STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1525

Scott Raden,
Appellant,

vs.

The Estate of Marvin Tvedt,
Respondent.

Filed April 3, 2017
Affirmed
Cleary, Chief Judge

Stearns County District Court
File No. 73-CV-14-9656

Isaac I. Tyroler, TSR Injury Law, Bloomington, Minnesota (for appellant)

Darwin S. Williams, Eden Prairie, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Jesson, Judge.

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

CLEARY, Chief Judge

Following a jury verdict in favor of respondent, the estate of Marvin Tvedt, on appellant Scott Raden's negligence claim arising out of an automobile collision, appellant asserts that the district court erred by (1) denying judgment as a matter of law, because the

evidence supporting respondent's medical-emergency defense was speculative and (2) denying a new trial, because the district court's responses to the jury's questions were prejudicial. Because a jury could have reasonably found, based on the direct and circumstantial evidence, that the cause of the automobile accident was respondent's first-time seizure, and because the district court did not abuse its discretion in its answer to the jury's questions, we affirm.

FACTS

On an afternoon in November 2013, Raden drove home from work and traveled northbound on Pine Cone Road. A middle left-turn lane separated the northbound lane from the southbound lane. At the same time, Martin Tvedt drove southbound on Pine Cone Road. Tvedt's vehicle gradually veered into oncoming traffic, eventually colliding with Raden's vehicle head on.

In November 2014, Raden filed a personal-injury lawsuit against Tvedt. Before trial, Tvedt died, and respondent, Marvin Tvedt's estate, was substituted as the defendant. Respondent's defense at trial was that Tvedt suffered a first-time seizure while driving, excusing his driving conduct. At the close of evidence, the district court directed a verdict finding Tvedt's driving negligent, but submitted the question to the jury on whether the crash was caused by a medical emergency experienced by Tvedt before the collision.

The evidence at trial regarding the timing of Tvedt's seizure was largely circumstantial as there were no eyewitnesses to Tvedt having the seizure before the accident. Raden testified that Tvedt's vehicle first came to his attention when it crossed

into the left-turn lane. Raden said that he did not observe Tvedt or anything inside Tvedt's vehicle before the collision.

A driver who was immediately behind Tvedt that day testified that Tvedt's vehicle gradually veered leftward across the center-turn lane toward oncoming traffic before colliding with Raden. The driver said that she did not observe Tvedt's brake lights illuminate before the collision, and that she did not otherwise observe Tvedt driving erratically.

Tvedt testified through a deposition read for the jury that he was 52 at the time of the deposition, had been driving since he was 16 years old, and had never been in any other car accident or had his license suspended or revoked. Tvedt said he never text-messaged others on his phone while driving. Tvedt testified that on the date of the accident he left work around 3:00 p.m. and that he spoke to a friend on the phone telling her that he was going to the bank. He said that he hung up the phone, put his phone in his pocket, got into his vehicle, and drove to the bank. Tvedt denied texting with his friend while driving. He said that he did not remember the accident, and the last thing he remembered before waking up in a hospital room was turning onto Pine Cone Road. A doctor later diagnosed Tvedt as having suffered a first-time seizure around the time of the accident. Tvedt testified that he never had a seizure prior to the day of the accident.

Responding officers Kari Bonfield and Jill Lundquist testified at trial. Bonfield was on patrol that day and, after arriving at the accident scene, noted that Tvedt was unresponsive and not able to communicate. Bonfield located Tvedt's cell phone to contact

his next of kin, and when she opened the phone she noticed a recent texting conversation. Tvedt's cell phone records were subpoenaed and Bonfield discovered that Tvedt sent a text message at 3:40:05 p.m. and received a text message at 3:41:24 p.m. Bonfield calculated that four minutes and 49 seconds had passed between Tvedt's last-sent text and the first 911 call about the accident at 3:44:49 p.m. As part of her investigation into Tvedt, Bonfield drove from Tvedt's residence to the accident scene to calculate the time of the route; it took Bonfield four minutes and 31 seconds to drive the route at approximately the same time of day as the accident.

Officer Lundquist testified that Tvedt was not conscious when she arrived at the scene. Lundquist thought Tvedt was showing signs of being "postictal," a medical term for exhibiting post-seizure symptoms, because Tvedt's body was shaking. Lundquist said that Tvedt's shaking was similar to seizures she had observed in the past. Lundquist also said Tvedt was confused about his surroundings and became combative when loaded into the ambulance. She said that Tvedt was cooperative with the texting-while-driving investigation and signed consent waivers for the police to search his cell phone.

An off-duty paramedic, who arrived early at the accident scene, testified by deposition that when she first arrived at the scene Tvedt was not responding and his head was down. Having experience treating seizures, she agreed that Tvedt was postictal. She did not see Tvedt convulse and noticed that when Tvedt awoke he seemed lethargic. She testified to observing Tvedt's cell phone on the vehicle's floor.

Two neurologists testified by deposition about Tvedt's medical status: Dr. Anh Nguyen, Tvedt's treating neurologist, and Dr. Richard Golden, a neurologist retained by Raden. Dr. Nguyen was the first neurologist to treat Tvedt after the accident. She testified that Dr. Fark, the emergency room (ER) doctor treating Tvedt on the day of the accident, noted that Tvedt had a laceration on the tip of his tongue. Dr. Nguyen said that the tongue laceration was proof that Tvedt suffered a seizure. Dr. Nguyen determined that Tvedt had a first-time seizure, but that it was impossible to tell whether the seizure occurred before or after the accident. Dr. Nguyen's deposition revealed that Dr. Fark wrote in Tvedt's medical records: "It is possible that the seizure may have occurred with the accident and concussion, but, again, I'm not really seeing external signs of head injury."

Dr. Golden testified that seizures can result from head injuries sustained during an accident, and that it is impossible to determine whether the seizure in this case occurred without provocation before the accident or after the accident due to head trauma. Dr. Golden said that he treats people for head injuries and that not every person with a head injury exhibits external, objective signs of trauma. Dr. Golden explained that the term "postictal" generally refers to post-seizure activity but it could include other types of behavior that represent the recovery of the brain from an event like a head injury or concussion. He said postictal symptoms include confusion and combativeness.

After both parties rested, the district court directed a verdict finding Tvedt's driving negligent, but it submitted a special-verdict form to the jury asking if the accident was caused by a medical emergency experienced by Tvedt before the collision.

During its deliberations, the jury submitted the following questions to the district court: "Do we base our decision solely on evidence or the reasonability of the situation from the evidence? If there are gaps in the facts, can a jury lawfully say yes?" The district court responded, "You are to base your decision on the evidence, and reasonable inferences that you can draw from the evidence." The district court underlined the word "and."

The jury answered the special verdict form in respondent's favor finding that the accident was caused by a medical emergency. After the trial, Raden moved for judgment as a matter of law (JMOL) or a new trial. The district court denied the motions.

Raden now appeals and challenges the district court's denial of his motions.

D E C I S I O N

I. JMOL Motion – Emergency-Rule Defense

Raden argues that the district court erred in denying his JMOL motion because respondent cannot meet its burden, as a matter of law, in establishing an emergency-rule defense. We disagree.

A party may make or renew a request for judgment as a matter of law after the case has been submitted to the jury. Minn. R. Civ. P. 50.02. If a verdict is returned, the district court may (1) allow the judgment to stand, (2) order a new trial, or (3) direct entry of judgment as a matter of law. Minn. R. Civ. P. 50.02(a).

Appellate courts review a denial of a motion for JMOL de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). When reviewing the denial of a motion for JMOL, appellate courts "construe the evidence in the light most favorable to

the prevailing party and ask whether there is [a] legally sufficient evidentiary basis for a reasonable jury to find for the prevailing party." *Karl v. Uptown Drink, LLC*, 835 N.W.2d 14, 17 (Minn. 2013) (alteration in original) (quotation omitted).

The emergency rule is "a particular application of the reasonable care test" and may absolve a driver of liability if the driver is "suddenly confronted with an emergency through no fault of his own" and "uses reasonable care commensurate with the sudden peril with which [the driver] is confronted." *Brady v. Kroll*, 244 Minn. 525, 530, 70 N.W.2d 354, 357-58 (1955). "The party who seeks [the rule's] benefit has the burden of proving the existence of an emergency not caused by his negligence." *Sabasko v. Fletcher*, 359 N.W.2d 339, 343 (Minn. App. 1984), *review denied* (Minn. Mar. 21, 1985).

Raden argues that respondent cannot, as a matter of law, meet its burden to show the emergency-rule defense because no eyewitnesses directly observed Tvedt having a seizure in his vehicle before the accident and two neurologists both agreed it was impossible to determine from the medical records if Tvedt had the seizure prior to the accident. Raden asserts that the jury could only speculate or guess about what caused the accident.

As the district court determined, Raden is correct that there is no direct evidence in the form of eyewitness testimony or medical testimony definitively showing that Tvedt suffered a seizure immediately before the collision. But, in civil cases, a fact may be proved through direct or circumstantial evidence and the law makes no distinction between

the weight given to either type of evidence. *Friend v. Gopher Co.*, 771 N.W.2d 33, 40 (Minn. App. 2009).

Construed in the light most favorable to respondent, the direct and circumstantial evidence presented at trial support the jury's conclusion that Tvedt suffered a medical emergency before the collision. The entire evidence at trial showed the following. Immediately before the collision, the driver behind Tvedt did not observe Tvedt activate his brake lights, observed no erratic driving, and noticed that Tvedt's vehicle moved gradually to the left into oncoming traffic. There was little evidence showing that Tvedt swerved to avoid the collision. A responding officer and an off-duty paramedic observed that Tvedt was postictal when they arrived after the collision. Tvedt first was unresponsive, and then he was confused about his surroundings and combative.

Doctors determined that Tvedt suffered a seizure near the time of the accident, either immediately before or after. The treating ER doctor noted that he saw no signs of head trauma. The ER doctor also noted that Tvedt had a laceration on his tongue, an indication of a seizure. Tvedt could not remember the accident and said that he does not text while driving. He said his cell phone was in his pocket while driving. Over three decades of driving, Tvedt had never been in a car accident, and he never had his license revoked or suspended. Finally, Tvedt cooperated with the texting-while-driving investigation, and voluntarily took an anticonvulsant medication after the first seizure.

The district court correctly concluded that this evidence provided a legally sufficient basis for a reasonable jury to find for respondent. Because of Tvedt's driving behavior

immediately before the accident, his clean driving record, his cooperation with law enforcement, the lack of evidence of a head injury, his postictal symptoms immediately after the accident, and the time of day, a reasonable jury could infer that it was more likely than not that Tvedt became incapacitated before the accident and that this emergency was the cause of the accident.

Raden relies on *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990), in which the Minnesota Supreme Court stated in a negligence case that when the evidence only allows the trier of fact to do no more than guess as to which of several acts was, in fact, the cause of the injury, the plaintiff has failed to prove negligence. Raden asserts this rule applies equally to respondent's evidence, which Raden says left room only for speculation. However, the jury here was not guessing as to which of several acts was in fact the cause of an injury. Rather, the direct and circumstantial evidence supported inferences that the seizure caused the accident and those inferences reasonably preponderated over other theories of causation.

Raden also relies on *E. H. Renner & Sons, Inc. v. Primus*, 295 Minn. 240, 243, 203 N.W.2d 832, 834-35 (1973) (citations omitted), where the supreme court stated:

> [V]erdicts cannot be based upon mere speculation or conjecture. Proof of a causal connection must be something more than merely consistent with the complainant's theory of the case.
>
> Where the entire evidence sustains, with equal justification, two or more inconsistent inferences so that one inference does not reasonably preponderate over the others, the complainant has not sustained the burden of proof on the proposition which alone would entitle him to recover.

Unlike *E. H. Renner & Sons*, 295 Minn. at 243-44, 203 N.W.2d at 834-35, the entire evidence at trial sustained one set of inferences and led to the conclusion that Tvedt had an emergency that caused the accident. Again, these inferences reasonably preponderated over other sets of inferences supporting an alternative theory, such as Tvedt's unsafe driving causing the accident.

Raden also cites *Hagsten v. Simberg*, 232 Minn. 160, 164, 44 N.W.2d 611, 613 (1950), where the supreme court held that mere proof that an accident occurred is not sufficient to prove negligence without actual proof of negligence or its causal relation to the injury. Likewise, Raden argues here that mere proof of the collision is not sufficient to prove that the collision was caused by a medical emergency without actual proof of that emergency. *Hagsten* is distinguishable because in that case there was no eyewitness testimony and no physical evidence whatsoever to prove the defendant's negligence. 232 Minn. at 163-64, 44 N.W.2d at 612-13. Unlike in *Hagsten*, the evidence admitted at trial in this case demonstrated the likely cause of the accident, not merely the fact that an accident occurred.

Citing an unpublished Minnesota case and cases from other states, Raden argues that, to succeed on a sudden-medical-emergency defense, a defendant must have an eyewitness, such as a co-passenger, or a medical expert, testify that a sudden medical emergency was the cause of the accident. Such a rule is contrary to Minnesota law, which allows a fact to be proved through direct or circumstantial evidence and makes no distinction between the weight given to either type of evidence. *Friend*, 771 N.W.2d at 40.

Further, this argument is unavailing because it ignores the fact that eyewitnesses in this case directly observed Tvedt's driving behavior before the accident.

In sum, because there was a legally sufficient evidentiary basis for a reasonable jury to find for respondent, the district court did not err in denying Raden's JMOL motion.

II. Motion for a New Trial – Additional Jury Instructions

Raden next argues that he is entitled to a new trial because the district court's additional instruction to the jury during its deliberations unfairly emphasized that the jury should make inferences.

A new trial may be granted to any of the parties because of an "[i]rregularity in the proceedings of the court . . . or any order or abuse of discretion, whereby the moving party was deprived of a fair trial," or because of "[e]rrors of law occurring at the trial." Minn. R. Civ. P. 59.01. Denying a motion for a new trial on the ground of an erroneous jury instruction rests within the district court's discretion, and this court will not reverse absent a clear abuse of that discretion. *Youngquist v. W. Nat. Mut. Ins. Co.*, 716 N.W.2d 383, 385 (Minn. App. 2006). An error in the jury instructions does not necessitate a new trial unless the error was prejudicial. *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006).

District courts have discretion to provide additional jury instructions after the jury poses a question to the court. Minn. R. Civ. P. 51.02(c). But, a district court may not give a jury instruction that tends to unduly emphasize one side of an issue. *Weiby v. Wente*, 264 N.W.2d 624, 628 (Minn. 1978). Further, a district court must not, "in charging the jury, single out and give undue prominence and emphasis to particular items of evidence, or

circumstances, favorable to one of the parties only." *Kincaid v. Jungkunz*, 109 Minn. 400, 402, 123 N.W. 1082, 1083 (1910).

Here, the jury asked the district court: (1) "Do we base our decision solely on evidence or the reasonability of the situation from the evidence" and (2) "[i]f there are gaps in the facts, can a jury lawfully say yes?" The district court responded, "You are to base your decision on the evidence, and reasonable inferences that you can draw from the evidence."

Raden argues that by underlining the word "and," the district court effectively instructed the jury to make further inferences and to speculate, especially because the jury indicated it thought there were gaps in the facts. We disagree.

While the better practice is to not underline or emphasize words in a jury instruction, the district court did not abuse its discretion, and its response correctly stated the law. A jury may base its decision both on the evidence and all reasonable inferences that can be drawn from the evidence. *N. Petrochemical Co. v. U.S. Fire Ins. Co.*, 277 N.W.2d 408, 410-11 (Minn. 1979); *Zaske v. Lee*, 651 N.W.2d 527, 533 (Minn. App. 2002), *review denied* (Minn. Dec. 17, 2002); 4 *Minnesota Practice*, CIVJIG 12.10 (2016). The district court's answer to the jury's questions did not unduly emphasize one side of an issue because the use of the underlined word "and" merely stressed that the jury was to consider both the evidence and also any reasonable inferences from that evidence. Respondent presented direct and circumstantial evidence at trial regarding the timing of the seizure, evidence that required the jury to make further inferences, justifying the instruction.

Unlike the detailed and suggestive jury instructions in *Kincaid*, 109 Minn. at 401-02, 123 N.W. at 1082-83, the district court's underlining of the word "and" did not give undue prominence to items of evidence or circumstances in respondent's favor. In its denial of Raden's motion for a new trial, the district court stated that its purpose in giving the instruction was not to emphasize either clause of its answer but to ensure that the jury was aware it could consider both the evidence and reasonable inferences from the evidence. The district court did not abuse its discretion because the jury indicated, through its questions, that it thought it could only rely on either the evidence *or* inferences drawn from the evidence.

Finally, even if error, the district court's additional instruction did not prejudice Raden because, based on the entire evidence admitted at trial, the jury could have reasonably made inferences in favor of Raden, for example by finding that Tvedt was texting while driving.

The district court did not abuse its discretion in issuing its additional jury instructions because the instructions correctly stated the law and did not unduly emphasize evidence or an issue favorable to one party over another.

Affirmed.