STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1965

Nathan Mead,
Appellant,

Amy Mead, Plaintiff,

vs.

BNSF Railway Company,
Respondent,

Ture Lee,
Respondent on related appeal,

and

BNSF Railway Company,
Respondent,

vs.

Jerry Lee,
Respondent on related appeal.

Filed September 30, 2019
Reversed and remanded
Kirk, Judge[*]

Hennepin County District Court
File No. 27-CV-15-10789

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

William Kvas, Richard L. Carlson, Hunegs, LeNeave & Kvas, P.A., Wayzata, Minnesota (for appellant)

Sally J. Ferguson, Emily A. Atkinson, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota; and

Alice E. Loughran (pro hac vice), Steptoe & Johnson, LLP, Washington, District of Columbia (for respondent BNSF Railway Company)

Robert H. Tennant, Meghan A. Cooper, Stringer & Rohleder, Ltd., St. Paul, Minnesota (for respondents Ture Lee and Jerry Lee)

Considered and decided by Schellhas, Presiding Judge; Rodenberg, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellant challenges the district court's grant of summary judgment. Because the district court's decision turned on the erroneous exclusion of medical expert testimony, we reverse and remand.

FACTS

Appellant Nathan Mead challenges the district court's grant of summary judgment in favor of respondent BNSF Railway Company (BNSF) on appellant's negligence claim against BNSF under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (2012). The parties dispute the material facts. Appellant alleges the following facts in support of his FELA claim.

On August 3, 2012, appellant was working as a carman inspecting and repairing railroad freight cars for BNSF when a supervisor asked him to respond to a call for repairs in St. Paul. Appellant was told to take a company truck, unit 20, to perform the repair

work. Appellant inspected unit 20, as required by BNSF safety rules, and observed defects in the windshield, defroster, and inspection lights. Appellant requested a different vehicle but none was available.

On his way to the job site, appellant drove into a tunnel, where he was forced to slow down and change lanes due to an earlier accident. While driving through the tunnel, appellant was rear-ended by respondent Jerry Lee. Appellant alleged that the driver's seat in the truck reclined upon impact, which caused him to "torpedo" backward through the rear window of the truck. Appellant suffered injuries to his head, neck, back, and shoulders as a result.

After the accident, unit 20 was taken to an automobile repair shop to be inspected and repaired. This repair shop had repaired BNSF vehicles in the past and had performed over $80,000 worth of repairs and maintenance on unit 20 alone. The repair shop inspected the driver's seat and determined that the recliner and slider mechanisms were intact and functioning properly.

Appellant hired William H. Muzzy, III, a mechanical engineer who consults and provides expert evaluation and testimony on restraint-system effectiveness in automobile accidents. In his report, Muzzy noted that the repair shop had previously performed repairs on the driver's seat of unit 20, including reupholstering the seat and replacing the cushioning, but had not replaced the recliner and slider mechanisms. According to Muzzy, it would have been prudent to rebuild the entire seat structure or replace it with a new seat, given the seat's condition and the constant use of the truck. Muzzy concluded that the recliner mechanism failed on the seat, that the repair shop knew or should have known that

the driver's seat recliner was worn and defective, and that appellant would not have received the injuries caused by hitting his head against the rear window of the truck had the recliner mechanism not failed.

In June 2015, appellant filed a complaint against BNSF alleging negligence under FELA. In the complaint, appellant also named respondent Ture Lee as a defendant. Appellant alleged that Ture Lee owned the vehicle that Jerry Lee was driving when the crash occurred and that Ture Lee was vicariously liable for Jerry Lee's negligence. In August 2015, BNSF filed a third-party complaint against Jerry Lee alleging that his negligence caused appellant's injuries and requesting contribution and indemnity from him in the event that BNSF was found liable to appellant. BNSF also filed a cross-claim against Ture Lee for contribution and indemnity.

BNSF subsequently moved for summary judgment. The district court granted BNSF's summary-judgment motion and dismissed appellant's FELA negligence claim against BNSF, concluding that appellant could not establish causation or foreseeability. Appellant appealed that decision to this court. We reversed, holding that the evidence, when viewed in the light most favorable to appellant, could support his theories regarding causation and foreseeability. *Mead v. BNSF Ry. Co.*, No. A17-0480, 2018 WL 414318, at *5-6 (Minn. App. Jan. 16, 2018). The case was remanded to the district court. *Id.* at *6.

On remand, BNSF filed a motion to "exclude the opinions and anticipated testimony offered" by appellant's experts, including Muzzy and Scott Benson, M.D. BNSF argued that both opinions lacked foundation.

Muzzy's expert opinion concerned the seat belt restraining system and the seat back recliner mechanism on the driver's seat in unit 20, as well as the condition of the driver's seat generally. Muzzy was also expected to testify that the repair shop knew or should have known that the driver's seat recliner was worn and defective, that the defect caused the driver's seat back to fail, and that such failure caused appellant's injuries. Dr. Benson's expected testimony consisted of a medical causation opinion that the act of appellant hitting the rear window of unit 20 contributed to the injuries that he sustained.

The district court granted BNSF's motion, reasoning, in relevant part, that Muzzy's opinion lacked foundation and was not supported by the evidence, and that Dr. Benson was not qualified to offer his expert testimony and his testimony lacked foundation. After the district court granted BNSF's motion to exclude, BNSF filed a motion to dismiss appellant's FELA claim, based solely on the exclusion of Dr. Benson's testimony and the consequent lack of medical-causation evidence.

The district court construed BNSF's motion as a summary-judgment motion and granted it, reasoning that appellant's FELA claim required medical expert testimony to prove that the failure of the seat-latch mechanism, and not the accident itself, caused his injuries and that appellant was unable to provide such testimony because the district court had ruled inadmissible the only medical-causation testimony he proffered, that of Dr. Benson. The district court therefore dismissed appellant's claim against BNSF, as well as BNSF's claims against Ture Lee and Jerry Lee.

Appellant challenges the district court's grant of summary judgment. BNSF filed a notice of related appeal challenging the district court's dismissal of BNSF's claims against the Lees.

D E C I S I O N

We review a grant of summary judgment de novo. *Gallagher v. BNSF Ry. Co.*, 829 N.W.2d 85, 88 (Minn. App. 2013). This requires determining whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Id.* at 88-89. We consider the evidence in the light most favorable to the non-moving party. *Id.* at 89. Summary judgment is proper when there are no genuine issues of material fact and a party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.01, *Gallagher*, 829 N.W.2d at 89.

I.

Appellant first argues that the district court erred in failing to apply the law-of-the-case doctrine and abused its discretion by ruling that Muzzy's expert testimony was inadmissible. At oral argument, BNSF argued that the admissibility of Muzzy's testimony and the application of the law-of-the-case doctrine are not necessary for resolution of this appeal. We agree.

In its summary-judgment order, the district court specifically addressed Dr. Benson's excluded testimony and granted summary judgment on the ground that without that testimony, appellant could not establish medical causation. The district court did not discuss Muzzy's expert testimony, and the exclusion of that testimony was not a basis for

the grant of summary judgment. Because the exclusion of Muzzy's testimony was not at issue in the decision appealed, we decline to address it.

II.

Appellant next argues that the district court erred by ruling that Dr. Benson's expert testimony was inadmissible and by subsequently granting BNSF's motion for summary judgment on the ground that appellant could not establish medical causation.

Minnesota appellate courts review a district court's evidentiary rulings for an abuse of discretion. *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012); *see also Kedrowski v. Lycoming Engines*, ___ N.W.2d ___, ___, 2019 WL 4282016, at *8 (Minn. Sept. 11, 2019). A district court abuses its discretion when "its decision is based on an erroneous view of the law or is inconsistent with the facts in the record." *Hudson v. Trillium Staffing*, 896 N.W.2d 536, 540 (Minn. 2017) (quotation omitted).

Minn. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

For expert testimony to be admissible under rule 702, a proponent must show that the testimony passes a four-part test: "(1) [t]he witness must qualify as an expert; (2) the expert's opinion must have foundational reliability; (3) the expert testimony must be

helpful to the trier of fact; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard." *Doe 76C*, 817 N.W.2d at 164. Appellant focuses on the second requirement, arguing that the district court erred by finding that Dr. Benson's opinion lacked foundational reliability. This court reviews a district court's ruling regarding foundational reliability for an abuse of discretion. *Id.*

The supreme court has outlined three steps that a district court must take in analyzing the foundational reliability of expert testimony. *Id.* at 167-68. "First, the district court must analyze the proffered testimony in light of the purpose for which it is being offered." *Id.* "Second, the court must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying." *Id.* at 168. Finally, the district court must analyze whether "the proponent of evidence about a given subject [has] show[n] that it is reliable in that particular case." *Id.* "As long as the district court considered the relevant foundational reliability factors, [an appellate court] will not reverse its evidentiary finding absent an abuse of discretion." *Id.*; *see also Kedrowski*, 2019 WL 4282016, at *7.

Appellant offered expert testimony from Dr. Benson that he suffered injuries to his neck, back and spine, and shoulder, as well as a traumatic brain injury and post-traumatic stress disorder, all as a result of the accident. The district court characterized Dr. Benson's opinion as linking the failure of the seat-recliner mechanism to appellant's injuries. The district court excluded this opinion, reasoning that it required "an analysis of the forces sustained by [appellant] in the accident as a result of the alleged seat-latch mechanism failure" and that "Dr. Benson does not have the proper qualifications to offer such opinion testimony" because he did not have the training or experience necessary to provide the

"combination of medical, biomedical, and design testimony" required to establish a causal link between the seat-latch mechanism failure and the injuries. The district court also concluded that Dr. Benson's opinion lacked foundation, reasoning as follows:

> Dr. Benson opines that all of [appellant's] injuries are a result of [appellant's] head hitting the rear window because of the alleged seat mechanism failure. Dr. Benson does not identify how all of those injuries could have been caused by [appellant's] head striking the rear window nor does it appear that Dr. Benson considered whether [appellant's] injuries would have resulted regardless of the alleged seat mechanism failure. Dr. Benson does not consider possible alternative explanations for [appellant's] head striking the rear window of the vehicle. Dr. Benson's opinions do not have mechanical or biomechanical testimony regarding whether the alleged seat recline was the reason [appellant's] head struck the window. Without that foundation, the court finds that Dr. Benson cannot establish causation between the alleged seat-latch mechanism failure and [appellant's] injuries and that Dr. Benson's opinions lack the foundation required to be admissible.

Appellant argues that the district court abused its discretion by excluding Dr. Benson's expert opinion because it "failed to analyze the proffered testimony in light of the purpose for which it was being offered." He argues that "Dr. Benson offered an opinion as to whether [appellant's] head breaking the truck's rear window played a part in his injuries, and he concluded it was a contributing factor," and that Dr. Benson "was not asked to determine whether the seat collapsed as determined by Muzzy or whether the seat acted in a normal fashion as determined by [BNSF's expert]." We agree.

The district court analyzed Dr. Benson's testimony as purporting to establish a causal link between the seat-latch mechanism's failure and appellant's injuries, but that was not the purpose for which the testimony was offered. Dr. Benson stated in an affidavit

that (1) he was one of appellant's treating physicians, (2) based on information appellant provided, "the collision on August 4, 2012 caused his head to strike and break the rear window of the truck," and (3) based on Dr. Benson's treatment of appellant, training, and experience, the act of appellant "striking and breaking the rear window of the truck contributed to the injuries that he sustained."

Consistent with that affidavit, at the motion hearing before the district court on BNSF's motion to exclude, appellant's counsel stated that "Dr. Benson is not going to be testifying that there was a defective seat recline mechanism," and that he instead would be limiting his testimony to an opinion that appellant's "striking and breaking of the rear window of the truck contributed to the injuries that he sustained."

At oral argument, appellant further clarified that Dr. Benson's testimony was based on appellant's medical history and Dr. Benson's exam and was not intended to establish whether or how the seat-latch mechanism failed. Appellant also stated that Dr. Benson's testimony was not based on Muzzy's expert opinion, but rather was based on appellant's medical history and the doctor's role as appellant's treating physician.

In sum, the district court erred by failing to analyze Dr. Benson's testimony in light of the purpose for which it was offered, by excluding Dr. Benson's testimony, and by granting summary judgment for BNSF based on appellant's inability to provide evidence of medical causation. We reverse and remand to the district court.[1]

Reversed and remanded.

[1] In light of our decision in this case, BNSF's claims against the Lees are reinstated.