STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2032

Tod A. Cosgriff,
Appellant,

Michelle L. Cosgriff,
Plaintiff,

vs.

Kimberly F. Hallgren,
Respondent.

Filed September 9, 2013
Affirmed
Halbrooks, Judge

St. Louis County District Court
File No. 69DU-CV-11-953

Robert H. Magie, III, Duluth, Minnesota (for appellant)

David M. Johnson, Thibodeau, Johnson & Feriancek, P.L.L.P., Duluth, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Hooten, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion for a new trial, arguing that the district court erred by refusing to submit the issue of his claimed loss of future earning capacity to the jury. We affirm.

FACTS

In December 2008, appellant Tod Cosgriff was a passenger in a vehicle driven by his wife, Michelle Cosgriff, returning home following outpatient surgery on his right ankle. He was seated in the front passenger seat when a vehicle operated by respondent Kimberly Hallgren struck the Cosgriffs' vehicle. Cosgriff sustained multiple fractures and a closed-head injury, and was hospitalized for five days. Toward the end of January 2009, he developed deep vein thrombosis (DVT) in his right leg and was hospitalized for seven additional days.

Cosgriff and his wife sued Hallgren in March 2011.[1] Hallgren admitted liability for the accident; the only issue for the jury was damages. Cosgriff testified that he is the sole owner of two small companies in the home-heating industry—Cosgriff Sheet Metal and Northland Geothermal. Cosgriff acknowledged that, at the time of trial, he continues to be involved in much of the physical work of the company and that he works 60 to 70 hours a week, including nights and weekends.

[1] Michelle Cosgriff is not a party to this appeal.

When Cosgriff returned to work in 2009, he noticed concentration issues. He described his concentration as "poor," but stated that it returns to normal when he is "relaxed and not having to deal with anything." Cosgriff testified that he becomes mentally and physically fatigued more easily than he did before the accident, particularly toward the end of the day. When asked if he has other issues relating to the closed-head injury, Cosgriff testified that he has problems with his memory and now has to "take pictures and write things down on a notepad to keep things separate." He is also "short" with customers and "not as concerned with spending as much time with them." Cosgriff stated that his overall mental status "leveled off" after the first year following the accident and has "pretty much stayed the same" since. Finally, Cosgriff testified that the mechanical parts of his work still come easily, such as "doing the service call and going in and fixing a furnace[.] I'm very comfortable doing that." He conceded that he is still able to work and, from a physical standpoint, can do everything he did before the accident. Some things just take more effort than before.

On cross-examination, Cosgriff testified that in the four years immediately preceding the accident, his annual income from the two businesses decreased from $88,000 in 2005 to $14,400 in 2008. In 2009, the year after the accident, his income was more than $44,000. Since 2009, Cosgriff's income has dropped because of "lots of things with the economy." He testified that in 2009, his businesses benefited from federal programs designed to address the housing downturn. Cosgriff agreed that none of his medical providers have given him any employment-related restrictions since he

returned to work in 2009. And he testified that his last medical treatment occurred almost two years prior to trial.

William Fleeson, M.D., an occupational-medicine specialist, testified on behalf of Cosgriff. Dr. Fleeson stated that he specializes in "diagnosing, treating and rehabilitating from problems in the workplace," and that he has 10 to 20 years' experience "evaluating people who are being looked at as to whether or not they have an ongoing, long-term physical or mental impairment from some problem."

Dr. Fleeson testified that Cosgriff has permanent pain in his right forearm as well as loss of nerve function in his right arm and hand. He stated that Cosgriff has continuing symptoms because of the DVT, including swelling, pain, and difficulty with activities such as climbing and crouching, and that Cosgriff is likely to experience pain and suffering as a result of these injuries for the rest of his life.

Dr. Fleeson further testified that Cosgriff manifests some symptoms of a closed-head injury. Cosgriff told Dr. Fleeson that he has poor concentration, struggles with some of his relicensing tests, loses things, and "has to take photos now so he would remember what to do on his jobs." Cosgriff also reported to Dr. Fleeson that he experiences mood swings and feelings of irritability.

Cosgriff's attorney asked Dr. Fleeson whether Cosgriff's permanent injuries would "affect or impact [his] future earning capacity." Defense counsel objected to the question based on lack of foundation, and the district court sustained the objection. Cosgriff's attorney later made an offer of proof that Dr. Fleeson would have testified that Cosgriff's permanent impairments adversely affect his earning capacity. He argued that

Dr. Fleeson was qualified to testify on this issue because "within his specialty he has specialized knowledge about the way in which injuries and disability affect the vocational li[ves] of his patients."

Defense counsel argued that the testimony was improper because the issue of Cosgriff's loss of future earning capacity had never been raised, given that none of the pretrial expert-witness disclosures posited an adverse effect on Cosgriff's future earning capacity. Cosgriff's counsel argued that Dr. Fleeson would not testify as to specific numbers, only that "Cosgriff has . . . disabilities that affect earning capacity." The district court ruled that the testimony was inadmissible because the opinion had not been disclosed, Dr. Fleeson was the wrong expert to testify on that issue, and the evidence did not support the claim.

Before closing arguments, the district court reaffirmed its ruling that the issue of Cosgriff's loss of future earning capacity would not be submitted to the jury. The district court stated, in part:

> Mr. Cosgriff's testimony was exactly as I thought it would be . . . . He has no physical limitations or restrictions regarding his return to work. He's essentially returned to work in his former capacity without any of those restrictions. Now, granted there are some mental impairments that are going to be argued about by both attorneys in front of the jury, but I saw no strong . . . link between those and a claim of loss of future earning capacity that would compel me to reverse my decision on Mr. Cosgriff.

Cosgriff's attorney asked to supplement the record with Dr. Fleeson's report to demonstrate that his opinion regarding Cosgriff's loss of future earning capacity had been properly disclosed. The district court accepted the report but concluded that, even in light

of the disclosure, the evidence was too vague and speculative to permit recovery on this element of damages, and therefore it was inappropriate for the jury to consider it.

The jury awarded Cosgriff $128,785 in damages.[2] Cosgriff moved for a new trial, arguing that the district court erred as a matter of law by refusing to submit the issue of loss of future earning capacity to the jury. The district court denied the motion. This appeal follows.

D E C I S I O N

We review the district court's denial of a motion for a new trial for an abuse of discretion. *Renswick v. Wenzel*, 819 N.W.2d 198, 204 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). We review the denial of a requested jury instruction for abuse of discretion. *Daly v. McFarland*, 812 N.W.2d 113, 122 (Minn. 2012). A party is entitled to a specific instruction if the evidence supports it. *Id.*

Loss of future earning capacity is an element of general damages. *Sturlaugson v. Renville Farmers Lumber Co.*, 295 Minn. 334, 336, 204 N.W.2d 430, 432 (1973). In order to recover a loss of future earning capacity, a plaintiff must establish "by a fair preponderance of the evidence the extent to which such impairment will be reasonably certain to occur." *Berg v. Gunderson*, 275 Minn. 420, 429, 147 N.W.2d 695, 701 (1966). Factors to consider include "age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry." *Wilson v. Sorge*, 256 Minn. 125, 132, 97 N.W.2d 477, 483 (1959). Testimony from a vocational or economic expert is not required in

[2] Cosgriff was awarded: past medical ($41,595); past pain and suffering ($55,000); past loss of earnings ($11,000); future medical ($11,190); and future pain and suffering ($10,000).

order to submit the question of loss of future earning capacity to the jury. *See id.* at 133, 97 N.W.2d at 484. But it is error for the district court to "permit the jury to speculate as to what [a plaintiff] would have earned." *Sturlaugson*, 295 Minn. at 337, 204 N.W.2d at 432.

Here, the district court ruled that Dr. Fleeson could testify "as to the physical restrictions, limitations . . . . that either [Tod] or [Michelle] Cosgriff [has]." But the district court did not permit Dr. Fleeson to give his opinion on Cosgriff's loss of future earning capacity on multiple grounds: (1) lack of timely disclosure, (2) lack of foundation with respect to economic issues, and (3) Cosgriff's testimony confirming that he is not restricted in his work activities.

Dr. Fleeson's report states that the swelling and discomfort in Cosgriff's leg "will continue to limit him significantly as to his performance of [activities of daily living], both persona[l]/recreational and occupational." It states that the effects of the closed-head injury "will continue to dramatically interfere with and be handicapping to his work performance," and that his future medical treatment may require the "occasional need for being off work." And it concludes: "It is already clear that he is not able to satisfactorily work at the same level of performance that he was accustomed to prior to the crash, and I have also discussed above the poor prognosis in this regard, with expectations for continued limitations and difficulties with such performance."

Cosgriff argues that a plaintiff is only required to present medical testimony as to his or her permanent disability in order to present sufficient evidence for the question of loss of future earning capacity to go to the jury. The district court concluded that "if you

prove permanent impairment *and* you can make some plausible argument that there is a reasonable likelihood of that [impairment] affecting earning capacity or future earnings, then I think it goes to the jury." (Emphasis added.)

Our caselaw is clear that a plaintiff may only recover if he or she is able to establish by a preponderance of the evidence "the extent to which such impairment [in future earning capacity] will be reasonably certain to occur." *Berg*, 275 Minn. at 429, 147 N.W.2d at 701. Although this is a very fact-specific inquiry, it has generally required more than evidence that a permanent injury exists; the plaintiff must also establish that the injury is reasonably certain to lead to an impairment of their future earnings.

In *Berg*, the appellant argued that the testimony of his medical expert that he suffered a permanent partial disability to his back was "sufficient to sustain a finding and award as to loss of future earning capacity." *Id.* at 428, 147 N.W.2d at 701. The supreme court concluded that the district court did not err in instructing the jury to disregard any loss-of-future-earning-capacity claim, because the appellant had "failed to establish by a fair preponderance . . . that the permanent partial disability to his back, testified to by [his medical expert], *would result* in any loss or diminution of his future earning capacity." *Id.* at 429, 147 N.W.2d at 701 (emphasis added).

In *Smith v. Rekucki*, the supreme court concluded that the plaintiff's testimony as to the permanence of her condition "does not per se provide a basis for future loss of services, since the evidence *must also show* that future incapacity to perform ordinary household chores and services has resulted from such permanent condition." 287 Minn.

149, 157, 177 N.W.2d 410, 415-16 (1970) (emphasis added). And in *Parr v. Cloutier*, the supreme court affirmed the district court's refusal to instruct the jury on the plaintiff's loss-of-future-earning-capacity claim, even though the plaintiff presented expert medical testimony of a 20% permanent partial impairment. 297 N.W.2d 138, 140 (Minn. 1980).

Cosgriff relies on *Wilson*, asserting that the plaintiff in *Wilson* "presented only medical testimony as to [her] disabilities." But the supreme court clearly considered more than expert medical testimony that a permanent disability existed. The supreme court concluded that the district court did not err by allowing the jury to consider loss of future earning capacity because the undisputed record reflected that the plaintiff's injuries "prevent[ed] her from lifting heavy objects; from doing her housework as before; and from performing any of the chores which she formerly handled on her husband's farm." *Wilson*, 256 Minn. at 126, 97 N.W.2d at 479.

Cosgriff also cites *Kwapien v. Starr*, in which this court held that the district court did not err by allowing the jury to consider a loss-of-future-earning-capacity claim. 400 N.W.2d 179, 183-84 (Minn. App. 1987). We concluded that "[f]rom the evidence presented at trial, the jury could reasonably have determined that the physical injuries and minimal permanent disability respondent sustained, in light of her lack of education or training, were reasonably certain to [a]ffect her capacity or power to earn a living in the future." *Id.* at 184. The words "in light of" indicate that these facts, in addition to the plaintiff's medical testimony, were a key part of this court's conclusion.

But undisputed medical testimony that a plaintiff suffered a permanent impairment is not, standing alone, sufficient to establish the extent to which an impairment in future earing capacity is reasonably certain to occur. *See Parr*, 297 N.W.2d at 140; *Berg*, 275 Minn. at 429, 147 N.W.2d at 701. In light of this precedent and the record before us, we cannot say that the district court abused its discretion by refusing to submit the question of Cosgriff's loss of future earning capacity to the jury.

Cosgriff's own testimony contradicts his assertion that he sustained a loss of his earning capacity. He testified that, at the time of trial, he was the sole owner of two companies, worked 60 to 70 hours per week, and was able to perform all of the physical elements of his work without limitation. He testified that he compensated for his concentration and memory issues by taking pictures and writing himself notes. And he testified that his medical providers had placed no permanent restrictions on his ability to work and that he had not sought any medical treatment for two years prior to trial.

Even taking Dr. Fleeson's report and potential testimony into account, Cosgriff presented only vague evidence as to the effect of his permanent impairments on his earning capacity or future earnings. Cosgriff's testimony that he is able to perform all of the physical aspects of his work the same as before the accident undermines Dr. Fleeson's testimony regarding any permanent physical effect on his future earning capacity. And Dr. Fleeson's testimony that the symptoms of the closed-head injury "will continue to dramatically interfere with and be handicapping to his work performance," without further evidentiary support, is so vague as to invite impermissible speculation from the jury. We therefore conclude that the district court acted within its discretion by

ruling that Cosgriff's impairment-of-future-earning claim would not be submitted to the jury.

Affirmed.