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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0159

Daniel Treinen, et al.,
Respondents,

vs.

Northern States Power Company
d/b/a Xcel Energy, et al.,
Defendants,

and

Northern States Power Company,
d/b/a Xcel Energy,
Third Party Plaintiff,

vs.

Donovan Construction Company,
third party defendant,
Appellant.

Filed January 27, 2009
Affirmed
Crippen, Judge[*]

Blue Earth County District Court
File No. 07-CV-06-1126

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

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Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

Appellant Donovan Construction Company contends that it is entitled to a new trial in this personal-injury case, arguing that the district court's failure to give a particular instruction to the jury was prejudicial error, that the court erred in prohibiting appellant from introducing into evidence the adverse party's pleadings and interrogatory answers, and that the court erroneously limited appellant's use of these file documents for impeachment purposes. We affirm.

FACTS

Respondent Daniel Treinen suffered injuries in two accidents that occurred about a year apart. First, in January 2003, defendant Thad Dahling's car struck respondent's pickup truck, and, second, in February 2004, respondent, operating a snowmobile, struck a snow-covered utility pole. In 2005, respondent brought a negligence suit in which he sought damages for injuries suffered in both accidents. Kristen Treinen, respondent's wife, also sued for loss of consortium as a result of each accident. The Treinens settled their claims arising from the car accident with defendant Dahling before trial, and their action against him was dismissed. A jury trial was then held on the claims arising from the snowmobile accident.

In late 2003, defendant Northern States Power Company, d/b/a Xcel Energy Company, contracted with appellant Donovan Construction to rebuild a segment of a power line. Xcel had a 75-foot easement that ran underneath the power line. North of the easement and running roughly parallel was a gravel township road, and in between the easement and the road was a strip of private agricultural land. On January 21, 2003, Xcel delivered two truckloads of utility poles to this area; appellant's employees used a boom truck to unload them by the road and then dragged them over the agricultural land to place them on the easement, where they were to be stockpiled until needed for the rebuilding project.

A primary issue at trial was the location of the utility pole when respondent struck it on his snowmobile. Under respondent's version of events, he was lawfully riding his snowmobile in the ditch, about 20-25 feet from the edge of the road but within the public right-of-way, when he struck the snow-covered utility pole. An eyewitness and respondent's brother-in-law, who arrived on the scene after the accident, concurred as to the location of the pole. Under Xcel's and appellant's version of events, respondent had trespassed over the agricultural land and then into the easement area when he hit a utility pole that was properly stored there. Appellant's construction foreman and a deputy sheriff testified that when they went to the site the day after the accident, they saw some poles within the easement area and saw none in the road right-of-way. The foreman further testified that on the Friday before the accident (which occurred on a Sunday), he had checked to make sure that any poles delivered that day had been stored within the

easement area, and he asserted that appellant did not store poles in the public right-of-way.

Another issue at trial concerned which injuries respondent had suffered in the car accident, which he had suffered in the snowmobile accident, and whether his injuries from the car accident had been aggravated by the snowmobile accident. Respondent's wife's loss-of-consortium damages from each accident were also at issue. The district court permitted the use of the pleadings and interrogatory answers for impeachment purposes, but ruled that they could not be introduced into evidence and that appellant's counsel could not introduce into evidence or refer to the couple's settlement with the dismissed defendant.

At the close of the evidence, the district court gave the jury its instructions, including, among other things, instructions regarding the duties of possessors of land to both entrants and trespassers and duties of the entrants and trespassers, as well as the statutes and regulations concerning the operation of snowmobiles. The jury determined by special verdict that appellant was 85% at fault in causing the snowmobile accident, Xcel was 10% at fault, respondent was 5% at fault, and the Treinens were entitled to damages. In appellant's post-trial motion, it argued, in relevant part, that the court should have given an instruction based on Minn. Stat. § 97B.001 (2006), concerning trespass on agricultural land. The district court denied the posttrial motion.

D E C I S I O N

The district court's decision of whether to grant a new trial is within its discretion, and the decision will not be reversed on appeal "absent a clear abuse of that discretion." *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

1.

Appellant argues that it is entitled to a new trial because the district court failed to give the jury an instruction regarding trespass on agricultural land under Minn. Stat. § 97B.001.

The district court has broad discretion in giving jury instructions and will not be reversed absent an abuse of that discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). An appellate court will not order a new trial if the district court's instructions "fairly and correctly stated applicable law." *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990).

We first observe that appellant did not request the statutory instruction or object to its absence until its new-trial motion. Generally, a party must make a timely objection to jury instructions. Minn. R. Civ. P. 51.04(a) (assigning errors in jury instructions). Nonetheless, "[a] court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51.04(a)(1) or (2)." Minn. R. Civ. P. 51.04(b). Likewise, untimely claims of errors in jury instructions will be considered on appeal only if they are fundamental, such that the errors "destroy the substantial correctness of the charge as a whole, cause a miscarriage of justice, or result in

substantial prejudice on an issue vital in the litigation." *Clifford v. Peterson*, 276 Minn. 142, 145, 149 N.W.2d 75, 77 (1967) (quotations and footnotes omitted).

Appellant argues that it would have been futile to request the agricultural-trespass instruction because the district court stated in its order denying a new trial that it would have denied any such request. Appellant has not produced any authority and none has been found to support its argument that futility excuses a party from raising a request for a jury instruction at trial. The issue rests on whether the claimed error was fundamental. If not, appellant has waived its argument.

As appellant states in its brief, "[t]he key factual dispute in this case was where [appellant] had stored these utility poles: Were they within [Xcel's] easement, or were they encroaching on the township road right-of-way?" Respondent insisted at trial that he operated his snowmobile lawfully on the right-of-way of the road, adamantly denied that he had trespassed on agricultural land, and contended that appellant was negligent because it left the utility pole in the public right-of-way with no warning of the hazard. For respondent to recover under this theory, the jury had to find that he had been in the right-of-way and that appellant had negligently left the utility pole there; it did so when it found that appellant was 85% at fault.

As stated earlier, appellant's (and Xcel's) theory of the case was that respondent had trespassed by riding his snowmobile over the strip of agricultural land and onto the easement where the utility poles were stored. Appellant asserted that because it had no notice that snowmobilers regularly trespassed on the easement, it had no duty to trespassers, such as respondent, to warn that the utility poles were stored there. Although

appellant asserts in its reply brief that the jury could have found that the utility pole respondent struck was on the strip of agricultural land between the easement and the right-of-way (and in fact respondent referred to this possibility in his closing argument), we do not address an argument raised by an appellant for the first time in its reply brief. *See* Minn. R. Civ. App. P. 128.02, subd. 3 ("The reply brief must be confined to new matter raised in the brief of the respondent.").

Pursuant to these competing theories, the district court instructed the jury on the legal standards affecting trespassers and possessors, 4A *Minnesota Practice*, CIVJIG 85.10, .13, .16, .22, .25 (2006); violations of nontraffic statutes, 4 *id.* 25.45; provisions applicable to the operation of a snowmobile, Minn. Stat. §§ 84.87, .90, subd. 3 (2006); and a portion of the snowmobile rules of the road, Minn. Dep't of Natural Res., *Snowmobile Safety Laws, Rules & Regulations* at 13 (2003).

Appellant argues that the jury should have been instructed under Minn. Stat. § 97B.001 that snowmobiles are prohibited from entering agricultural land without first obtaining permission from the landowner. It does not dispute the jury instruction that snowmobiles are not prohibited from entering land outside the seven-county metropolitan area unless advised to the contrary under Minn. Stat § 84.90, subd. 3, but contends that in light of Minn. Stat. § 97B.001, Minn. Stat. § 84.90, subd. 3, is limited to nonagricultural land. With these instructions, it argues, the jury could have concluded that respondent had trespassed over the agricultural land, despite the fact that it had not been posted, and it contends that failure to so instruct was prejudicial error.

But the basic theories at trial were that the utility pole respondent struck was either in the easement area or in the right-of-way. On cross-examination, respondent testified that he was aware that he could not ride on agricultural land unless he had permission from the owner. He testified that he drove his snowmobile in the right-of-way and he stated at least four times in response to appellant's questions that he did not drive his snowmobile on agricultural land. To examine legal duties related to his presence on agricultural land, the jury would have to reject his theory of the case; the verdict establishes, to the contrary, that his testimony was accepted, and there was no occasion for the jury to analyze the provisions of Minn. Stat. § 97B.001. Further, although we do not reach the merits of the applicability of that statute, we note that the provisions of Minn. Stat. §§ 84.87, .90, subd. 3, are specific in their applicability to the operation of snowmobiles. Appellant has not shown that the error, if any, by the district court in not giving an agricultural-trespass instruction under Minn. Stat. § 97B.001 was fundamental.

2.

Appellant next challenges the district court's evidentiary rulings, arguing that the court improperly limited its use of pleadings and discovery documents for impeachment purposes and erred in precluding appellant from introducing respondent's pleadings and answers to interrogatories into evidence.

Evidentiary rulings by the district court will be reversed only on a showing of an abuse of discretion. *Johnson v. Wash. County*, 518 N.W.2d 594, 601 (Minn. 1994). An error in the exclusion of evidence is grounds for a new trial if it would "affect the substantial rights of the parties." Minn. R. Civ. P. 61.

Appellant argues that the district court improperly limited its cross-examination of the Treinens regarding their damage claims by not allowing it to use respondent's pleadings and discovery documents in cross-examination. Our review of the transcript shows that both respondent and his wife were subject to adequate cross-examination by appellant. And despite appellant's arguments, it has not shown that the district court prevented it from using these documents for impeachment; to the contrary, the district court made it clear that they could be used for impeachment.

Appellant also argues that the court erred when it prohibited appellant from introducing into evidence respondent's pleadings and interrogatory answers. Appellant argues that it wanted to use them to show that the injuries to respondent had actually occurred as a result of the car accident, as well as to challenge his wife's loss-of-consortium claims for both accidents.

Because the admission into evidence of pleadings and interrogatory answers is grounded in party-opponent admissions, the documents are generally admitted when the party has proceeded inconsistently and excluded when the party has not proceeded inconsistently. *Kelly v. Ellefson*, 712 N.W.2d 759, 766 (Minn. 2006). Yet the district court may exclude any evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Respondent moved the court to exclude the pleadings and answers to interrogatories from introduction into evidence, arguing that these documents were highly

prejudicial, duplicative, confusing, and irrelevant, in light of the fact that the pleadings included claims against the car-accident defendant, with whom they had subsequently settled and who had been dismissed from the case. Likewise, the interrogatory answers had been given to the dismissed defendant. The district court, which had also ordered appellant and Xcel not to disclose respondent's settlement with the dismissed defendant, exercised its discretion to conclude that the pleadings and interrogatory answers should not be given to the jury, and this decision was not an abuse of discretion.[1] In any event, as respondent argues, appellant had every opportunity to use the pleadings and discovery documents for impeachment purposes, so that no prejudicial harm could have occurred from the exclusion of the documents themselves from evidence. Appellant fully presented its case to the jury, and no prejudice or abuse of discretion has been shown.

Affirmed.

[1] Although appellant makes some statements about the district court's ruling that it could not introduce into evidence or discuss the settlement at trial, it has not directly challenged these rulings on appeal.