STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0693
A20-1587

Raymond Kvalvog, et al.,
Appellants,

vs.

Josh Lee, et al.,
Respondents,

Secura Insurance,
Defendant.

Filed July 19, 2021
Affirmed
Larkin, Judge

Clay County District Court
File No. 14-CV-16-4157

Kenneth R. White, Law Office of Kenneth R. White, P.C., Mankato, Minnesota; and

Andrew D. Parker, Parker Daniels Kibort LLC, Minneapolis, Minnesota (for appellants)

Stephen M. Warner, Paul J. Rocheford, Timothy J. Carrigan, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

In these consolidated appeals following a jury trial on negligence claims, appellants assign error to the district court's special-verdict form and jury instructions, denial of a motion for a new trial, denial of posttrial discovery, and denial of a motion seeking relief from final judgment. We affirm.

FACTS

In June 2015, Zachary and Connor Kvalvog were tragically killed in a motor-vehicle accident on Interstate 94 while driving from Minnesota to Wisconsin to compete in a summer basketball tournament for high school teams. The boys played for the Park Christian School (PCS) basketball team, which was coached by Josh Lee (Lee). Zachary, who was 18 years old at the time, was driving his parents' pickup truck. His younger brother Connor and teammates Mark Schwandt (Schwandt) and Jimmy Morton (Morton) were also in the pickup.

Zachary's pickup was positioned last in a convoy of three vehicles. Tim Kerr (Kerr), PCS's football coach, drove the lead vehicle, and Lee drove the second vehicle. Around 9:00 a.m., the convoy approached a semi. Kerr and Lee drove past the semi in the left lane. As Zachary attempted to pass the semi, it moved into his lane, causing him to take evasive action and lose control of the pickup. The pickup crossed into the median and rolled, killing Zachary and Connor. Schwandt and Morton survived. The semi driver was never identified.

The boys' parents, Raymond and Katherine Kvalvog (appellants), commenced a lawsuit against Lee and PCS (respondents). Appellants also sued the pickup manufacturer and their insurer, and later settled the liability issues regarding those claims. Respondents filed a third-party complaint against Raymond Kvalvog and the unidentified semi driver, alleging that they were contributorily negligent. Raymond Kvalvog later settled with respondents on the third-party claim.

In their amended complaint, appellants alleged that respondents "were in violation as coach and school [by] allowing operation of a vehicle by athletes as individuals to a school athletic tournament" and that Lee "failed to maintain a reasonable means of transportation to a school athletic event acting in a negligent and unlawful manner." They further alleged that "by operation of the doctrine of respondeat superior" PCS was "vicariously liable for any negligent act" of Lee "performed in the course and scope of his employment" at PCS.

Respondents moved for summary judgment, arguing that the crash was not foreseeable and that their actions were not the proximate cause of the accident. Respondents identified the four alleged negligent acts as follows: allowing Zachary to drive, positioning Zachary last in the convoy, speeding, and Lee's use of his cellphone. The district court denied respondents' motion. In doing so, the court concluded that allowing Zachary to drive was "not legally sufficient to establish proximate cause," but it could be considered in conjunction with other factors.

The case was tried to a jury. The evidence at trial indicated that on the morning of the accident, the individuals who were traveling to the tournament met at the PCS parking

lot. Raymond Kvalvog drove to the PCS parking lot that morning and was present when Zachary drove away in his parent's pickup. Trial testimony indicated that the convoy was speeding. At trial, appellants questioned Lee about allegedly demanding that Zachary "keep up" during the trip. Lee denied making that demand.

The jury heard conflicting expert testimony regarding the cause of the crash. Appellants' expert opined that speed and Zachary's position in the convoy were factors in the accident. Respondents' expert testified that speed and positioning did not cause the accident. The jury also heard testimony from Minnesota State Trooper Rod Eischens (Sgt. Eischens), who appellants called as a witness. He testified that "although they were exceeding the speed limit, speed itself was not a factor in the crash" and that the "whole tragic chain of events was initiated by the semi encroaching into the left traffic lane, which caused Zachary to veer." Morton and Schwandt testified that they thought the semi moved within arm's reach of their seats in the pickup.

Evidence at trial indicated that, prior to the trip, Lee asked PCS Principal Chris Nellermoe to provide vans for travel to the tournament, but Nellermoe refused. Additionally, PCS's athletic handbook, which was admitted as evidence, stated that players traveling to out-of-town games were not supposed to drive themselves without written permission.

The district court submitted a special-verdict form to the jury, which asked the jury to determine whether the trip was a school activity, whether the semi driver was negligent, whether Lee was negligent, and whether Zachary was negligent. The special-verdict form also contained an instruction stating that allowing Zachary to drive "is not enough, by

itself," to find Lee negligent. The jury determined that the trip was a school activity, that the semi driver was negligent and caused the accident, that Lee was not negligent, and that Zachary was not negligent.

Appellants moved for judgment notwithstanding the verdict or a new trial. The district court denied the motion. Appellants filed an appeal, seeking review of the final judgment and order denying a new trial. Appellants then learned of a "close relationship" between Sgt. Eischens and some of the "leaders" at PCS. Appellants moved to stay the appeal to seek relief based on that newly discovered information. This court stayed the appeal.

Appellants moved the district court for relief from the final judgment pursuant to Minn. R. Civ. P. 60.02. The motion was primarily based on respondents' failure to disclose a perceived conflict of interest arising from personal connections between Sgt. Eischens and representatives of PCS, specifically, Nellermoe and former PCS president Kent Hannestad. According to appellants, the Eischens family was friends with the Nellermoe and Hannestad families.

Appellants subpoenaed Sgt. Eischens and other nonparties, seeking depositions and documents to support their rule 60.02 motion. The district court quashed the subpoenas, concluding that they were improperly issued. The court also denied appellants' rule 60.02 motion. Appellants filed a second appeal challenging those decisions. We dissolved the stay and consolidated the two appeals.

DECISION

I.

Appellants contend that the district court made two legal errors that "infected the entire proceeding." Specifically, they argue that the district court erred in concluding that the jury could not consider the fault of PCS "as an entity" and in concluding that allowing Zachary to drive, in itself, was insufficient to establish negligence. Those alleged errors manifested themselves at trial in the district court's special-verdict form, which did not ask the jury to determine if PCS was negligent and which stated that "[a]llowing Zachary Kvalvog to drive is not enough, by itself, to find Josh Lee negligent." Appellants also argue that the district court erred by failing to define the terms "supervision" and "trip" for the jury as those terms were used in the special-verdict form and by failing to instruct the jury regarding a particular portion of Minnesota's speeding statute.

The questions posed in a special-verdict form are limited by "the pleadings and evidence." Minn. R. Civ. P. 49.01(a). If the district court submits questions to a jury in a special-verdict form, it must "give to the jury such explanations and instructions concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.* "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." *Id.* In sum, a party who fails to object to the contents of a special-verdict form prior to its submission to the jury forfeits objection. *Larson v. Degner*, 78 N.W.2d 333, 338 (Minn. 1956); *H Window Co. v. Cascade Wood Prods.*, 596 N.W.2d 271, 274 (Minn. App. 1999),

review dismissed (Minn. Aug. 18, 1999); *Kath v. Burlington N. R.R. Co.*, 441 N.W.2d 569, 572 (Minn. App. 1989), *review denied* (Minn. July 27, 1989). Moreover, a party may not seek to benefit from an invited error. *Majerus v. Guelsow*, 113 N.W.2d 450, 457 (Minn. 1962).

Before instructing the jury and before closing arguments, a district court must inform the parties of its proposed jury instructions and give them an opportunity to object to those instructions. Minn. R. Civ. P. 51.02(a), (b). "A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection." Minn. R. Civ. P. 51.03(a). A party preserves an objection for appeal by asserting a proper objection pursuant to rule 51.03. Minn. R. Civ. P. 51.04(a). The failure to object to a jury instruction constitutes forfeiture of the issue on appeal. *Murphy v. City of Minneapolis*, 292 N.W.2d 751, 755 (Minn. 1980); *Germann v. F.L. Smithe Mach. Co.*, 381 N.W.2d 503, 509-10 (Minn. App. 1986), *aff'd*, 395 N.W.2d 922 (Minn. 1986).

Nonetheless, this court may review unobjected-to special-verdict forms and jury instructions for plain error. Minn. R. Civ. P. 51.04(b); *see Frazier v. Burlington N. Santa Fe Corp*., 811 N.W.2d 618, 626 (Minn. 2012), *as modified* (Apr. 19, 2012) (assuming application of the plain-error standard when reviewing alleged errors in special-verdict form and jury instruction). "Under the plain-error test, an appellate court reviews an assertion of error to determine (1) whether there is an error, (2) whether the error is plain, and (3) whether the error affects a party's substantial rights." *Poppler v. Wright Hennepin Coop. Elec. Ass'n*, 834 N.W.2d 527, 551 (Minn. App. 2013), *aff'd*, 845 N.W.2d 168 (Minn.

2014). If these requirements are satisfied, we consider whether correction of the error is necessary to ensure fairness and the integrity of the judicial proceedings. *Id.* "Failure to satisfy any of the prongs of the plain-error test dooms the claim." *Frazier*, 811 N.W.2d at 626.

With those principles in mind, we turn to appellants' challenges to the district court's special-verdict form and jury instructions.

Failure to Include PCS on the Special-Verdict Form

Appellants argue that the district court erroneously "limited the liability basis" by not including PCS on the special-verdict form as a potentially negligent party. As to that issue, appellants did not plead a claim of negligence against any PCS employee other than Lee. And at a pretrial hearing, appellants took the position that an "entity doesn't act itself" and explained that their claim against PCS was premised on vicarious liability for the acts of Lee, stating, "That's the case." Appellants initially proposed a special-verdict form asking whether PCS was negligent, but they ultimately agreed to a form that did not include that inquiry. Instead, the special-verdict form asked whether the tournament trip was a school event and whether Lee was negligent. The parties agreed that if the jury answered both of those questions in the affirmative, then PCS would be vicariously liable. In sum, appellants' claim against PCS was based on vicarious liability for the acts of Lee, and appellants agreed to a special-verdict form presenting that liability question to the jury. Because appellants did not object to the district court's failure to include PCS on the special-verdict form, we review for plain error.

In *Frazier*, the Minnesota Supreme Court considered unobjected-to errors in a special-verdict form and jury instructions regarding a defendant's duty of care in a wrongful-death case. *Id.* at 621. The main issue on appeal was whether the defendant was entitled to a new trial on liability based on an allegedly erroneous jury instruction regarding the defendant's duty of care. *Id.* The district court had instructed the jury to apply a common-law or "reasonable person" standard of care, and the defendant did not object to that instruction. *Id.* But after the jury returned a verdict in the plaintiffs' favor, the defendant moved for a new trial on several grounds, including that it could be held liable only if the plaintiffs proved that it failed to comply with a different standard of care, specifically, a standard of care established by applicable federal regulations. *Id.* The district court denied the new-trial motion. *Id.* at 622.

On appeal to this court, we applied the plain-error standard of review and reversed the district court's denial of a new trial. *Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 781 (Minn. App. 2010), *rev'd*, 811 N.W.2d 618 (Minn. 2012). This court concluded that the error in the jury instruction was plain, that it had affected the defendant's substantial right to a fair trial, and that the defendant was entitled to a new trial to ensure the fairness and integrity of the judicial proceeding. *Id.*

The supreme court reversed this court, concluding that "even if the instruction to the jury and special-verdict form question were erroneous, even if [the defendant] invited the error, and even if invited error is reviewable for plain error," the defendant was not entitled to a new trial. *Frazier*, 811 N.W.2d at 626. In so concluding, the supreme court emphasized that satisfaction of the first three parts of the plain-error standard does not

mandate reversal; instead, an appellate court "will address the error only if necessary to ensure fairness and the integrity of the judicial proceedings." *Id*. at 626-27 (quotation omitted). The supreme court stated that the plain-error exception is to be used sparingly. *Id.* at 627. The supreme court explained that the record in *Frazier* indicated that the defendant "litigated the case on one theory—common-law negligence—while at the same time attempting to preserve its right to a new trial on another theory—regulatory compliance." *Id.* at 628. The supreme court stated that "a reversal of the verdict here would allow a party to choose to try a case on one theory while holding a second theory in reserve for a possible appeal" and that granting a new trial after a party "knowingly tried the case" based on a later-challenged theory would "not accord with notions of fairness or ensure integrity in judicial proceedings." *Id.* Indeed, "reversal of the jury's verdict for this assumed error . . . would adversely impact the integrity of the judicial proceedings." *Id.*

Here, the record clearly indicates that appellants proceeded under the theory that PCS's liability stemmed from the acts of Lee. For example, respondents moved the district court to exclude testimony and argument that PCS was directly negligent and to omit PCS from the special-verdict form. At a hearing on that motion, the district court asked appellants to clarify their claim against PCS, and appellants confirmed that their claim was for vicarious liability based on the negligence of Lee. The district court asked appellants, "are you going to be arguing that [PCS] as an entity was negligent?" Appellants' counsel responded, "I don't think I can do that under the law, because the entity doesn't act itself. It acts through people." The district court stated, "you don't have a negligence claim against the school, other than a vicarious one, so you--." Appellants' counsel interrupted

and said, "That's correct." The district court continued, "--can't argue that the school was negligent, because you didn't bring that claim," and said, "the argument that the school is negligent by virtue of anything other than its vicarious liability for . . . Lee's negligence is impermissible argument." Appellants' counsel confirmed the district court's understanding of their claims, stating, "I have no issue with that" and "[t]hat's the case."

In addition, although appellants initially proposed a special-verdict form asking whether PCS was negligent, they ultimately agreed to a form that did not include that inquiry. The special-verdict form did not ask the jury to find whether PCS was negligent, and appellants did not object to that form, consistent with appellants' stated intent to establish PCS's liability under a vicarious-liability theory. Thus, the record indicates that appellants litigated the case against PCS on one theory—vicarious liability—and now seek a new trial on another theory—direct liability. Under the reasoning of *Frazier*, granting a new trial on the theory that PCS was directly liable for the deaths of Zachary and Connor after appellants knowingly proceeded against PCS solely on a vicarious-liability theory "would adversely impact the integrity of the judicial proceedings." *Id.*

In sum, assuming without deciding that the first three parts of the plain-error standard are satisfied, a new trial is not appropriate because correction of the error is not necessary to ensure fairness and the integrity of the judicial proceedings.

Special-Verdict Form Statement that Allowing Zachary to Drive Was in Itself Insufficient to Establish Negligence

Appellants argue that the district court erred by including, in the special-verdict form, a statement that "[a]llowing Zachary Kvalvog to drive is not enough, by itself, to

find Josh Lee negligent." Appellants did not object to the substance of that statement. In fact, appellants filed a motion in limine to exclude evidence that appellants had allowed Zachary to drive to the tournament, arguing, "there isn't just negligence by allowing somebody to drive." Although appellants objected to inclusion of the statement at issue in the special-verdict form, they did not assert that it was an erroneous statement of law; instead, they argued that the statement would be more appropriately included in the jury instructions. Because appellants did not object to the substance of the statement that allowing Zachary to drive did not in itself constitute negligence, we review for plain error.

The record indicates that appellants repeatedly agreed that allowing Zachary to drive was not, in itself, negligent, and proceeded at trial on that theory. For example, at a pretrial hearing, counsel for appellants argued:

> *[T]here isn't just negligence by allowing somebody to drive*. Unless you really, truly, I mean, it'd have to be a circumstance where you thought the person was the worst driver in the world and you said "they're still going to drive," maybe you could do that, but you need to show some negligence beyond that and there isn't any proof of that and that's why we bring that motion.

(Emphasis added.) As to the special verdict form, appellants' counsel argued:

> Next one is on the old 6, which is now 2, on the second sentence "allowing Zachary Kvalvog to drive is not enough by itself to find Josh Lee negligent." *It's plaintiffs' position that that's actually more of a jury instruction than a verdict form and if we're going to include language like that, it should be in the instructions.* Also, if we're going to include language like that, it should say "allowing Zachary Kvalvog to drive is not enough in itself to find negligence" and it shouldn't be specific to Josh Lee, because I think *that also deals with any issues concerning his parents letting him drive*.
> . . . .

> I would put it right under where the school activity definition is, is where I would put it in the jury instructions, but, I guess, my concern about it being specific to Josh Lee, is, then, *I'm expecting that there should not be any questions to my clients about, well, why did you let him drive.* And as long as there's no questions about that, then, it can stay with Josh Lee. But my -- *the law is, letting him drive in and of itself, does not create negligence*.
>
> . . . .
>
> *Because the law says letting him drive doesn't create negligence and that's what I'm asking for. If we had this -- that it be non-specific to an individual*.

(Emphasis added.)

The record shows that appellants' approach was a tactical decision intended to shield them from any blame for allowing Zachary to drive to the tournament. Thus, the record once again indicates that appellants litigated the case against PCS on one theory—allowing Zachary to drive was not in itself a negligent act—and now seek a new trial on another, contrary theory. Under the reasoning of *Frazier*, granting a new trial under those circumstances would adversely impact the integrity of the judicial proceedings.

In sum, assuming without deciding that the first three parts of the plain-error standard are satisfied, a new trial is not appropriate because correction of the error is not necessary to ensure fairness and the integrity of the judicial proceedings.

Failure to Define "Supervision" and "Trip" as Used in the Special-Verdict Form

The special-verdict form stated that Lee's liability was limited to his "supervision of the Wisconsin Dells tournament trip." Appellants argue that the district court's unobjected-to failure to define the terms "supervision" and "trip" constitutes reversible plain error because "if the jury limited its consideration to the time from the departure from

the parking lot to the crash, it ignored significant evidence and bases for fault." Because appellants did not object, we review for plain error. *See Poppler*, 834 N.W.2d at 550.

An error is plain if it is clear or obvious, which generally requires that the error violate caselaw, a rule, or a standard of conduct. *Id.* at 552. Appellants do not persuade us that the district court's failure to define the terms "supervision" and "trip" was clear or obvious error. Those are commonly understood terms. Moreover, appellants provided context for those terms during closing arguments. For example, appellants' counsel argued, "This case is simple. These boys were not taken care of on the road. They went too fast, they were put in the back of the caravan[,] and they were told through a phone call to keep up." Appellants' counsel also argued, "when they take control and they take those kids, that's when they're responsible." Appellants' counsel further argued that Lee "set up the trip" and that PCS, "through its employees, took control of these kids" and "violated their own [school] rules . . . about transporting these kids to this tournament." Given those arguments, we are not persuaded that the alleged error affected appellants' substantial rights.

In sum, appellants have not established a basis for relief under the plain-error standard.

Failure to Instruct the Jury Regarding a Particular Provision in Minnesota's Speeding Statute

Appellants argue that the district court erred by failing to instruct the jury that "[w]here no special hazard exists" 70 miles per hour on interstate highways outside the limits of certain urbanized areas "shall be lawful, but any speeds in excess of such limits

shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful." Minn. Stat. § 169.14, subd. 2 (2020). Because appellants did not object to the district court's instruction regarding speeding, we review for plain error.

The district court instructed the jury consistent with Minn. Stat. § 169.14, subd. 1 (2020), which states:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions. Every driver is 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. In every event speed shall be so restricted as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

Although speed was an issue at trial, and appellants presented evidence that speed may have caused the accident, appellants do not explain how the district court's failure to instruct the jury regarding specific speed limits resulted in plain error. Once again, an error is plain if it is clear or obvious, which generally requires that the error violate caselaw, a rule, or a standard of conduct. *Poppler*, 834 N.W.2d at 552. Appellants cite no caselaw, rule, or standard indicating that a district court must instruct a jury on the specific speeds that are prima facie evidence of unreasonable conduct under Minn. Stat. § 169.14, subd. 2. Moreover, appellants' failure to request the instruction may have been a matter of trial strategy. As the district court noted, appellants' failure to request a jury instruction regarding Minn. Stat. § 169.14, subd. 2, "could have been a strategic move . . . to avoid a contributory negligence finding in regards to Zachary's own speeding."

In sum, on this record, we are not persuaded that the district court erred in its jury instruction regarding Minnesota's speeding laws, that the error was plain, or that correction of the alleged error is necessary to ensure fairness and the integrity of the judicial proceedings. Appellants therefore are not entitled to relief under the plain-error standard.

Cumulative Error

Appellants argue that they are entitled to a new trial due to the cumulative effect of the alleged errors in the special-verdict form and jury instructions. "An appellant may be entitled to a new trial in rare cases where the errors, when taken cumulatively, have the effect of denying the appellant a fair trial." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). When determining whether cumulative error denied a defendant a fair trial, "reviewing courts balance the egregiousness of the errors against the weight of proof against the defendant." *State v. Swinger*, 800 N.W.2d 833, 841 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011).

Appellate courts have developed and applied the cumulative-error doctrine only in criminal cases. *See, e.g.*, *State v. Williams*, 908 N.W.2d 362, 366 (Minn. 2018); *Fraga*, 898 N.W.2d at 278; *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006). Indeed, appellants cite *State v. Underwood*, 281 N.W.2d 337, 344 (Minn. 1979), as support for their cumulative-error argument. Appellants do not identify any authority supporting application of the cumulative-error doctrine in this civil action.

Assuming without deciding that the doctrine applies here, we are not persuaded that the alleged errors in the special-verdict form and jury instructions resulted in an unfair trial. As discussed above, appellants either endorsed or did not object to the alleged errors, and

those alleged errors were not inconsistent with appellants' trial theory and strategy. Moreover, the egregiousness of the alleged errors in this case is simply incomparable to errors that have resulted in relief under the cumulative-error doctrine in criminal cases. *See, e.g.*, *State v. Mayhorn*, 720 N.W.2d 776, 791-92 (Minn. 2006) (concluding that the cumulative effect of 12 errors, which included "pervasive" and "unprecedented" prosecutorial misconduct as well as evidentiary errors, denied the defendant a fair trial).

In sum, appellants are not entitled to a new trial based on the cumulative effect of the alleged errors in the special-verdict form and jury instructions.

II.

Appellants contend that the district court erred by denying their motion for a new trial. A district court may grant a new trial if the verdict "is not justified by the evidence, or is contrary to law." Minn. R. Civ. P. 59.01(g). We review a district court's decision to deny a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

In determining whether a verdict is justified by the evidence, a district court is vested with "the broadest possible discretionary power." *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004) (quotation omitted). "[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) (quotations omitted). "We must reconcile the special-verdict answers in a reasonable manner consistent with the evidence and its fair inferences." *Id.* (quotation omitted).

Appellants argue that the district court erred in denying a new trial because the evidence established that Lee was negligent. The jury found that Lee was not negligent in his supervision of the trip, despite hearing testimony that Zachary's speed and position in the convoy caused the accident. Appellants point to evidence that Lee allowed Zachary to drive, in violation of school policy; evidence that Lee allowed Zachary to be the last car in the convoy; evidence that Lee was speeding and did not direct Kerr to slow down; evidence that Lee directed Zachary to keep up with Lee while driving; and evidence that after the crash Lee "spent his time on the telephone." Again, there was expert testimony that speed and positioning did not cause the accident and that the semi was the sole cause of the accident. The verdict is consistent with that testimony.

As to the evidence that Lee violated school policy by allowing Zachary to drive, PCS's internal policy does not have the force of law and did not per se establish a standard of care. *See Schmidt v. Beninga*, 173 N.W.2d 401, 408 (Minn. 1970) (noting that although company policies may be admitted as evidence of negligence, observance or failure to observe them does not by itself amount to due care or the lack of it). Moreover, evidence at trial and the verdict itself indicate that the accident did not result from any negligent driving by Zachary, and instead resulted from the semi driver's negligence. The PCS policy does not render the verdict manifestly and palpably contrary to the evidence.

As to Lee's alleged statement to Zachary to "keep up," at trial, Lee denied making such a statement. Viewing the evidence in a light most favorable to the verdict, the alleged statement does not provide grounds for a new trial. *See Navarre*, 652 N.W.2d at 21.

Moreover, Lee's use of his cellphone after the crash did not contribute to the crash, and such evidence is insufficient to overturn the verdict.

In sum, on this record the district court did not abuse its discretion by denying appellants' motion for a new trial.

III.

Appellants argue that the district court erred in quashing subpoenas intended to obtain evidence supporting their rule 60.02 motion. We review a district court's discovery determinations for an abuse of discretion. *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 305-06 (Minn. 1990). The district court will not be reversed unless it "abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *Id.* at 306. We review a district court's construction and application of the rules of civil procedure de novo. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

"A subpoena commanding attendance . . . at a deposition, or for production . . . shall be issued in the name of the court where the action is pending." Minn. R. Civ. P. 45.01(b). Discovery is limited to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Minn. R. Civ. P. 26.02(b). Under Minn. R. Civ. P. 27.02:

> *If an appeal has been taken from a judgment or order*, or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment or order was rendered may allow the taking of the deposition of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case, the party who desires to perpetuate the testimony may make *a motion in the*

> *district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court.* The motion shall show the names, addresses, the substance of the testimony expected to be elicited from each person to be examined, and the reasons for perpetuating their testimony. *If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken* and may make orders authorized by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(Emphasis added.)

In quashing appellants' subpoenas, the district court found that there was "no action pending" or remaining claims or defenses and, therefore, no basis for appellants to seek subpoenas under rules 26.02 and 45.01. The court determined that rule 27.02 was applicable because appellants filed an appeal prior to issuing the subpoenas and failed to comply with the procedural requirements of that rule. The court also determined that appellants' subpoenas were not warranted under rule 27.02. In doing so, the district court relied on federal cases interpreting Fed. R. Civ. P. 27(b), which the court deemed "identical in substance" to Minnesota's rule.

In *In re Guardianship of Kowalski*, this court held that a party was not entitled to conduct discovery in a case in which an appeal was pending because the party had not complied with the procedural requirements of rule 27.02 and there was "no finding by the court that the perpetuation of testimony [was] necessary to avoid a failure or delay of justice." 392 N.W.2d 310, 312, 314 (Minn. App. 1986), *review denied* (Minn. Oct. 17, 1986). The district court's application of rule 27.02 is consistent with *Kowalski*.

Appellants argue that the procedural requirements of rule 27.02 were inapplicable for several reasons. But even if appellants' subpoenas were procedurally sound, the district court did not abuse its discretion in quashing them. Federal caselaw is "instructive" if a Minnesota Rule of Civil Procedure is similar to a Federal Rule of Civil Procedure, which is the case here. *Cox v. Mid-Minn. Mut. Ins. Co.*, 909 N.W.2d 540, 544 (Minn. 2018). Under Fed. R. Civ. P. 27(b), a "court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court." "The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court," and "[i]f the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken." Fed. R. Civ. P. 27(b). Federal caselaw indicates that the scope of discovery under Fed. R. Civ. P. 27(b) is limited, that courts have discretion in permitting such discovery, and that the rule is intended to preserve known testimony, not to discover or uncover testimony. *See, e.g.*, *Norex Petroleum Ltd. v. Access Indus., Inc.*, 620 F. Supp. 2d 587, 591 (S.D.N.Y. 2009).

The district court here found that appellants' subpoenas were investigatory in nature and not intended to preserve evidence. Appellants do not refute these findings. In fact, they concede that the subpoenas were intended "to determine the nature and extent of the undisclosed conflict" and to "allow all of the parties to understand that conflict and how it may have impacted the report and testimony of Sgt. Eischens." Thus, the district court's refusal to allow the posttrial subpoenas was consistent with instructive federal authority.

In sum, the district court's refusal to allow the subpoenas was based on a sound view of the law and was not an abuse of discretion. *See Montgomery Ward & Co.*, 450 N.W.2d at 306.

IV.

Appellants contend that the district court erred in denying their request for relief from judgment under Minn. R. Civ. P. 60.02. Rule 60.02 permits a court to grant relief from a final judgment on grounds such as newly discovered evidence, fraud, or "[a]ny other reason justifying relief." Minn. R. Civ. P. 60.02(b), (c), (f). Appellants sought relief on all three of those grounds, based on Sgt. Eischens's alleged conflict of interest.[1] We review a district court's denial of a rule 60.02 motion for an abuse of discretion. *In re Welfare of Children of Coats*, 633 N.W.2d 505, 510 (Minn. 2001).

Newly Discovered Evidence

To warrant a new trial based on newly discovered evidence under rule 60.02(b), "the moving party must show that the new evidence was not discovered until after trial, and could not have been discovered before trial by the exercise of reasonable diligence." *Frazier*, 811 N.W.2d at 631 (quotation omitted). Reasonable diligence "requires the use of available discovery tools as well as reasonable investigation efforts." *Regents of Univ.*

[1] We stayed appellants' first appeal to allow appellants to seek relief under rule 60.02(b). Appellants later moved this court to modify the stay to allow the district court to hear a motion for relief on any basis under rule 60.02. We denied the motion, but declined to address whether appellants were precluded from moving for relief on any basis under rule 60.02. The district court determined, based on this court's order, that appellants were limited to a claim under rule 60.02(b). However, "for the sake of judicial efficiency," the district court addressed the merits on all three grounds.

of Minn. v. Med., Inc., 405 N.W.2d 474, 479 (Minn. App. 1987), *review denied* (Minn. July 15, 1987).

Appellants argue that information showing personal connections between Sgt. Eischens, Nellermoe, and Hannestad constitutes newly discovered evidence and that those connections affected the investigation. Katherine Kvalvog filed an affidavit attesting that she looked at Facebook posts of Nellermoe's wife and found "terms of endearment" directed at Sgt. Eischens's wife. She further attested that after the accident, Sgt. Eischens's daughter married a PCS graduate, and the Nellermoe family attended the ceremony; that Sgt. Eischens's daughter's husband's sister is married to Hannestad's son; and that Sgt. Eischens's daughter owns a photography studio that photographed members of the Hannestad and Nellermoe families.

Appellants filed an affidavit from Morton in which Morton affirmed that Sgt. Eischens tried to direct his statements regarding the accident. Appellants also filed affidavits from another PCS player, who claimed that Nellermoe and Lee told him that "they had friends with the police," and from two coaches who claimed they were told by PCS officials that PCS had friends in law enforcement. Also, appellants filed a December 2015 text message between Sgt. Eischens and Nellermoe stating, "Might not hurt for you to run this by your school attorney if you have one."

In opposing appellants' motion, respondents challenged the credibility of the assertions in appellants' affidavits, pointing to numerous inconsistencies in the record. Respondents filed their own affidavit and attachments. In one document, Nellermoe stated that his family and Sgt. Eischens's family became acquainted in the 1990s when they

attended the same church, that their interactions since 1999 have been sporadic, and that "their relationship is they are spouses of two women who are friends."

The district court found appellants' characterizations of Sgt. Eischens's investigation inaccurate and that the allegations regarding attempts to sway testimony and statements about PCS's friends in law enforcement were not credible. Appellants do not meaningfully challenge that finding, other than to assert that the district court was not permitted to undertake a credibility determination. We disagree. "Conflicts in the evidence, even though the presentation is upon affidavits, are to be resolved by the [district] court." *Knapp v. Knapp*, 883 N.W.2d 833, 838 (Minn. App. 2016) (quotation omitted).

The district court also found that appellants did not exercise due diligence in uncovering the connections. Appellants assign error to that determination and point to affidavits from two attorneys stating that as a matter of practice, they do not ask law-enforcement witnesses about conflicts of interest. Although those affidavits indicate that such questions are not the norm, we cannot say that the district court abused its discretion in determining that appellants failed to undertake reasonable investigative efforts. *See Frazier*, 811 N.W.2d at 631 (stating that district courts have discretion in determining whether the factors supporting a new trial based on newly discovered evidence have been met). Appellants conducted extensive discovery and deposed Sgt. Eischens, Nellermoe, and Hannestad prior to trial. The newly discovered personal connections could have been revealed during that pretrial discovery.

The district court also determined that the relationships were not significant enough to warrant disclosure under state patrol policies requiring impartiality and prohibiting

officers from becoming involved in matters impacting the officer's family, relatives, or persons with whom the officer had a significant personal relationship. The district court did not abuse its discretion in reaching that determination.

Moreover, newly discovered evidence "must not be merely collateral, impeaching, or cumulative, but rather, must be such as to have a probable effect upon the result of a new trial." *Id.* (quotation omitted). The district court determined that the new evidence was not material and that it was impeachment evidence that would not have a probable effect on the verdict in a new trial. The record supports that determination. Sgt. Eischens was one of several experts that testified regarding the cause of the accident during a five-day trial. Given the other record evidence supporting the verdict, impeachment of Sgt. Eischens's testimony would not have had a probable effect on the verdict at a new trial.

Fraud

To prevail on a motion to vacate under rule 60.02(c) on the basis of fraud, the moving party must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct which prevented the moving party from fully and fairly presenting its case. *Regents of Univ. of Minn.*, 405 N.W.2d at 480. "Clear and convincing evidence" means that the party's evidence must be "unequivocal and uncontradicted, and intrinsically probable and credible." *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994). The fraud or misconduct must "have gone to the ultimate issue of the case." *Regents of Univ. of Minn.*, 405 N.W.2d at 480.

Appellants argue that "the record reveals fraud by a witness," Sgt. Eischens, and that PCS "was fully aware" of the fraud. The district court found that there was "no merit" in appellants' assertion that Sgt. Eischens "deliberately withheld the information as part of a conspiracy to rob [appellants] of a fair trial" and that appellants failed to produce clear and convincing evidence of fraud. The court also determined that no new trial was warranted because the evidence was "impeachment material" and collateral to the case. The record supports the district court's determinations.

Any Other Reason Justifying Relief

Appellants seek relief under rule 60.02(f) based upon an alleged "fraud upon the court." Fraud upon the court occurs when "a court is misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair." *Halloran v. Blue & White Liberty Cab Co.*, 92 N.W.2d 794, 798 (Minn. 1958). "Fraud sufficient to vacate a judgment pursuant to Minn. R. Civ. P. 60.02 occurs when a party intentionally misleads or deceives the court as to material circumstances." *In re Conservatorship of Bromley*, 359 N.W.2d 723, 724 (Minn. App. 1984), *review denied* (Minn. Mar. 21, 1985). No such conduct occurred during the underlying trial.

Moreover, in addressing rule 60.02(f), the district court determined that no relief was warranted because the evidence at issue did not concern a significant relationship and that the evidence was "at best, impeachment material" that would not impact the outcome of the case. The district court did not abuse its discretion in reaching that determination.

In conclusion, we are extremely sympathetic to the tragic loss that gave rise to this lawsuit. But the record shows that appellants were allowed to present their chosen claims and case theories to the jury and that they received a fair trial. Because we do not discern reversible error, we affirm.

Affirmed.