STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1925

State Farm Fire and Casualty Company
as subrogee of Peter and Susan Fox,
Respondent,

vs.

Homewerks Worldwide, LLC,
Appellant.

Filed August 14, 2017
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CV-14-20844

Timothy S. Poeschl, Hanson Lulic & Krall, LLC, Minneapolis, Minnesota (for respondent)

Cody C. Krieg, Nicole R. Weinand, Law Offices of Thomas P. Stilp, Golden Valley, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

SMITH, TRACY M., Judge

In this appeal from a judgment in favor of respondent following a jury trial on its strict-products-liability claims, appellant asserts that the district court erred by denying its motion for judgment as a matter of law or a new trial on the grounds that (1) appellant

substantially complied with the procedure for obtaining dismissal as a passive seller under Minn. Stat. § 544.41 (2016), (2) the district court erred in not granting respondent's motion to voluntarily dismiss its claims before trial, (3) the evidence was insufficient to prove the sale and defect of the product, (4) respondent's expert testimony lacked foundational reliability, (5) the district court abused its discretion in questioning respondent's expert witness, and (6) attorney misconduct deprived appellant of a fair trial. We affirm.

FACTS

In August 2013, a brass valve attached to a washing machine failed, causing property damage in a house owned by Susan and Peter Fox. In December 2014, the Foxes' insurer, respondent State Farm Fire & Casualty Co. (State Farm), initiated this strict-products-liability action against appellant Homewerks Worldwide LLC (Homewerks), whose name was branded into the valve at issue. State Farm's complaint alleged that Homewerks was both the manufacturer and the distributor of the valve. In its answer, Homewerks denied having manufactured the valve and identified the party it believed to be the manufacturer.

In May 2015, Homewerks's counsel asked State Farm's counsel to agree to extend certain deadlines, stating, "I need permission to add [the alleged manufacturer] as a defendant in this case, and need to certify that we are not the manufacturer." The parties filed a stipulation to amend the scheduling order to extend some deadlines so the alleged manufacturer could be added as a defendant, and the district court amended the scheduling order pursuant to the stipulation. The alleged manufacturer was never added as a party.

On February 29, 2016, State Farm moved to preclude Homewerks from arguing that it was not the manufacturer or, in the alternative, to amend the case caption to name the alleged manufacturer as an additional defendant. The district court denied the motions.

On March 11, Homewerks filed an affidavit pursuant to Minn. Stat. § 544.41 certifying that it was not the manufacturer of the product and identifying the company it believed to be the manufacturer.

On March 14, in a pretrial hearing the day before trial was scheduled to begin, State Farm moved to voluntarily dismiss its claims. The district court questioned whether the motion was based on a misunderstanding of the law, as State Farm's counsel appeared to mistakenly believe that Homewerks could not be held liable in strict liability if it was not the manufacturer and did not cause or know of the defect. The district court engaged in extensive discussion with both parties regarding the law and explained why it questioned whether both parties were misinterpreting the law. The district court asked the parties to submit briefs on the issues discussed at the pretrial hearing.

On March 15, State Farm filed a brief arguing that it had a valid claim against Homewerks and asking to proceed to trial. The district court interpreted this brief as effectively withdrawing the motion for voluntary dismissal.

A jury trial was held on March 16 to 18. The jury returned a special verdict with the following findings: (1) the valve was in a defective condition unreasonably dangerous to the ordinary user or consumer's property; (2) the defective condition was a direct cause of the flooding in August 2013; (3) Homewerks sold the valve; (4) the defective condition existed at the time the valve left the control of Homewerks; (5) the installer was not

negligent in the installation of the valve; (6) the manufacturer was 15% at fault for the flooding and Homewerks was 85% at fault; and (7) the amount of money that would fairly and adequately compensate State Farm was $44,479.90. Judgment was entered in favor of State Farm against Homewerks in the amount of $44,479.90.

Homewerks moved for judgment as a matter of law or a new trial, arguing that (1) the district court should have granted State Farm's motion to voluntarily dismiss its claims, (2) there was insufficient evidence to establish that Homewerks sold the product or that the product was defective, (3) the jury should have been instructed about the seller's-exception statute because Homewerks substantially complied with the statute's requirements, (4) Homewerks's expert testimony lacked foundational reliability and should have been excluded, and (5) Homewerks was deprived of a fair trial by "irregularities of the proceedings" and "passion and prejudice of the Jury" resulting from judicial bias and attorney misconduct. The district court rejected all of Homewerks's arguments and denied the motion.

Homewerks appeals.

D E C I S I O N

I. Homewerks is not entitled to dismissal under the seller's-exception statute.

Homewerks argues that the district court erred in denying its motion for judgment as a matter of law based on the seller's-exception statute. We review the denial of a motion for judgment as a matter of law de novo, viewing the evidence in the light most favorable to the nonmoving party and affirming if the verdict can be sustained on any reasonable theory of the evidence. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998).

Homewerks asserts that the district court erred by determining that Homewerks was not entitled to dismissal[1] of the strict-products-liability claim against it under Minn. Stat. § 544.41 because Homewerks is not the manufacturer of the product. Homewerks argues that, although it did not file an affidavit certifying nonmanufacture with the court upon answering, it "substantially complied" with Minn. Stat. § 544.41 by identifying the alleged manufacturer in its answer dated January 15, 2015, and by serving State Farm with an affidavit of nonmanufacture on May 20, 2015.

Common-law principles of strict products liability allow a plaintiff injured by a defective product to sue not only the manufacturer, but also a "faultless" commercial seller or distributor of the product, on a strict-products-liability theory in tort. *In re Shigellosis Litigation*, 647 N.W.2d 1, 5-6 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). Under the common law, a seller or distributor may be held jointly and severally liable for damages caused by a product defect, even if the seller or distributor did not cause or know of the defect. *Id.* at 6.

The seller's-exception statute, Minn. Stat. § 544.41, sets forth a procedure allowing a seller or distributor to seek dismissal of a strict-products-liability claim against it if the plaintiff can recover from the manufacturer instead. *Id.* First, the defendant "shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product." Minn. Stat. § 544.41, subd. 1. Then, "[o]nce the plaintiff

[1] Homewerks never moved for dismissal under section 544.41. Instead, it asks this court to reverse the district court's "determination" in its denial of Homewerks's posttrial motion for judgment as a matter of law that Homewerks did not comply with the statute and was not entitled to dismissal.

has filed a complaint against a manufacturer and the manufacturer has or is required to have answered . . . , the court shall order the dismissal" of the strict-products-liability claim against the certifying defendant. *Id.*, subd. 2. "Due diligence shall be exercised by the certifying defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer." *Id.* At any time after dismissal, the plaintiff may move to vacate the order and reinstate the certifying defendant if it can show that it cannot recover against the manufacturer for certain reasons such as a statute of limitations or the manufacturer's insolvency. *Id.*

Homewerks argues that State Farm failed to exercise due diligence to sue the manufacturer as required by subdivision 2. But Homewerks did not follow the necessary steps to initiate the statutory procedures and trigger any obligation on State Farm's part to act diligently to sue the manufacturer. Homewerks did not "upon answering . . . file an affidavit certifying the correct identity of the manufacturer." *Id.*, subd. 1. Because Homewerks never initiated section 544.41 procedures with the court, a duty on State Farm to sue the manufacturer did not attach.

Homewerks argues, however, that it "substantially complied" with the statute by identifying the manufacturer in its answer, serving an affidavit of nonmanufacture, and filing the affidavit shortly before trial. The language in section 544.41, however, is clear—it requires the defendant to file the affidavit with the court upon answering. *Id.* While substantial compliance may suffice when statutory language is unclear, it does not suffice

when a statute identifies an unambiguous prerequisite to an action. *Safety Signs, L.L.C. v. Niles-Wiese Constr. Co.*, 840 N.W.2d 34, 41 (Minn. 2013).

Moreover, Homewerks not only failed to timely file the affidavit of nonmanufacture, it never asked the district court to dismiss the claim under the seller's-exception statute. Instead, Homewerks asked to proceed through trial, requested a jury instruction on the seller's-exception statute, and, in a posttrial motion, asked the district court to overturn the verdict based on the statute. Homewerks's approach is not authorized by the seller's-exception statute. The district court did not err in concluding that Homewerks was not entitled to dismissal or judgment as a matter of law based on the seller's-exception statute.

II. The district court did not abuse its discretion by not granting State Farm's motion for voluntary dismissal.

Homewerks argues that the district court abused its discretion when it did not grant State Farm's motion to voluntarily dismiss its claims the day before trial. Because of the procedural posture and the fact that the parties did not stipulate to dismissal, Minn. R. Civ. P. 41.01(b) governs. That rule states that "an action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper." Minn. R. Civ. P. 41.01(b). In determining whether to grant a plaintiff's motion to dismiss under this rule, district courts consider: (1) the defendant's effort and the expense of trial preparation, (2) the plaintiff's excessive delay and lack of diligence, (3) insufficient explanation of the plaintiff's need for dismissal, and (4) whether the defendant moved for summary judgment. *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409,

411 (Minn. App. 1998). District courts have "wide discretion" in determining whether to grant a plaintiff's motion for dismissal. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 716 N.W.2d 366, 376 (Minn. App. 2006), *aff'd*, 763 N.W.2d 313 (Minn. 2007). We will not reverse a decision on a rule 41.01(b) motion unless the district court abused its discretion. *Altimus*, 578 N.W.2d at 411.

Homewerks argues that it was improper for the district court to try to convince State Farm's counsel that she had a viable claim against Homewerks, rather than allowing her to dismiss the claims based on her mistaken belief that her client could not prevail. The district court explained why it questioned whether both parties were misinterpreting the law and asked counsel to submit additional briefing on those issues. State Farm later submitted a brief arguing that it did have a viable claim, and the case proceeded to trial.

Given the late date on which State Farm brought the rule 41.01(b) motion, the lack of a sufficient explanation for the need for dismissal, and State Farm's effective withdrawal of its motion, we cannot conclude that the district court abused its discretion in refusing to grant voluntary dismissal. *See* Minn. R. Civ. P. 41.01(b); *Hoyt Props.*, 716 N.W.2d at 376.

III. The record contains sufficient evidence to support the jury's findings.

We will affirm a district court's denial of a postverdict motion for judgment as a matter of law if the record contains "any competent evidence reasonably tending to sustain the verdict." *Pouliot*, 582 N.W.2d at 224 (quotation omitted). We view the evidence in the light most favorable to the prevailing party and will not set aside the verdict if it can be sustained on any reasonable theory of the evidence. *Id.*

A. The record contains sufficient evidence to prove that the valve was Homewerks's product and had been in Homewerks's control.

Homewerks argues that the record contains insufficient evidence to prove that Homewerks sold the valve. According to Homewerks, State Farm was required to present evidence that Homewerks sold the product, that a particular buyer bought the product, that title passed, and that a particular price was paid. As authority for this proposition, Homewerks cites cases involving the sale of goods under the UCC, which defines "sale" as "the passing of title from the seller to the buyer for a price." *See* Minn. Stat. § 336.2-106(1) (2016). We are not aware of any authority requiring that a product satisfy the UCC's definition of sale or appellant's list of elements in order to prove a defendant's liability in a strict-products-liability case.

Instead, to recover on a theory of strict products liability, the plaintiff must establish three elements: "(1) that the defendant's product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant's control, and (3) that the defect was the proximate cause of the injury sustained." *W. Sur. & Cas. Co. v. Gen. Elec. Co.*, 433 N.W.2d 444, 447 (Minn. App. 1988) (quotation omitted), *review denied* (Minn. Feb. 22, 1989). The special-verdict form covered all three of these elements, asking (1) whether the valve was in a defective condition unreasonably dangerous to the ordinary user or consumer's property, (2) whether the defective condition existed at the time the valve left the control of Homewerks, and (3) whether the defective condition was a direct cause of the damage. The jury responded

in the affirmative to all three of these questions, thus finding that the plaintiff proved the three elements of the strict-products-liability claim.

The special-verdict form also asked, "Did Homewerks Worldwide LLC sell the boiler drain valve," to which the jury also responded, "Yes." But whether the defendant "sold" the product in question is not one of the three elements that Minnesota cases identify as the elements of a strict-products-liability claim. *See id.* With respect to the defendant's involvement, it is enough that the plaintiff prove that the product is "the defendant's product" and had been in "the defendant's control" at some point, in accordance with the elements of the claim. *See id.* Therefore, we need not address whether there is sufficient evidence to support the jury's finding that Homewerks "sold" the product, as that finding is of no legal significance to the ultimate finding of liability on the claim.

Instead, we evaluate the sufficiency of the evidence supporting the jury's finding that the valve was Homewerks's product and had been in Homewerks's control. To establish these elements, State Farm offered photographs showing that Homewerks's name is printed on the valve. Viewing the evidence in the light most favorable to the verdict, we conclude that the record contains sufficient evidence reasonably tending to sustain the verdict. *See Pouliot*, 582 N.W.2d at 224.

B. The record contains sufficient evidence to prove that the valve was defective.

Homewerks argues that the record contains insufficient evidence to prove that the valve was defective because State Farm did not present evidence of the specific percentage of zinc in the valve, which could have been determined through metallurgical testing.

State Farm's expert witness testified that he did not believe that metallurgical testing was necessary "[b]ecause you won't get and you cannot get that failure, okay, without a susceptible material." He testified about his qualifications and that he had inspected "well into the hundreds" of this type of valve in his career. He testified that it is "well known in the industry" that the stress corrosion cracking that caused the failure in this case is common in brass components that are made with susceptible material. He further testified that it is "pretty easy to diagnose" the problem because the failure in this case "has all the characteristics needed" to determine that it was caused by a susceptible valve material. We conclude that there is sufficient evidence to sustain the jury's finding that the valve was defective. *See id.*

IV. State Farm's expert testimony did not lack foundational reliability.

Homewerks argues that the district court abused its discretion in admitting the expert testimony because it lacked "foundational reliability." Echoing its sufficiency-of-the-evidence argument, Homewerks contends that the expert testimony was speculative and unreliable because the expert did not know how much zinc was in the valve. Expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue" and "must have foundational reliability." Minn. R. Evid. 702. An expert opinion must be based on "readily ascertainable facts" and not mere speculation or conjecture. *Whitney v. Buttrick*, 376 N.W.2d 274, 277 (Minn. App. 1985), *review denied* (Minn. Jan. 23, 1986). Evidentiary rulings concerning foundation are within the district court's discretion and will be reversed only "when that discretion has been clearly abused." *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994).

Although the expert did not know the precise amount of zinc in the valve, his testimony was not based on mere speculation. The expert testified that the kind of failure that occurred "cannot" happen without a susceptible material. He cited his experience inspecting "well into the hundreds" of similar valves and working with the "common" problem of stress corrosion cracking in brass components. This testimony reflects a basis in readily ascertainable facts. The district court therefore did not abuse its discretion in admitting the expert testimony and concluding that it had sufficient foundational reliability. *See Id.*

V. The district court did not abuse its discretion in questioning State Farm's expert witness.

Homewerks argues that it was deprived of a fair trial because the district court questioned State Farm's expert witness in order to help State Farm establish the degree of certainty to which he held his opinions. After the cross examination of the expert and out of the presence of the jury, the district court noted that the expert "hasn't really testified much about whether he holds anything that he said to a reasonable degree of engineering certainty, so I would give you leave to ask him that question." Homewerks's counsel remarked that that was "kind," but she did not object. When State Farm's counsel stated that she was finished with redirect, the district court asked, "You're not going to ask him about the reasonable degree of engineering certainty?" State Farm's counsel asked the expert how he can state that he knows how the product failed, and the expert responded that it was "[b]ecause of the reasonable engineering—or degree of engineering certainty." The district court then asked the expert to clarify whether he held all of the opinions he had

testified to that day to a reasonable degree of engineering certainty, to which the expert responded in the affirmative.

"The court may interrogate witnesses, whether called by itself or by a party." Minn. R. Evid. 614(b). It is generally not improper for a district court to question witnesses in order to clarify their testimony. *Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985). But a judge must avoid "assum[ing] the role of the advocate." *Block v. Target Stores, Inc.*, 458 N.W.2d 705, 713 (Minn. App. 1990), *review denied* (Minn. Aug. 7, 1990). A new trial is warranted if the district court abused its discretion in questioning a witness. *Id.* at 712.

In *Block*, the court of appeals noted that a district court judge's conduct was "disturbing" where the court had engaged in "sarcastic questioning" and "extensive cross examination" of one party's expert witness that "destroyed the witness's credibility and demeaned his qualifications." *Id.* at 712-13. Here, the district court's questioning helped State Farm establish the level of confidence the expert had in his opinions. But Homewerks did not object to the district court's questioning or make any record that, but for the additional testimony elicited by the court, the expert's testimony would not have met the foundational requirement that it be based on readily ascertainable facts. *See Whitney*, 376 N.W.2d at 277. Given the brevity of the additional testimony, which followed extensive testimony by the expert explaining the basis for his opinions, and the absence of objection by Homewerks, we cannot conclude that the district court abused its discretion in questioning the expert.

VI. The district court did not abuse its discretion in denying Homewerks a new trial based on attorney misconduct.

Homewerks asserts that it was deprived of a fair trial because of misconduct and irregularities by State Farm's counsel in closing arguments. *See* Minn. R. Civ. P. 59.01(b). The decision whether to grant a new trial due to counsel misconduct "rests almost wholly in the discretion of the [district] court, which is in a better position to assess [the misconduct's] impact on the jury." *Hall v. Stokely-Van Camp, Inc.*, 259 Minn. 101, 105, 106 N.W.2d 8, 11 (1960). An appellate court will reverse such a decision "only where there has been a clear abuse of that discretion." *Id.* If the party asserting closing-argument misconduct did not timely object or request a jury instruction correcting the misleading statement at trial, the standard of misconduct required for reversal is raised. *Russell v. Strohochein*, 305 Minn. 532, 535, 233 N.W.2d 289, 292 (1975). Unobjected-to misconduct "must have been so reprehensible as to require the action of the [district] court on its own motion." *Id.*

A. The district court did not abuse its discretion in declining to grant a new trial because State Farm's counsel commented on the lack of evidence of negligent installation.

Homewerks argues that State Farm's counsel improperly asked the jury to draw a negative inference from Homewerks's failure to produce certain evidence regarding its theory that improper installation caused the damage. Specifically, State Farm's counsel noted that Homewerks did not call a valve installer as a witness to testify about what should

have been done in installing the valve, and stated that, "if the defendant wanted to present a case that this is an installation error, they should have done so and they didn't."

"[C]omments by a plaintiff's counsel drawing an adverse inference from the defendant's failure to call a particular witness are improper where the witness was equally available to both parties and equally likely to favor either party." *Springfield Farmers Elevator Co. v. Hogenson Constr. Co.*, 268 N.W.2d 80, 83 n.1 (Minn. 1978). Because Homewerks did not object to this statement, however, it only warrants reversal if it was "so reprehensible as to require the action of the [district] court on its own motion." *See Russell*, 305 Minn. at 535, 233 N.W.2d at 292.

Throughout trial, Homewerks suggested that the company that installed the valve, which was not a party, was liable. Homewerks noted in its opening statement that the valve was "supplied and installed by" the installer and "came from who knows where." Homewerks hinted at the installer's liability when questioning witnesses. And Homewerks requested and received a jury instruction and special-verdict-form question about the installer's liability. In light of Homewerks's repeated references to the installer's role, State Farm's statement that there had been no testimony about whether the installation was actually negligent was not improper. Furthermore, the *Springfield* rule does not apply to State Farm's comment because testimony about negligent installation would not have been "equally likely to favor either party." *Springfield*, 258 N.W.2d at 83 n.1. State Farm was entitled to strict-products-liability recovery against Homewerks, so only Homewerks stood to benefit from shifting blame toward the installer. We therefore conclude that the district court did not abuse its discretion in declining to grant a new trial based on State Farm's

comment on the lack of testimony regarding the installer's negligence. *See Hall*, 259 Minn. at 105, 106 N.W.2d at 11.

B. The district court did not abuse its discretion in declining to grant a new trial based on an unsupported statement in closing arguments.

Homewerks asserts that it was deprived of a fair trial because State Farm's counsel made a statement unsupported by the evidence in her closing-argument rebuttal. Specifically, Homewerks challenges State Farm's assertion that metallurgical testing destroys the product and would never be part of an expert's initial assignment. This comment was in response to Homewerks's statement in its closing argument that the expert could not say what percentage of zinc was in the valve because State Farm had not asked him to conduct metallurgical testing. Thus, the jury heard the expert testify that metallurgical testing was not necessary, it heard Homewerks argue that it was necessary, and it heard State Farm give a reason, unsupported by the record, why one might avoid such testing.

An attorney "should not introduce into his argument to the jury statements and conclusions unsupported by the evidence." *Hall*, 259 Minn. at 104, 106 N.W.2d at 10. But the decision whether to grant a new trial due to counsel misconduct in closing arguments "rests almost wholly in the discretion of the [district] court, which is in a better position to assess its impact on the jury." *Id.* at 105, 106 N.W.2d at 11. We conclude that the district court did not abuse its discretion in declining to grant a new trial based on this comment, which it implicitly concluded was likely harmless.

C. The district court did not abuse its discretion in declining to grant a new trial based on an incorrect statement of law in closing arguments.

Homewerks argues that it was deprived of a fair trial because State Farm's counsel misstated the law in her closing argument when she said: "You will see in the jury instructions what 'sold' means. Basically this question is asking did Homewerks Worldwide, LLC put this product into the chain of distribution?"

Homewerks did not object to this statement at trial, so the heightened standard of review applies. *See Russell*, 305 Minn. at 535, 233 N.W.2d at 292. Because the jury received instructions on the law and directed the jury to refer to them, it is unlikely that counsel's statement had much impact on the jury. Furthermore, we are not persuaded that State Farm's comment is inaccurate. It is not inconsistent with the jury instruction that "[a]n intermediary in the chain of manufacture and distribution, other than the manufacturer, has a duty to sell a product that is not in a defective condition unreasonably dangerous to users of the product."[2] We therefore conclude that the district court did not abuse its discretion in declining to grant a new trial based on this statement.

D. State Farm's counsel did not comment improperly on the valve's country of origin.

Homewerks asserts that passion and prejudice of the jury deprived it of a fair trial because, according to Homewerks, State Farm encouraged the jury to punish Homewerks for selling a product made in China. State Farm never mentioned where the product was made, but Homewerks argues that because "Made in China" was printed on the valve, State

[2] Homewerks does not challenge the use of this jury instruction.

Farm's request that the jury not "let them off the hook for this" invited passion and prejudice. The district court did not abuse its discretion by declining to grant a new trial based on this allegation, which has no basis in the record.

Affirmed.