STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1994

Carney Lien,
Respondent,

vs.

Casper Construction, Inc., et al.,
Defendants,
Veit & Company, Inc.,
Appellant.

Filed January 14, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Itasca County District Court
File No. 31-CV-15-1957

Eric J. Magnuson, Katherine S. Barrett Wiik, Robins Kaplan, L.L.P., Minneapolis, Minnesota; and

Cortney S. LeNeave, Thomas W. Fuller, Richard L. Carlson, Hunegs, LeNeave & Kvas, P.A., Wayzata, Minnesota (for respondent)

Thomas H. Boyd, Tucker A. Chambers, Winthrop & Weinstine, P.A., Minneapolis, Minnesota; and

Mark A. Solheim, Angela Beranek Brandt, John M. Bjorkman, Larson • King, L.L.P., St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

REYES, Judge

Following a jury trial, appellant Veit & Company Inc. (Veit) challenges the district court's denial of its motion for judgment as a matter of law (JMOL) and motion for a new trial. Respondent/cross-appellant Carney Lien (Lien) argues that the district court erred in denying his motion to amend the complaint to add a claim for punitive damages. We affirm in part, reverse in part, and remand.

FACTS

On August 28, 2014, Lien drove home from work on a state highway in Itasca County. As he drove, a rock broke through the windshield of his car and struck him in the head, causing serious injuries. These included a skull fracture, facial lacerations, partial blindness, and a severe traumatic brain injury, which have all permanently impacted his everyday life.

At the time, Burlington Northern Santa Fe Railway (BNSF) had retained Veit to supply pit run material for the construction of an expansion at BNSF's Gunn Yard site. Veit contracted with Hawkinson Sand and Gravel (Hawkinson) to supply and haul material from their pit to the construction site. Hawkinson hired trucking companies, including Casper Construction, Inc. (Casper), to transport the material. Veit was responsible for excavating the material from the Hawkinson pit and loading it into the trucks. Lien sued Veit, Hawkinson, and Casper, alleging that the rock that caused his injuries fell out of a truck owned by Casper and driven by Casper's employee.

Prior to trial, Lien settled with Casper and Hawkinson. Lien also made a motion to amend the complaint to add punitive damages, which was denied. The district court held a jury trial in April 2017 on Lien's remaining negligence claim against Veit.

At trial, Veit presented its theory of the case that this was nothing more than a tragic, "freak accident," which occurred when a rock became lodged in the dual tires of the Casper dump truck and kicked up onto the road, ricocheting into Lien's windshield. Veit provided testimony from an excavator who maintained that, on the day of the accident, they were properly loading the trucks on the site. Veit also produced an accident-reconstruction expert who testified that, based on the evidence, engineering physics, and his own reconstructions, the rock was likely ejected from the dual tires and did not come from the truck bed.

In contrast, Lien argued that Veit was filling the dump trucks dangerously full with the pit run material, such that on the day of the accident, rocks were falling off the top and over the sides of the truck involved in the accident. Lien produced witnesses who were present at the scene of the accident, who testified as such. Lien also produced three truck drivers who were working on this project, who testified that Veit was consistently overloading the trucks with material at the Hawkinson excavation site.

After two weeks of trial, the jury found all three companies causally negligent, and allocated 38% of the fault to Veit.

The district court denied Veit's motion for JMOL and motion for a new trial. The district court affirmed the jury verdict, adjusted the award for collateral sources, and entered judgment against Veit in the amount of $4,754,973.67. This appeal follows.

D E C I S I O N

I. The district court did not err in denying Veit's motion for JMOL because sufficient evidence supported the verdict.

Veit argues that the district court erred by failing to enter JMOL in its favor for two reasons: (1) Lien failed to establish a standard of care and (2) Lien failed to offer admissible evidence supporting a breach of any standard of care by Veit.

If a party moves for JMOL after a jury returns a verdict, 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 the district court's decision to deny a motion for JMOL de novo. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018). "[W]e 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) (quotation omitted). An appellate court will set aside a jury's verdict "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. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) (quotation omitted).

A. Lien presented sufficient evidence at trial to establish the standard of care.

Veit argues that Lien was required to establish with expert testimony the standard of care for excavating pit run material and loading it into trucks. We are not persuaded.

The district court has broad discretion in determining whether an expert opinion is necessary to establish the standard of care to assist the jury. *Seaton v. Scott County*, 404

N.W.2d 396, 399 (Minn. App. 1987). The supreme court has stated that expert testimony is not needed, "[w]here the acts or omissions complained of are within the general knowledge and experience of lay persons . . . even in cases of alleged medical malpractice." *Atwater Creamery Co., v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985). On the other hand, expert testimony is necessary "if it would be speculative for the factfinder to decide the issue of negligence without [it]." *Id*.

Here, the district court referenced the trial testimony of three dump-truck drivers working on the Gunn Yard project, who all agreed that, if dump trucks were overloaded, material could spill out over the top or sides, creating hazardous conditions. The district court concluded that sufficient evidence was presented that could lead a jury to infer that a reasonable loader would not load a dump truck with so much pit material that excess gravel would spill from the sides. The district court deemed an expert opinion not necessary because loading a dump truck involves basic common sense.

We agree with the district court that loading dump trucks is not so technical an activity that average jurors could not understand that a reasonable loader would take care in loading the truck properly because overloading could cause material to spill out over the top or sides and cause injury. A layperson would not need to speculate on the standard of care, because it is within the realm of common knowledge.

This conclusion is consistent with Minnesota caselaw, which has found expert testimony necessary with highly technical or "professional" issues. *Blatz v. Allina Health System*, 622 N.W.2d 376, 388 (Minn. App. 2001) ("When a claim is predicated on conduct subject to a professional standard of care, expert evidence is generally required . . . ."),

review denied (Minn. May 16, 2001); *Atwater*, 366 N.W.2d at 279 (finding expert testimony necessary to establish standard of care for insurance agents); *Seaton*, 404 N.W.2d at 400 (concluding expert testimony required for standard of care for designing a bridge). The district court therefore did not abuse its discretion in finding expert testimony unnecessary to establish the standard of care.

B. Lien presented sufficient evidence at trial to establish that Veit breached its standard of care.

Veit further argues that, even if sufficient evidence established a standard of care, there was not sufficient evidence to allow a reasonable jury to find that Veit breached that standard of care. We disagree.

The evidence introduced at trial, viewed in the light most favorable to the verdict, included evidence that Veit consistently overloaded the trucks leaving the Hawkinson pit for the Gunn Yard site. It also included testimony from drivers on the road who saw the rock that struck Lien "come off the top" of the Casper truck.

Three truck drivers testified that Veit overloaded trucks for this construction project. The first truck driver, a gravel truck driver for 30 years, testified that he saw Veit overloading trucks at the Hawkinson site on more than one occasion, "coned up into like a V above the side boards and then the rest spilled off like water." This driver knew that Veit was overloading his truck because of the pressure gauge on his dashboard.

The second truck driver, an owner of a hauling company employed to haul material at the Hawkinson site, has been working in the industry for 25 years. At trial, he testified that Veit was "overloading my trucks and others . . . 75 to 90 percent of the time," to the

point that material was "coming over the top of the side board." This truck driver further testified that he reported this overloading repeatedly to Veit's supervisors on site.

The third truck driver, whose deposition testimony was read into the record at trial, explained that if a truck is loaded properly the material will go in the middle of the truck, "and you should be able to stand in the four corners with a human body." But on this project, he reported that the material was improperly loaded from corner to corner, and piled too high, sometimes several feet above the sideboards.

Lien also provided testimony from three eyewitnesses who were on the road at the time of the accident. The first witness, who was driving a semi-truck about 100 feet directly behind Lien and had a clear view above Lien's small car, testified that he first saw some small rocks falling off the dump truck coming towards them in the other lane. Then, he saw "a larger rock come off the top, bounce once on the highway, and up and through . . . his windshield and the back window exploded. . . ."

This testimony was corroborated by a second witness on the road, driving directly behind the dump truck who saw the truck pull onto the highway from the Hawkinson pit and head toward Grand Rapids. When he got closer to the truck, he slowed down because he "could see rocks coming off the truck" from the driver's side and falling into the oncoming lane of traffic. This witness saw the rock that hit Lien fall from the side of the truck, bounce off the highway, and into Lien's windshield. He further testified that the rocks were not coming from the truck's tires, and that the mud flaps were never disturbed.

A third witness driving his car behind the second witness testified that rocks were coming out over the top of the Casper truck and falling over the sides, so he and the car in

front of him slowed down. He then stated that he saw the rock that hit Lien come "from the top left of the truck."

Taken together, the testimony from the truck drivers and the eyewitnesses supports a reasonable inference that the Casper truck was overloaded on the day of the accident, which ultimately caused the rock to come off the truck bed and into Lien's windshield. There was sufficient evidence for a jury to find that Veit breached its standard of care. Given that this court may only set aside a jury verdict if it was "perverse and palpably contrary to the evidence," *Moorhead*, 789 N.W.2d at 888 (quotation omitted), the district court did not err in denying Veit's motion for JMOL.

II. The district court did not abuse its discretion in denying Veit's motion for a new trial based on evidentiary rulings and allegations of attorney misconduct.

Veit next argues that the district court abused its discretion in denying appellant's motion for a new trial for two reasons: (1) erroneous evidentiary rulings and (2) misconduct throughout the trial by Lien's attorneys.

A new trial may be granted to any party 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. "On appeal from a denial of a motion for a new trial, an appellate court should not set aside a jury verdict unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotations and footnote omitted).

A. The district court did not abuse its discretion in its evidentiary rulings.

Veit argues that the district court made two primary evidentiary errors: (1) allowing in evidence of previous overloading of other trucks and (2) excluding statements of the truck driver regarding the origin of the rock that injured respondent.

With regard to evidentiary rulings, the district court has discretion to admit or exclude evidence, and its rulings "will not be disturbed absent indications of an erroneous legal view or abuse of discretion." *TMG Life Ins. Co. v. County of Goodhue*, 540 N.W.2d 848, 851 (Minn. 1995). Even if an evidentiary ruling is erroneous, it will not be reversed unless it results in prejudice. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). An evidentiary error is prejudicial if there is a reasonable possibility that it might have changed the result of the trial. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 725 (Minn. 1983).

1. Previous overloading

Veit argues that the district court erroneously allowed into evidence the testimony from the three truck drivers concerning instances of Veit overloading trucks at the Hawkinson pit site, over Veit's objections. Veit argues that this testimony: (1) is improper character evidence under Minn. R. Evid. 404(b); (2) should have been excluded under Minn. R. Evid. 403; (3) does not constitute evidence of habit; and (4) was not relevant to foreseeability. Veit's arguments lack merit.

First, Veit argues that this testimony is improper character evidence. Rule 404(b) provides that evidence of prior bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But, it may be

admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. Veit relies on *Ray v. Miller Meester Advert., Inc.*, 664 N.W.2d 355 (Minn. App. 2003). In that case, an employee introduced evidence that her former employer did not respond to harassment complaints in the past. *Ray*, 664 N.W.2d at 363. This court explained that for character evidence to be admissible, it must be "proved by a preponderance of the evidence, relevant to a material issue, more probative than prejudicial, and close in time and similar in kind to the conduct at issue." *Id*. at 364. (quotation omitted). This court held that the prior bad-act allegations did not meet those requirements. *Id*. The previous allegations of harassment occurred as long as seven years prior, and all but one of the people who perpetrated those earlier instances of harassment were no longer with the company. *Id*.

Here, the potential systematic overloading of other trucks at this same excavation site, in the same time frame as the accident, is extremely probative. Unlike in *Ray*, the conduct at issue here is much closer in time and similar in kind to the conduct in that case. The district court did not abuse its discretion when it admitted evidence of overloading under rule 404(b).

Second, Veit argues that this evidence of overloading was improperly admitted under rule 403, which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Minn. R. Evid. 403. As noted above, the evidence was more probative than prejudicial. Veit also argues that this evidence confused and misled the jury, because it concerned other trucks on other days, and was not about the Casper truck

involved in the accident. The district court weighed these arguments, and found that the evidence regarding the loading practices at the excavation site was relevant to the issues of foreseeability of risk and scope of duty and outweighed any potential for unfair prejudice or jury confusion. The district court properly exercised its discretion.

Third, Veit argues that the district court erroneously allowed in the testimony about overloading as evidence of habit under rule 406. That rule states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Minn. R. Evid. 406. "Whether the response is sufficiently regular and whether the specific situation has been repeated enough to constitute habit are questions for the [district] court." Minn. R. Evid. 406 1989 comm. cmt. "The [district court] should make a searching inquiry to assure that a true habit exists." *Id*.

Here, the district court held that, by introducing testimony from multiple employees that Veit was overloading trucks at the excavation site, "it tends to establish habit, within the meaning of Rule 406, more definitively." Three truck drivers testified as to Veit's practice of overloading trucks at the Hawkinson site. One driver specifically testified that he witnessed Veit overloading trucks up to 90 percent of the time on this project. Given that determining whether the response is sufficiently regular is a discretionary question for the district court, we discern no abuse of discretion.

Finally, Veit argues that evidence of overloading was not admissible based on relevance to foreseeability. The district court held that if overloading occurred, the jury

could find that Veit owed a duty to institute greater safety precautions and that "the issue of foreseeability in this case is a close call, to be submitted to the jury." We agree. "In close cases, the question of foreseeability is for the jury." *Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998). Admitting the evidence of overloading gave the jury the opportunity to determine whether Lien's injury was a foreseeable result of overloading the trucks with pit run material.

2. Statement by the truck driver

Veit argues that the district court erred in excluding a statement by the driver of the truck involved in the accident in his guilty plea to a misdemeanor traffic offense. We are not persuaded.

The district court excluded the statement based on Minn. Stat. § 169.94, subd.1 (2018), which states that "[n]o record of the conviction of any person for any violation of this chapter shall be admissible as evidence in any court in any civil action." In the statement, the truck driver states that the rock was kicked up by the tires. Veit asserts that this would only have been used as a prior inconsistent statement to impeach the driver's trial testimony, that he did not know where the rock came from, and it would not have required any disclosure of his guilty plea.

However, even if it could have been admitted under the statute, the district court also found that, pursuant to rule 403, any probative value would be outweighed by substantial prejudice. The district court found that the danger of unfair prejudice arose "because if [the truck driver's] written statement had been introduced into evidence-it would have been impossible to question him regarding the context of his statement, or his

reasons for making that statement, without impermissibly referencing his guilty plea to a misdemeanor failure to secure a load," in violation of the statute. The district court found that the statement made during his plea deal would be too confusing, and "any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Because the district court properly applied Rule 403, it did not abuse its discretion in excluding the statement by the truck driver.

B. The district court did not abuse its discretion by refusing to grant a new trial based on attorney misconduct.

Veit argues that its motion for a new trial should have been granted on the basis of misconduct by Lien's counsel. We disagree.

The decision to grant a new trial based on claimed attorney misconduct "is not governed by fixed rules, but instead rests wholly within the discretion of the trial court." *Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994). This is because the district court judge, being present during the entirety of the trial, is best positioned to determine whether an attorney's misconduct is egregious enough to affect a jury's verdict. *Id*. at 601. The question on appeal therefore, is whether the district court abused its discretion, with the focus being on whether any misconduct resulted in prejudice. *Id*.

Veit primarily takes issue with Lien's "golden rule" statement made during closing arguments, and asserts that "the prejudice caused by this golden-rule argument was compounded and exacerbated by the cumulative prejudicial effect of the other pervasive misconduct throughout the trial," including numerous orders, sustained objections, and court admonishments.

A "golden rule" argument is one that improperly asks the jury to put themselves directly in the shoes of a party. *See Bisbee v. Ruppert*, 235 N.W.2d 364, 370 (Minn. 1970) (concluding that asking jurors to consider what damages they would seek in plaintiff's position improper). During closing arguments, Lien's counsel made the following remarks:

> Lien's counsel: So what should Veit have to pay him to have this new job, a job they assigned him to, he didn't contract or volunteer for, and that they needlessly and carelessly forced upon him? If we put a job posting out, person wanted who will take rock to head, suffer the following conditions, and mirror Mr. Lien's condition, what would Veit have to pay somebody to take that job?
>
> Veit's counsel: Objection. Improper argument.
>
> The court: Overruled.
>
> Lien's counsel: They'd have to pay him at least what their CEO is making each year.
>
> Veit's counsel: Objection. Improper argument.
>
> The court: Sustained.
>
> Lien's counsel: For rest of his life he's got that job. Half a million dollars a year to a million, no one would take it, none of us.
>
> Veit's counsel: Objection. Improper argument.
>
> The court: Sustained. Disregard.

The district court held that:

> The argument of [Lien's] counsel asked the jury to determine what amount of compensation was fair for a person experiencing the same deficits as [Lien]. Evidence of such objective deficits were properly admitted into evidence. This

> argument straddles the line between a permissible argument based on objective evidence, and an impermissible argument based on a plaintiff's subjective experience. Because the admissibility of such an argument is a close call, the Court concludes that this argument does not represent misconduct of the type warranting a new trial.

The district ultimately, and reasonably, found that any misconduct was not egregious enough to have impacted the verdict.

Even if we were to assume misconduct, Veit must demonstrate prejudice. When an objection is made to improper argument, and the district court gives a curative instruction, a new trial should not be granted on appeal unless the misconduct was prejudicial. *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977).

Here, the district court overruled the first objection to the argument, but then sustained the next two, ultimately instructing the jury to "disregard" the statement that "no one" would take that job. The district court also gave the standard jury instruction that "nothing the attorneys say during the trial, including opening statements and closing arguments, is evidence." *See Omlid v. Lee,* 391 N.W.2d 62, 65 (Minn. App 1986) (new trial not warranted because appellant's counsel immediately objected, district court sustained objection, and gave a curative instruction to jury). There is nothing to suggest that this argument significantly prejudiced the jury such that it impacted the verdict.

We conclude that the district court did not abuse its discretion in denying Veit's motion for a new trial based on its evidentiary rulings and allegations of attorney misconduct.

III. The district court improperly weighed the evidence when considering if Lien had established a prima facie case for punitive damages.

Lien cross-appeals, arguing that the district court erred in denying his motion for leave to amend the complaint to seek punitive damages because Veit "deliberately disregarded the rights and safety of Minnesota motorists by ignoring repeated complaints of overloading," such that Lien established a prima facie claim for punitive damages. We agree.

The parties dispute whether the proper standard of review is de novo or abuse of discretion. In cases involving posttrial appeals, we have reviewed the denial of a motion to add a claim for punitive damages for an abuse of discretion. *Hogenson v. Hogenson*, 852 N.W.2d 266, 277 (Minn. App. 2014) (stating that "[t]he district court's decision to deny a motion to add a claim for punitive damages is reviewed for an abuse of discretion."); *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007), *aff'd*, 742 N.W.2d 660 (Minn. 2007). The district court's decision to deny Lien's motion here will therefore be reviewed for an abuse of discretion.

Under Minn. Stat. § 549.191 (2018), a party to a civil action may move to amend the complaint to add a claim for punitive damages. In support of a punitive-damages motion, the moving party must offer prima facie evidence that clearly and convincingly shows the defendant's "deliberate disregard for the rights or safety of others." Minn. Stat. §§ 549.191-.20, subd. 1(a) (2018). A defendant has acted with deliberate disregard for the rights or safety of others if:

> the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the

> rights or safety of others and: (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b) (2018).

If the district court finds prima facie evidence in support of the motion, it "shall" grant the motion to amend the complaint. Minn. Stat. § 549.191. A prima facie case is established when evidence is presented, which, if unrebutted, sustains a fact or supports a judgment. *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). "[P]rima facie does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages." *Swanlund v. Shimano Indus. Corp. LTD.*, 459 N.W.2d 151, 154 (Minn. App. 1990) (quotation omitted), *review denied* (Minn. Oct. 5, 1990). Clear and convincing evidence refers to a quantum of evidence that is "more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).

Lien argues that the unrebutted evidence shows that before Lien's injury, Veit's on-site project supervisor and Veit's loaders "all knew that Veit was overloading trucks with sand and rock at the Hawkinson pit." In support of its motion for punitive damages, Lien submitted affidavits from five truck drivers working on the project, who reported that Veit systematically overloaded trucks at this job site. In addition to the three truck drivers who testified at trial, Lien included affidavits from an additional two drivers.

One of these truck drivers worked the Gunn Yard project around the time of the accident. He stated in his affidavit that his truck was damaged due to Veit overloading it.

This truck driver reported that "almost every time" his truck was loaded, Veit filled it "all the way to the edge of the truck, which was unsafe." He also noted that he complained to Veit's loader and foreman "many times about overloading" and that Veit continued to overload despite his complaints.

Considering the totality of these drivers' statements, the district court found the evidence, if proven, "may support a claim for ordinary negligence" but that "neither a showing of negligence nor gross negligence by [Veit] is sufficient to satisfy the deliberate-disregard standard for punitive damage claims." The district court's only stated reason for denying the motion was the fact that the drivers acknowledged they have a responsibility to check their trucks. However, this does not detract from Veit's actions, and the district court therefore abused its discretion by improperly weighing evidence. We therefore reverse and remand for reconsideration by the district court as to whether Lien has established a prima facie case for punitive damages. Because we reverse and remand on this issue, there is no need to address Veit's counter-arguments.

Additionally, because the district's court's analysis ended there, it did not consider whether Veit's on-site supervisors were acting in a managerial capacity such that Veit can be held liable for punitive damages under Minn. Stat. § 549.20, subd. 2 (2018). We also remand to the district court for consideration of this issue.

Affirmed in part, reversed in part, and remanded.