STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0968

Patricia J. Marquardt,
Respondent,

vs.

James M Schaffhausen, et al.,
Appellants,

Steven M. Dittes, et al.,
Defendants,

Steven W. Sonnesyn, et al.,
Defendants.

Filed September 8, 2020
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CV-16-12770

Douglas E. Schmidt, Stephanie J. Winter, Schmidt & Salita, Minnetonka, Minnesota; and

Eric J. Magnuson, Robins Kaplan, L.L.P., Minneapolis, Minnesota; and

Patrick Stoneking, Jeff Anderson & Associates, St. Paul, Minnesota (for respondent)

Richard J. Thomas, Chad J. Hintz, Burke & Thomas, PLLP, Arden Hills, Minnesota (for appellants)

Considered and decided by Reyes, Presiding Judge; Jesson, Judge; and Cochran, Judge.

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

REYES, Judge

Appellants, Dr. James M. Schaffhausen and Twin Cities Orthopedics, P.A., challenge a judgment in favor of respondent Patricia J. Marquardt following a jury trial on her medical-malpractice claims against appellants. We issued a decision in the appeal in May 2019. In April 2020, the Minnesota Supreme Court reversed our May 2019 decision and remanded to us for consideration of issues raised on appeal but not addressed in our May 2019 decision. We allowed supplemental briefing, and we now reject appellant's remaining arguments for reversal. Accordingly, we affirm.

FACTS

The facts underlying this appeal are thoroughly set forth in both the supreme court's opinion and this court's previous opinion. *See Marquardt v. Schaffhausen*, 941 N.W.2d 715 (Minn. 2020) (*Marquardt II*); *Marquardt v. Schaffhausen*, No. A18-0968, 2019 WL 2167475 (Minn. App. May 20, 2019) (*Marquardt I*), *rev'd* 941 N.W.2d 715 (Minn. 2020). We provide a brief summary below.

In January 2012, Dr. Schaffhausen performed a knee-replacement surgery on Marquardt at Fairview Ridges Hospital in Burnsville. Three days after the surgery, a culture taken during the surgery came back positive for Methicillin-resistant Staphylococcus aureus (MRSA), a type of staph infection. Marquardt was prescribed a six-week course of the antibiotic vancomycin and discharged from the hospital. She returned to her home in Superior, Wisconsin.

A week after her post-surgical discharge, home monitoring detected dangerously high vancomycin levels in Marquardt's bloodstream. Marquardt went to St. Mary's Hospital in Duluth, where doctors diagnosed her with vancomycin toxicity, acute renal failure, anemia, and MRSA. Marquardt remained at St. Mary's for 11 days, and returned to the hospital several times over the following months.

Throughout her hospitalizations, Marquardt continued to fight the MRSA infection, and she developed neurological deficits. Two neurologists treated her at St. Mary's and reached different diagnoses. During her first two visits, neurologist Laura Boylan diagnosed her with acute disseminated encephalomyelitis (ADEM). During a third visit, neurologist Mostafa Farache diagnosed her with posterior reversible encephalopathy syndrome (PRES). Marquardt's neurologic deficits have persisted despite the ultimately successful treatment of her MSRA infection.

Marquardt commenced this medical-malpractice action against appellants in June 2016, alleging that Dr. Schaffhausen departed from the standard of care before, during, and after her surgery, and that his departures caused her brain damage. The district court held a jury trial on Marquardt's claims in October 2017. The jury found Dr. Schaffhausen causally negligent, attributed 80% of fault to him, and awarded $2.5 million in damages. The district court entered judgment on the jury's verdict, and appellants moved for judgment as a matter of law (JMOL) or a new trial, both of which the district court denied.

This appeal followed. In *Marquardt I*, this court, in a divided decision, reversed the district court's denial of a motion for a new trial on the ground that Marquardt's experts were not qualified to testify as to causation. 2019 WL 2167475, at *5. We did not reach

four additional issues appellants raised because our expert-qualification holding was dispositive. *Id.*[1] In *Marquardt II*, the supreme court reversed our decision, determining that the district court did not abuse its discretion by allowing Marquardt's experts to testify, and remanded to us for consideration of the remaining issues raised by appellants. 941 N.W.2d at 722-23.

D E C I S I O N

Appellants challenge the district court's denial of JMOL and its denial of a new trial. We review the denial of JMOL de novo, making an "independent determination of the sufficiency of the evidence." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 54-55 (Minn. 2019) (quotation omitted). "Judgment as a matter of law may be granted only when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome." *Id.* (quotation omitted).

We review the denial of a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). "[W]e will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Wash. Cty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted). "Verdicts are upset only in extreme circumstances." *Bolander v. Bolander*, 703

[1] Judge Jesson dissented from our expert-qualification holding and addressed the remaining issues raised by appellants. *See id.* at *7-13 (Jesson, J., dissenting). This decision is consistent with the analysis of Judge Jesson's dissent on the remaining issues.

N.W.2d 529, 545 (Minn. App. 2005) (citing *Ralph Hegman Co. v. Transamerica Ins. Co.*, 198 N.W.2d 555, 558 (Minn. 1972)), *review dismissed* (Minn. Nov. 15, 2005).

The four issues remaining for our consideration following the supreme court's remand are: (1) whether Marquardt presented sufficient evidence of causation to support the jury's verdict; (2) whether the district court abused its discretion by admitting Marquardt's medical records containing Dr. Boylan's ADEM diagnosis without requiring Dr. Boylan to testify; (3) whether the district court abused its discretion by denying a new trial based on improper closing argument by opposing counsel; and (4) whether the district court abused its discretion by denying a new trial on damages for past medical expenses. We address each issue in turn.

I. The district court appropriately denied appellants' requests for JMOL and a new trial because sufficient evidence supports the negligence claim.

Appellants argue that the district court erred by denying JMOL and abused its discretion by denying a new trial on the ground that Marquardt failed to provide sufficient evidence that Dr. Schaffhausen's negligence caused her brain damage. We disagree.

A plaintiff satisfies the causation element of a medical-malpractice action by showing that it is more probable than not that her injury resulted from the defendant health-care provider's negligence than from something for which defendant is not responsible. *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 333 (Minn. 2013); *see also Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980) (*Cornfeldt II*). Causation typically must be

proved through expert testimony and may not be based on the jury's speculation. *See Reinhardt v. Colton*, 337 N.W.2d 88, 94-95 (Minn. 1983). However,

> the rule that a verdict in a malpractice case cannot be based on speculation or conjecture as to cause does not necessarily require that the plaintiff prove causation by direct and positive evidence which excludes every other possible hypothesis as to the cause of the injuries. Generally, it is held that, after a fair preponderance of evidence discloses facts and circumstances proving a reasonable probability that the defendant's negligence or want of skill was the proximate cause of the injury, the plaintiff has supported his burden of proof sufficiently to justify a verdict in his behalf.

Schulz v. Feigal, 142 N.W.2d 84, 89 (Minn. 1966). Based on our careful review of the trial record, we conclude that, although not overwhelming, the testimony offered by Marquardt's experts was sufficient to support the jury's verdict on causation.

Marquardt offered two theories of causation at trial, one assuming that she developed ADEM as Dr. Boylan diagnosed, and one assuming that she developed PRES as Dr. Farache diagnosed. Dr. Stark, an orthopedic surgeon like Dr. Schaffhausen, provided an opinion central to both theories: that Marquardt's post-surgical complications could have been avoided if Dr. Schaffhausen had postponed the surgery and proceeded with a conservative course of treatment of cleaning out the knee, waiting for the culture results, and treating the MRSA infection under the close supervision of infectious-disease specialists. Dr. Stark testified to a 90-95% chance that the MRSA infection would have been cured without complications had Dr. Schaffhausen proceeded conservatively. And Dr. Stark testified that, regardless of whether Marquardt had ADEM or PRES,

Dr. Schaffhausen's deviations from the standard of care caused her post-surgery neurological deficits.

In support of the ADEM theory, Dr. Stark testified that the spread of the MRSA infection caused by the sawing and cutting during the surgery triggered the ADEM. Dr. Stephan, an infectious-diseases doctor who treated Marquardt at St. Mary's in Duluth, testified that the MRSA infection was present in Marquardt's knee at the time of the surgery performed by Dr. Schaffhausen and that he saw evidence of the MRSA infection spreading, including swelling, redness, heat to the joint, and positive blood cultures by the time he saw Marquardt at St. Mary's. He testified that the surgery created a "highly likely situation" for the infection to spread into the bone and that it could spread into the bloodstream as well.

In addition to Marquardt's primary theory of ADEM at trial, she also offered expert testimony in support of the PRES theory. Dr. Stark testified that the MRSA infection caused sepsis that contributed to impairment in Marquardt's renal function and a spike of her vancomycin toxicity. And he testified that the PRES would not have occurred had Marquardt remained in the hospital for monitoring.

Appellants argue that Marquardt's causation evidence is insufficient under either theory because (1) she offered no evidence that the spread of the MRSA infection caused the ADEM rather than the infection itself, which was not attributable to any conduct by Dr. Schaffhausen and (2) she did not prove that the vancomycin toxicity, which caused the PRES, could have been avoided if the surgery were postponed. We conclude that these arguments demand too much. As we note above, Marquardt did not have to "prove

causation by direct and positive evidence which excludes every other possible hypothesis as to the cause of the injuries." *Schulz*, 142 N.W.2d at 89. Moreover, the jury could reasonably infer from the testimony of Marquardt's experts that postponing the surgery would have allowed Marquardt's MRSA infection to be treated more quickly and without complications. We therefore reject appellants' assertion that insufficient evidence supports a chain of causation. *See Knuth v. Emergency Care Consultants, P.A.*, 644 N.W.2d 106, 112 (Minn. App. 2002) (reasoning that, "[d]espite the thinness of the causation evidence," expert testimony was sufficient to allow jury to reasonably imply chain of causation), *review denied* (Minn. Aug. 6, 2002).

The parties hotly contested causation at trial and presented the jury with competing evidence. Both Dr. Stark and Dr. Stephan were subject to rigorous cross-examination by appellants' counsel, and appellants offered the testimony of their own experts, who disagreed with Dr. Stark's and Dr. Stephan's opinions.[2] "As a reviewing court, we do not determine which experts we would have believed, but whether the jury had adequate facts to support its finding of causation." *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 387 (Minn. App. 2001), *review denied* (Minn. May 16, 2001). Although a close issue, we cannot conclude that "the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome," as we must to conclude the necessity of JMOL. *Kedrowski*, 933 N.W.2d at 55 (quotation omitted). Nor are we persuaded that the jury's

[2] The disagreements among the experts were not absolute. As the district court noted, even Dr. Farache, who made the PRES diagnosis and testified for appellants, could not exclude ADEM as a possible diagnosis.

verdict is "manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict," as required to conclude that the district court abused its discretion by denying a new trial. *Navarre*, 652 N.W.2d at 21. Accordingly, we reject appellants' argument for JMOL or a new trial.

II. The district court did not abuse its discretion by denying a new trial based on its admission of Dr. Boylan's ADEM diagnosis without her testimony.

Appellants argue that the records of Dr. Boylan's ADEM diagnosis should have been excluded because they contain an opinion on a "highly controversial" issue central to Marquardt's medical-malpractice claims. We are not persuaded.[3]

The district court exercises broad discretion in making evidentiary rulings, and we will not reverse such rulings absent an abuse of that discretion. *See Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). Medical records are generally admissible under the business-records exception to the hearsay rule. *See In re Martin*, 458 N.W.2d 700, 703 (Minn. App. 1990) (citing Minn. R. Evid. 803(6))[4]; *see also Wadena v. Bush*, 232 N.W.2d 753, 758 (Minn. 1975) (recognizing admissibility of hospital records germane to medical history, diagnosis, or treatment under Uniform Business Records as Evidence Act before adoption of Minnesota Rules of Evidence).

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[3] In her supplemental brief submitted following remand by the supreme court, Marquardt argues that appellants waived any objection to admission of Dr. Boylan's ADEM diagnosis by failing to object to the admission of other evidence containing references to an ADEM diagnosis. We decline to address this argument because Marquardt did not raise it in her principal brief. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (noting that issues not raised in principal brief generally will not be considered).

[4] As to commitment proceedings, the Minnesota Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Acts supersedes *Martin*.

Appellants rely primarily on two cases to support their argument: the supreme court's decision in *Cornfeldt*, 262 N.W.2d 684 (Minn. 1977) (*Cornfeldt I*), and the Eighth Circuit's decision in *Skogen v. Dow Chemical Co.*, 375 F.2d 692 (8th Cir. 1967). Those decisions affirmed the discretionary decisions of trial courts to exclude hospital records. *Cornfeldt I*, 262 N.W.2d at 640-41; *Skogen*, 375 F.2d at 704-05. Appellants urge us to rely on these cases in reversing the district court's discretionary decision, which we will not lightly do. Moreover, as the district court noted, *Skogen* and *Cornfeldt* are distinguishable on their facts, having involved disputes over the causes of the plaintiffs' injuries, rather than mere medical diagnoses, such as Dr. Boylan's ADEM diagnosis. *See Skogen*, 375 F.2d at 704 (affirming exclusion of conclusion that medical condition caused by inhalation of insect poison; *Cornfeldt I*, 262 N.W.2d at 640 (affirming exclusion of hospital record containing diagnosis of "halothane hepatitis" regarding dispute over whether halothane could cause hepatitis).[5] We additionally note that the claims in both *Cornfeldt* and *Skogen* were tried before the adoption of the Minnesota Rules of Evidence, which governed the district court's decision in this case.[6] Under Minn. R. Evid. 803(6), business records are

[5] In their supplemental brief, appellants also rely on this court's decision in *In re Child of Simon*, 662 N.W.2d 155 (Minn. App. 2003). In that case, this court expressly recognized that "[b]usiness records qualify for admission under the business-records exception even if they include opinions or diagnoses," but reasoned that "a business record containing an opinion on an ultimate issue is admissible only if the witness offering the opinion is available to permit the fact-finder to test the weight and credibility of the opinion through cross-examination." *Id.* at 161 (citing *Skogen*, 375 F.2d at 704-05) (additional citations omitted). *Simon* is distinguishable from this case for the same reason that *Cornfeldt* and *Skogen* are, namely, that Dr. Boylan's ADEM diagnosis is not an opinion on an ultimate issue.

[6] The Minnesota Rules of Evidence took effect July 1, 1977. The supreme court decided *Cornfeldt* on December 30, 1977, and the parties necessarily tried the case earlier than that.

"not excluded by the hearsay rule, *even though the declarant is available as a witness . . .* unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." (Emphasis added.) Appellants do not argue that the plain language of the governing rule requires exclusion.[7] In sum, the district court did not abuse its discretion by admitting hospital records containing Dr. Boylan's ADEM diagnosis, or by denying a new trial on this ground.

III. The district court did not abuse its discretion by denying appellants' new trial request based on Marquardt's closing argument.

Appellants argue that the district court abused its discretion by denying a new trial based on Marquardt's counsel's improper closing argument. We disagree.

We will not reverse a district court's decision to grant or deny a new-trial request based on attorney misconduct absent a clear abuse of discretion. *Jewett v. Deutsch*, 437 N.W.2d 717, 721 (Minn. App. 1989); *see also Poston v. Colestock*, 540 N.W.2d 92, 94 (Minn. App. 1995) ("Appellate courts rarely disturb a district court's response to improper remarks in closing arguments."), *review denied* (Minn. Jan. 25, 1996). A new trial is not warranted unless the improper statement resulted in prejudice to the losing party that is

[7] A district court may exclude business records, including medical records, under Minn. R. Evid. 403 on the ground that their prejudicial effect outweighs their probative value. In their supplemental brief, appellants cite a secondary source suggesting the application of rule 403. Any intended argument regarding rule 403, however, is not sufficiently developed to warrant our consideration. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (holding that assignment of error unsupported by argument or authority is waived "unless prejudicial error is obvious on mere inspection"). Nor did appellants' principal brief preserve the argument. *See Moorhead Econ. Dev. Auth.*, 789 N.W.2d at 887.

sufficient to affect the outcome of the case. *Connolly v. Nicollet Hotel*, 104 N.W.2d 721, 731-32 (Minn. 1960).

Appellants argue that Marquardt's counsel's closing argument incorrectly linked appellants' expert Dr. Gregory Filice's testimony that sepsis results in ischemia and perfusion to Dr. Farache's testimony that PRES is a perfusion, to reach the ultimate conclusion that the spread of infection causes PRES. The district court agreed that Marquardt's counsel confused Dr. Filice's testimony by conflating ischemic perfusion (reduced blood flow) with *hyper*-perfusion (increased blood flow), but disagreed that counsel "deliberate[ly] attempt[ed] to confuse the jury by blurring the line between [ADEM and PRES]." The district court reasoned that, "[h]aving listened to the closing argument—which is a markedly different experience than reading it from a transcript—[Marquardt's] counsel's misstatement came across more as lexical confusion than a deliberate or malicious attempt to distort the juror's recollection of the record." The district court held that, "in light of the whole trial, the evidence received, the instruction given to the jurors that they were to rely on their own recollection of the facts, and the general lack of any clarity in the relevant section of [Marquardt's] counsel's closing," the misstatement did not result in prejudice.

We are not persuaded that the district court abused its very broad discretion by denying a new trial on this ground. We defer to the district court's superior ability to gauge the impact of the challenged statements in view of the trial as a whole. *See Fischer v. Mart*, 241 N.W.2d 320, 321-22 (Minn. 1976) (noting that, by being present during trial and observing its impact, district court in best position to determine whether attorney's

misconduct prejudiced jury). And we note that, in addition to the district court instructing the jury that arguments of counsel are not evidence, each of the attorneys in his closing argument strongly encouraged the jury to view the other attorney's argument with skepticism. *See Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 630 (Minn. 2012) ("We presume that juries follow the instructions they are given."). Accordingly, we reject appellants' argument that the district court abused its discretion by denying a new trial on this ground.

IV. The district court did not abuse its discretion on the damages awarded.

Appellants argue that the district court abused its discretion by denying a new damages trial because Marquardt failed to show which of her medical expenses Dr. Schaffhausen's negligence caused. We are not persuaded.

Again, here, the district court has broad discretion. *See Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984). "Generally, a new trial on damages will be granted only where the verdict is so inadequate or excessive that it could only have been rendered on account of passion or prejudice." *Rush v. Jostock*, 710 N.W.2d 570, 577 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. May 24, 2006).

Marquardt requested that the jury award $500,000 for past medical expenses based on evidence that she submitted of amounts billed for her care after her discharge from Fairview Ridges following Dr. Shaffhausen's surgery. The jury awarded the full amount. Appellants argue that Marquardt failed to submit sufficient evidence connecting all of her post-discharge expenses to Dr. Schaffhausen's negligence. *See, e.g., Rowe v. Munye*, 702 N.W.2d 729, 742 (Minn. 2005) ("The defendant should be responsible only for the injuries

that are legally caused by the defendant's negligence."). The district court rejected this argument, reasoning that, although the expert testimony was not "directed explicitly at the question of damages, there was enough evidence about the various treatments provided and their necessity for the jury to base a determination of which expenses were causally related to Dr. Schaffhausen's, and the other doctors', negligence and which were not." The district court also noted that the damages issue is inextricably tied to the causation issue. The district court concluded that, even if it were to find "some fault in the jury's past-medical expense determination," the award is "not so manifestly and palpably contrary to the evidence viewed as a whole that it would warrant a new trial." We discern no abuse of discretion by the district court.

Appellants argue that a new trial is required because Marquardt failed to submit sufficient evidence that all of her medical expenses were "reasonable and necessary," relying on *Birdsall v. Duluth-Superior Transit Co.*, 267 N.W. 363 (Minn. 1936). In *Birdsall*, the supreme court rejected an argument that claimed medical expenses were unnecessary, reasoning that "[t]here is no showing that any other care, nursing, or medical attention than that here given would have sufficed." *Id.* at 365. Appellants do not argue that Marquardt received unnecessary medical care; rather they argue that Dr. Schaffhausen's negligence did not necessitate all of the medical care. Thus, *Birdsall* is inapposite, and we reject appellants' argument that the district court abused its discretion by denying a new trial on this ground.

Affirmed.