to give a requested jury instruction on the standard of care in the presence of children. The district court's decision to deny or grant "a motion for a new trial on the ground of erroneous instructions" will not be reversed absent a clear abuse of discretion. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 230, 214 N.W.2d 672, 674 (1974) (quotation omitted); *see also Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 785 (Minn. App. 2010) (Minge, J., dissenting) ("No reported Minnesota court decisions have reversed a district court determination in civil litigation that its use of unobjected-to jury instructions did or did not constitute error requiring a new trial."), *rev'd* 811 N.W.2d 618 (Minn. 2012). Further, jury instructions that overall fairly and accurately state the applicable law, viewed as a whole from the standpoint of the jury, do not entitle appellant to a new trial. *Rowe v. Munye*, 702 N.W.2d 729, 743 (Minn. 2005); *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

The requested instruction in this case stemmed from *Kachman v. Blosberg*, in which the supreme court stated that "where children are known or may reasonably be expected to be in the vicinity, a high degree of vigilance is required by the driver of a vehicle to measure up to the standard of what the law regards as ordinary care." 251 Minn. 224, 231, 87 N.W.2d 687, 693 (1958). But that statement is not an independent statement of law, rather "[i]t is but a restatement of the rule that ordinary care is the exercise of a degree of care commensurate with the circumstances." *Id.* at 232, 87 N.W.2d at 694. "The fact that a person knows, or has reason to know, that children are likely to be around should be taken into account when deciding whether reasonable care

was used[, but] [t]he duty always remains the same—reasonable care under the circumstances." 4A *Minnesota Practice*, CIVJIG 70.10 (2006); *see also id.*, use note (2006) (noting that this instruction is "merely a particularization of one of the circumstances to be considered in determining reasonable care"). Thus, under these circumstances, the district court did not abuse its discretion in declining to give the requested jury instruction.

Viewed in a light most favorable to the jury's special verdict, we conclude that there is substantial evidence that is consistent with the verdict and that appellant's other assertions of error have not properly been preserved for appellate review and are otherwise without merit.

Affirmed.