STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0197

Melissa Regouski, as court-appointed Guardian and
Conservator for Morgan Moeller, Ward and Protected Person,
Appellant,

vs.

Noel Zander, et al.,
Respondents,

John Charles Bruns, et al.,
Respondents,

CNH Industrial America LLC, a/k/a CASE IH,
Defendant.

Filed August 12, 2019
Affirmed; motion denied
Connolly, Judge

Wright County District Court
File No. 86-CV-15-2832

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Kevin F. Gray, Troy A. Poetz, Matthew W. Moehrle, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota (for respondents Noel Zander, Karla Zander, and Elm Grove Trucking, LLC)

Rolf E. Sonnesyn, James C. Kovacs, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, Minnesota (for respondents John Bruns, Diane Bruns, Dustin Zander, and Elm Grove Land, LLC)

Considered and decided by Slieter, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of her motions for judgment as a matter of law (JMOL) and a new trial, arguing that the district court erred when it found sufficient evidence to support the jury's fault allocation in an automobile-tractor collision and when it concluded that there were no evidentiary errors justifying a new trial. Appellant also argues that the district court erred as a matter of law when it determined that respondent farmers were not engaged in a joint enterprise. Because there is sufficient evidence to support the jury's verdict and there are no evidentiary errors warranting a new trial, we affirm.

FACTS

In September 2014, Morgan Moeller was driving with his brother in the dark on Highway 106 in Wright County when Morgan hit a plow being pulled behind a tractor driven by respondent Noel Zander, which resulted in a head on collision that caused severe injuries to Moeller. Appellant Melissa Regouski, as court-appointed Guardian and Conservator for Morgan Moeller, filed a complaint against Noel Zander alleging that he

acted negligently in the operation of the tractor and plow, causing the motor vehicle crash. Noel Zander denied liability for the accident and asserted that it was caused or contributed to by the negligence of Moeller.

Appellant also alleged that respondents John Bruns, Diane Bruns, Dustin Zander, Karla Zander, Elm Grove Land LLC (EGL) and Elm Grove Trucking, LLC (EGT) were vicariously liable for the accident because they were engaged in a joint enterprise or joint venture with Noel Zander. Appellant, additionally, alleged products-liability claims against CNH Industrial America, LLC (Case IH), the manufacturer of the tractor that Noel Zander was driving. Respondents Noel Zander, John Bruns, Diane Bruns, Dustin Zander, Karla Zander, EGT and EGL brought cross-claims against Case IH for contribution and indemnity.

The district court bifurcated the case relating to the issues of joint venture and joint enterprise at appellant's request and held a court trial in November and December 2017. In its March 16, 2018 order, the court determined that John Bruns, Diane Bruns, Dustin Zander, Karla Zander, EGL, EGT and Noel Zander were not engaged in a joint venture or joint enterprise. Appellant's products-liability claims with Case IH were settled on a *Pierringer* basis prior to the negligence trial.

At the negligence trial, Noel Zander testified that the plow trailing his tractor was in a full, open position. He stated that he had the plow in "field mode" rather than "transport mode," which meant the plow extended into Moeller's lane of traffic between three and eight feet. Zander also stated that he had chosen to drive with his field lights on and that he knew he could not dim his high beam. Testimony also established that Zander's

tractor was visible to Moeller's car after Moeller turned on to Highway 106. Moeller's brother testified that he noticed the headlights and understood they were being emitted from a "bigger truck vehicle." He stated that the lights were "very bright" and "blinding." Despite the blinding lights, Moeller's brother testified that he did not see Moeller turn the steering wheel prior to impact. He also stated that he did not feel a sensation that Moeller applied the brakes.

Both appellant and Zander elicited expert testimony. Appellant's expert, Dr. Alan Lewis, testified that the tractor lights would be so blinding that Moeller would have been unable to see any indication of the plow extended into his lane. Dr. Lewis performed a test as to whether the eye would be blinded from approximately 81 feet away. In order to reach his conclusion, Dr. Lewis extrapolated his testing to determine that Moeller could not have seen the plow at 100 and 200 feet due to the blinding glare.

Zander's expert, Daniel Lofgren, testified that when Moeller's car crested the last hill before the impact, he was 354 feet from the point of eventual impact. Mr. Lofgren opined that based on his analysis, if Moeller would have stopped or moved three feet to the right the accident would have been avoided. Additionally, he testified that at one point while cresting the hill, Moeller would not have been in the line of sight of the tractor's headlights.

At the close of trial, the jury returned a verdict finding Moeller to have been 55% at fault, Zander to have been 45% at fault, and assigned no fault to Case IH. Case IH had been placed on the special-verdict form over appellant's objection. Appellant moved for JMOL. Appellant argued that no evidence was admitted from which a jury could

reasonably conclude that Moeller operated his car in a negligent manner or that there was any negligence on his part that caused the crash.

Appellant also moved for a new trial on liability, arguing that the district court made erroneous and prejudicial evidentiary determinations. Specifically, appellant argued that the district court erred in admitting evidence of "zig zag" rolling papers and a pipe smelling of illicit substances found in the car that Moeller was driving after the crash, admitting evidence of Moeller's prior history of drug and alcohol use, admitting evidence of drug metabolites found in his post-accident urine sample, admitting evidence relating to the settled products-liability suit with Case IH, by including Case IH on the special-verdict form, and by permitting testimony from Zander's expert, Daniel Lofgren.

The district court denied appellant's motion for JMOL, concluding that there was sufficient evidence presented to the jury for it to determine that Moeller could have avoided the accident with due care. The district court also denied appellant's motion for a new trial, concluding that there were no evidentiary errors that prejudiced the outcome of the trial.

Appellant argues that the district court erred in denying her motions for JMOL and a new trial. Appellant also argues that the district court erred as a matter of law when it concluded that no joint enterprise existed with the dismissed defendants in the bifurcated court trial.

D E C I S I O N

I. Motion for JMOL

This court reviews a motion for JMOL de novo. *Daly v. McFarland*, 812 N.W.2d 113, 119 (Minn. 2012). Rule 50.02 permits the district court to enter JMOL after "a party

has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." When this court reviews the denial of a JMOL it must consider all the evidence presented, both that supporting the verdict and that supporting the motion. *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983). "JMOL is inappropriate if jurors could differ on the conclusions to be drawn from the record" and "we review the evidence in the light most favorable to the prevailing party," which in this case is Zander. *Daly*, 812 N.W.2d at 119.

The apportionment of causal negligence is a question for the jury. *Riley v. Lake*, 203 N.W.2d 331, 340 (Minn. 1972). Thus, in a negligence action, we will not overturn a jury's verdict where there is evidence of both parties' fault. *Id.* Therefore, the question before this court is whether there is evidence from which a jury could place causal fault on Moeller.

Appellant argues that JMOL should have been granted because there was no evidence presented to the jury indicating that Moeller negligently operated his vehicle or was a cause of the accident. However, drivers have a duty to operate motor vehicles with due care, and this includes a duty to become aware of and avoid potential hazards. For example, Minnesota statutes provide that individuals driving on highways are "responsible for becoming and remaining aware of the actual and potential hazards then existing on the highway and must use due care in operating a vehicle" and "in every event speed shall be so restricted as may be necessary to avoid colliding with any . . . vehicle," which requires driving "at an appropriate reduced speed . . . when approaching a hill crest, . . . and when special hazards exist with . . . other traffic." Minn. Stat. § 169.14, subds. 1, 3(a) (2018).

Consideration of a driver's duty to utilize due care to avoid potential hazards supports the jury's verdict. There was evidence presented that appellant could have become aware of the potential hazard created by Zander and that he could have avoided the hazard with due care. Specifically, accident reconstructionist Daniel Lofgren testified that Moeller could have avoided the accident had he "slowed down to a reasonable speed." Lofgren testified that Moeller

> . . . could have stopped, um, upon seeing the bright white lights when he came over the crest the last time, he also could have slowed to the point there was—there was five feet of room of gravel shoulder and asphalt and he only needed to move to the right three feet. So if you're slowed down appropriately, you can maneuver to the right and use the gravel that's available there.

Moreover, there was no evidence at trial that Moeller attempted to avoid the accident. To the contrary, Moeller's brother testified that prior to the accident he did not observe or feel Moeller turn the wheel or apply the brakes. There were no tire marks from Moeller's car before impact which would indicate braking, swerving, or any other quick maneuvers. And no evidence was presented that Moeller slowed down when he approached the top of the hill.

Consequently, because there is evidence in the record from which a jury could conclude that Moeller failed to exercise due care in approaching a potential hazard, and there is evidence that with the exercise of due care he could have perceived and avoided it, the district court did not err when it denied appellant's motion for JMOL.

II. Motion for a New Trial

Appellant made a posttrial motion, in the alternative, for a new trial, arguing that multiple evidentiary errors prejudiced the outcome of the trial. The district court is afforded broad discretion when ruling on evidentiary matters and will not be reversed absent an abuse of that discretion. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006). Even if the district court makes an improper evidentiary determination, a new trial will only be granted if the improper evidentiary ruling prejudiced the complaining party. *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006).[1]

Drug-Related Evidence

Evidence that Moeller may have been intoxicated at the time of the crash and other drug-related evidence was admitted at trial over appellant's objection. Specifically, the district court admitted (1) evidence of Moeller's prior drug use, (2) evidence of "Zig Zag" rolling papers and a pipe containing marijuana residue that were found in Moeller's car after the accident, and (3) evidence of THH metabolites and benzodiazepine found in Moeller's post-accident urine sample. The district court reasoned that the drug-related evidence was relevant circumstantial evidence that Moeller was potentially impaired at the

[1] Respondents filed a motion to strike portions of appellant's reply brief that raise issues not presented in appellant's principal brief. The portion of appellant's reply brief that respondents ask us to strike relates to whether this court should grant a new trial on the allocation of fault. Because we have concluded that based on the evidence this decision is left to the jury, we deny respondents' motion as moot.

time of the accident. *See VanHercke v. Eastvold*, 405 N.W.2d 902, 906 (Minn. App. 1987) (evidence of a motorist's potential intoxication at the time of an accident is relevant to both causation and comparative fault).

Appellant asserts that the district court should have required Zander to produce direct evidence of intoxication before he could make an argument to the jury that Moeller was potentially impaired at the time of the accident. Specifically, appellant argues that the presence of THC and benzodiazepine metabolites in Moeller's post-accident urinalysis does not correlate to intoxication at the time of the crash, and therefore, expert testimony was required to explain how the controlled substances found in Moeller's system equate to intoxication at the time of the crash. However, as indicated by respondents, appellant makes these assertions without citing to any scientific authority or expert testimony in the record. Appellant also does not cite to any legal authority that would have required Zander to produce expert testimony on the issue before arguing that Moeller was potentially intoxicated.[2]

Appellant cites two cases for the proposition that the evidence of potential intoxication should have been excluded: *Mueller v. Sigmond*, 486 N.W.2d 841, 843-44 (Minn. App. 1992) (this court excluded evidence of an accident victim's potential intoxication but stated that "[h]ad Sigmond shown that Mueller's drinking contributed to cause" the accident, the probatory nature of the evidence would not have been substantially outweighed by the risk of prejudice, and would have been admissible), and *Hastings v.*

[2] Appellant's medical expert testified that THC and benzodiazepine could impair one's driving ability.

United Pacific Ins. Co., 396 N.W.2d 682, 684 (Minn. App. 1986) (summary judgment was proper where there was no evidence that the driver's intoxication caused accident). However, in *Mueller* and *Hastings* the evidence of potential intoxication was excluded because there was no evidence that the victims of the accidents were contributorily negligent. But here, there was evidence that Moeller failed to exercise due care when approaching a potential hazard. Additionally, this court in *Mueller* evaluated the district court's decision to admit evidence of potential intoxication under Minn. R. Evid. 403.

The district court found that the drug-related evidence's probative value was not substantially outweighed by the danger of unfair prejudice. "Such exclusion is within the trial court's discretion." *Mueller*, 486 N.W.2d at 844. The evidence here permitted the inference that Moeller had time to observe the potential hazard and avoid it, but did not. *See id.* at 844-45. The district court did not abuse its discretion by admitting the evidence.

Finally, even if the district court abused its discretion by admitting the drug-related evidence, appellant cannot demonstrate the requisite prejudice required for the grant of a new trial. The record contains sufficient evidence of Moeller's fault independent of any evidence that may have shown Moeller was intoxicated at the time of the accident. Moreover, the district court crafted an instruction that specifically addressed the concern that the jury would use the drug-related evidence for improper purposes. The instruction stated:

> If a person was intoxicated, that does not necessarily prove he or she was negligent. However, an intoxicated person is required to use the same care required of a sober person. *The mere fact that Plaintiff had THC metabolite in his blood does*

> *not necessarily mean that he was under the influence and does not in and of itself constitute contributory negligence.*[3]

(Emphasis added.)

This instruction told the jury that the THC found in Moeller's system did not mean that he was under the influence of the drug and that it did not by itself constitute contributory negligence. We assume that the jury followed the court's instructions. *State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009). Consequently, because the jury could have reached its verdict based on the other evidence, and because the jury instruction lessened any prejudicial effect of the drug evidence, appellant cannot establish the requisite prejudice, even if the district court erred.

Expert Testimony

Appellant challenges the admission of the testimony from Zander's expert witness, Daniel Lofgren. Appellant asserts that Lofgren's testimony "relied heavily" upon a photograph taken by Case IH's expert "known to be lacking in foundational reliability." However, respondents argue that Lofgren did not rely upon the challenged photograph taken by Case IH's expert. Respondents state that Lofgren laid foundation for his opinion and he described the materials and investigations he relied upon, and in doing so, he did not list the photograph.

As respondents articulate, appellant fails to cite to the record where she claims Lofgren relied upon the alleged photograph and a review of his testimony does not support her claim. Moreover, appellant's reply brief does not address respondents' claim that there

[3] The district court meant to say urine instead of blood.

is nothing in the record to suggest that Lofgren relied on the photograph. Without evidence in the record showing that Lofgren relied on the photograph at trial, it cannot be said that the district court abused its discretion by permitting Lofgren to testify.

Errors concerning the settled claim against Case IH

Shortly before trial, Case IH was dismissed from the lawsuit pursuant to a *Pierringer* settlement agreement it entered into with appellant. However, the district court, over appellant's objection, permitted Zander to introduce evidence of Case IH's fault and to place Case IH on the special-verdict form. Specifically, the district court admitted Case IH's interrogatories and appellant's answers, as well as a redacted expert report prepared by appellant's products-liability expert, who was absent at trial. The district court determined that the evidence related to Case IH's fault warranted placing Case IH on the special-verdict form.

Even if the district court erred by admitting this evidence and by submitting Case IH's fault to the jury, appellant cannot demonstrate the requisite prejudice for a new trial. This is because despite the admission of evidence relating to Case IH, the jury returned a verdict that found Case IH zero percent at fault. Thus, the result of the case would have been the same, with or without the evidence—that is Case IH would still have had zero percent of the liability placed on it.

Appellant argues that the evidence, particularly the redacted expert report, did prejudice the trial because Zander used the evidence in closing argument where he asked the jury to find that Zander was not negligent. However, the jury rejected any suggestion that Zander was not negligent with regard to his operation of the tractor and placed

significant fault on him. Consequently, because the evidence relating to the settled products-liability claim with Case IH and Case IH's presence on the special-verdict form did not prejudice appellant, the district court did not err by denying appellant's motion for a new trial.

Because we have concluded that the district court did not err by denying appellant's motions for JMOL and a new trial, appellant's remaining argument relating to the liability of the other respondents for their alleged participation in a joint enterprise is moot and we decline to address it.

Affirmed; motion denied.