STATE OF MINNESOTA
IN COURT OF APPEALS
A09-458

Nancy Becker and Michael Becker, individually and as parents and guardians for Nykkole E. Becker, f/k/a Nykkole E. Rossini,
Appellants,

and

Minnesota Department of Human Services, intervenor,
Appellant,

vs.

Mayo Foundation,
Respondent.

Filed February 2, 2010
Affirmed
Larkin, Judge

Olmsted County District Court
File No. 55-C0-01-003453

Chris A. Messerly, Vincent J. Moccio, Laura M. Provinzino, Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, Minnesota (for appellants)

Paul B. Klaas, William R. Stoeri, Bart B. Torvik, Dorsey & Whitney LLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Kalitowski, Presiding Judge; Larkin, Judge; and Crippen, Judge.*

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

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

LARKIN, Judge

In this post-remand appeal following a jury verdict, appellants challenge the district court's denial of their motion for a new trial claiming that the district court erred by (1) allowing two individuals who had employment relationships with respondent to serve on the jury, (2) submitting the issue of negligence to the jury, and (3) allowing improper testimony. Because the district court did not err by concluding that appellants' juror-bias claim failed or by submitting the issue of negligence to the jury, and because any error in the district court's evidentiary rulings was not prejudicial, we affirm.

FACTS

Nykkole Rossini, n/k/a Nykkole Becker (the child), was born on July 26, 1997. On August 17, her biological mother and father brought her to the emergency room at Saint Mary's Hospital in Rochester, which is operated by respondent Mayo Foundation (Mayo), for examination of bruises on her left forearm. Dr. Gregory Alberton examined the child. X-rays revealed a spiral fracture on the child's left humerus. When questioned regarding the cause of the injury, the child's father explained that he was holding the child when the child "spasmed" and began to roll out of his arms. The father claimed that the injury occurred when he grabbed the child's left arm to keep her from falling to the floor. Medical personnel found this explanation plausible and concluded that the injury was accidental. Dr. Gregory Alberton applied a splint and gave the parents a date for a follow-up appointment. On September 3, the child's mother took the child back to Saint

Mary's for follow-up care as instructed. A doctor examined the child and determined that her fracture was healing and that further treatment was unnecessary.

On September 11, the child's mother again brought the child to Saint Mary's emergency room. She reported that the child had been vomiting and sleeping a lot. A doctor examined the child and fed her using two different types of formula. The doctor concluded that the child was suffering from a "stomach bug" and sent the child home with her mother.

On September 15, the child was brought to St. Mary's emergency room a third time. The mother reported that the child had a decreased appetite and was listless. An examination revealed a bruise on the left side of the child's head and a swollen fontanelle (i.e., the space between the skull bones of an infant). Radiologic testing revealed that the child had suffered multiple skull and rib fractures, fractures to both legs, bleeding on the brain, and brain infarctions. Some of the rib fractures were determined to have predated the child's September 11 visit to St. Mary's Hospital. Doctors diagnosed the child with shaken baby syndrome, admitted the child to the intensive care unit, and reported the child's injuries to law enforcement and Olmsted County Social Services.

It is undisputed that the injuries that were discovered and diagnosed on September 15 caused the child to suffer severe and permanent developmental delays. The child is unlikely to ever function above the level of an infant. She likely will require 24-hour medical care and special medical equipment for the rest of her life, as she cannot sit up, walk, talk, or eat independently.

The state took custody of the child and placed her with appellants Nancy and Michael Becker. The child's biological father was convicted of first- and third-degree assault related to the child's injuries. The child's biological mother pleaded guilty to child endangerment. The district court terminated the parental rights of the biological parents, and appellants adopted the child.

In 2001, appellants sued Mayo alleging that the child's injuries were the result of the treating physicians' failure to report suspected child abuse after the child's first visit to St. Mary's emergency room. The district court granted appellant Minnesota Department of Human Services' motion to intervene. Following a trial, a jury found that Mayo was negligent, but that Mayo's negligence was not the cause of the child's injuries. Judgment was entered by the district court, affirmed by this court, and reversed by the supreme court. The supreme court held that the Child Abuse Reporting Act, Minn. Stat. § 626.556 (2008)[1], does not create civil liability for failure to report suspected child abuse to authorities. *Becker v. Mayo Found.*, 737 N.W.2d 200, 209 (Minn. 2007). But the supreme court also held the district court erred by excluding all evidence related to Mayo's responsibility to report suspected abuse when appellants presented a prima facie case that the ordinary skill and care expected in the medical profession required Mayo to report a child with suspicious injuries as a victim of suspected child abuse. *Becker*, 737 N.W.2d at 217-18. The supreme court remanded the case for a new trial. *Id.* at 219.

[1] While the supreme court's ruling in *Becker* was governed by the 2006 statute, we note that the statute did not change between 2006 and 2008. The supreme court's analysis of the statute therefore remains controlling, and we cite to the current statute.

The case was retried in August, 2008. Appellants presented evidence regarding a physician's duty to report suspected child abuse and what social services could have done to protect the child if it had been given the opportunity to intervene in the child's care. The jury returned a special verdict finding that Mayo was not negligent. Appellants moved for a new trial, alleging multiple errors, three of which are the grounds for its claims on appeal. The district court denied the motion, and this appeal follows.

D E C I S I O N

The decision to grant a new trial lies within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Appellants claim that the district court erred by (1) allowing two individuals to serve on the jury despite their financial relationship with Mayo, (2) submitting the issue of negligence to the jury, and (3) allowing three of Mayo's witnesses to offer improper testimony. Appellant argues that each of the alleged errors warrants a new trial. We address each claim in turn.

I.

"In determining whether to dismiss a potential juror for cause, the [district] court must decide whether the juror 'can set aside his or her impression or opinion and render an impartial verdict.'" *State v. Anderson*, 603 N.W.2d 354, 356 (Minn. App. 1999) (quoting *State v. Drieman*, 457 N.W.2d 703, 708 (Minn. 1990)), *review denied* (Minn. Mar. 14, 2000). "On review, this court will not lightly substitute its own judgment for that of the [district court] judge because the judge is in the best position to evaluate the testimony and demeanor of potential jurors." *Id.* The district court's resolution of the

question of whether a prospective juror's protestation of impartiality is credible is entitled to special deference because it is essentially a determination of credibility and of demeanor. *State v. Logan*, 535 N.W.2d 320, 323 (Minn. 1995). Appellants claim that the district court erred by allowing R.L., a Mayo employee, and W.F., whose spouse was a Mayo employee at the time of trial, to serve on the jury.

Prior to voir dire, appellants requested that the district court exclude all Mayo employees and the spouses of Mayo employees from the jury. Mayo opposed the motion. The district court noted that it shared appellants' concern regarding relationships between prospective jurors and Mayo and recognized the need to be cautious in this regard. But the district court declined to automatically exclude prospective jurors based on their employment relationships with Mayo. The district court instructed the parties to ask appropriate questions during voir dire regarding each prospective juror's ability to sit as a fair and impartial juror.

Twelve prospective jurors were called for voir dire. Each introduced himself and herself and provided general information including his or her employment and spouse's employment. Three indicated that they were Mayo employees. P.M. stated that she was employed as a registered nurse at Mayo and that her husband was a physician at Mayo. S.D. stated that she worked as a nurse at Mayo and that her husband participated in laboratory clinical trials at Mayo. R.L. stated that she worked for Mayo as a librarian. After these initial introductions, the district court held a sidebar conference. Appellants' counsel raised a general objection to "a couple of the jurors . . . who have made it so crystal clear that the Mayo Clinic is a significant part of their life and employment and

income I think they should be excluded," but did not identify the particular jurors. The district court did not rule on the request, but instead invited the lawyers to question the prospective jurors regarding the issue, noting that all of the jurors had stated that they thought they could be fair.

After P.M. was questioned, appellants moved to exclude her for cause, noting that she had referred to herself as "a loyal Mayo employee," and that "[b]y all appearances one hundred percent of [her family's] household income … comes from [Mayo]." Mayo did not object, and the district court excused P.M. After S.D. was questioned, appellants moved to exclude her for cause, arguing that the totality of her household income came from Mayo and that "she didn't know if her involvement or experiences with Mayo would color [her view of the case]." Mayo did not object, and the district court excused S.D.

W.F. was eventually added to the venire as a replacement. W.F. stated that his wife worked in community pediatrics at Mayo. Appellants questioned R.L. and W.F. about their respective connections to Mayo and whether those connections would impact their view of the case. R.L. stated that she did not think she would tend to believe Mayo's witnesses more and acknowledged that "[Mayo] make[s] mistakes like any other big clinic." W.F. stated that he did not think that his wife's employment with Mayo would affect his ability to serve as a juror, and Mayo would not have "a head start" in the case. R.L. and W.F. did not express concerns that their continued employment relationship with Mayo was dependent upon the jury reaching a particular verdict or on Mayo's profitability.

After this line of questioning, the district court held a sidebar conference and asked the parties if they had "at this point any challenges for cause." Even though appellants had originally requested that no Mayo employee, or spouse of a Mayo employee, be allowed to serve on the jury, appellants did not challenge R.L. or W.F. for cause; nor did appellants exercise a peremptory strike against R.L. or W.F. Both were selected as members of the jury.

Appellants now argue that they were denied their right to a fair and impartial jury and that R.L. and W.F. should have been excused for cause under the doctrine of implied bias. An implied bias is a bias that is conclusively presumed as a matter of law. *United States v. Wood*, 299 U.S. 123, 133, 57 S. Ct. 177, 179 (1936). "A juror who is found to have an implied bias is not susceptible to rehabilitation through further questioning." *State v. Brown*, 732 N.W.2d 625, 629 n.2 (Minn. 2007) (citing *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000)). Other jurisdictions have been inclined to presume bias in extreme situations "where the prospective juror is connected to the litigation at issue in such a way that [it] is highly unlikely that he or she could act impartially during deliberations." *Id.* (citing *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992)). But Minnesota has not expressly adopted or rejected the doctrine of implied bias. In *Holt v. State*, the supreme court noted that it had "discussed the doctrine in [*Brown*, 732 N.W.2d at 625,] without expressly rejecting or adopting it." 772 N.W.2d 470, 477 (Minn. 2009). The supreme court again considered the doctrine in *Williams v. State*, stating, "Minnesota has not adopted the theory of implied bias and we see no reason to do so here." 764 N.W.2d 21, 28 (Minn. 2009).

This court has previously explained that while the doctrine of implied bias appears "philosophically sound" and has been employed by the federal courts in appropriate circumstances, Minn. R. Crim. P. 26.02[2] does not appear to embody it. *Anderson*, 603 N.W.2d at 357. In *Anderson*, we noted that "without a clear indication from the Minnesota Supreme Court, this court is reluctant to adopt into its established jurisprudence a new doctrine that would have such a profound effect on current practice." *Id.* Thus, we decline appellants' invitation to adopt the doctrine of implied bias in this case "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

Appellants rely heavily on *State v. Hurst*, 153 Minn. 525, 193 N.W. 680 (1922), arguing that the supreme court applied the doctrine of implied bias in that case. In *Hurst*, the state challenged four jurors on the basis of "implied bias," and the district court sustained the challenges. *Id.* at 532, 193 N.W. at 682. The supreme court upheld the challenge to one of the jurors who was a member of an association of businessmen that employed the defendant. *Id.* In upholding the challenge, the supreme court noted that the defendant "was in a sense the employee of [the association's] members, and the relation of master and servant between a juror and a party is good ground for challenge of the juror for implied bias." *Id.* (citing Minn. Gen. Stat. § 9233 (1913) (repealed 1979)).

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[2] Although this is a civil case, the criminal rule controls because "[i]n any civil action or proceeding either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials, except that the number of peremptory challenges to be allowed on either side shall be as provided in this section." Minn. Stat. § 546.10 (2008).

Appellant's reliance on *Hurst* for the proposition that our supreme court has adopted the implied-bias doctrine is misplaced. The statutory scheme at issue in *Hurst*, which expressly provided for a juror challenge based upon "implied bias," is no longer in effect. *See* Minn. Gen. Stat. § 9233 ("A challenge for *implied bias* may be taken for … [s]tanding in relation of . . . master and servant . . . ."") (emphasis added); 1979 Minn. Laws ch. 233, § 42, at 500 (repealing Minn. Stat. § 631.31 (1978), the successor statute to § 9233). And current law does not embody the implied-bias doctrine. *See Anderson*, 603 N.W.2d at 355-57 (stating that the issue of whether this court should "expand Minn. R. Crim. P. 26.02, subd. 5, to include the doctrine of implied bias" is an issue of first impression and noting that the rule does not appear to embody the doctrine). Given that *Hurst* is based on a statute that is no longer in effect and our supreme court's recent, repeated recognition that the implied-bias doctrine has not been adopted in Minnesota, *Hurst* is of minimal persuasive value on the issue.

The district court correctly rejected appellants' argument that the doctrine of implied bias should be applied in this case. Because the implied-bias doctrine is inapplicable, appellants' claim of juror bias is properly analyzed under the traditional analysis, which was summarized in *State v. Stufflebean*, 329 N.W.2d 314 (Minn. 1983). Under *Stufflebean*, to succeed on a claim of juror bias, an appellant must show: (1) the challenged juror was subject to challenge for cause, (2) actual prejudice resulted from the failure to dismiss, and (3) an appropriate objection was made by the appellant. 329 N.W.2d at 317. The district court applied the *Stufflebean* test and correctly concluded that appellants failed to establish a viable claim of juror bias.

Subject to Challenge for Cause

"The supreme court has consistently held that Minn. R. Crim. P. 26.02, subd. 5, contains the exclusive grounds on which jurors may be challenged for bias." *Anderson*, 603 N.W.2d at 356. Under rule 26.02, a juror may be excused based upon a variety of grounds, including "[s]tanding in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted." Minn. R. Crim. P. 26.02, subd. 5(1)6. The district court correctly recognized that R.L. was employed by Mayo and therefore fell within the class of prospective jurors subject to a challenge for cause under the rule. Appellants' juror-bias claim as to R.L. meets the first prong of the *Stufflebean* test.

However, the district court also correctly determined that W.F. does not fall within the class of prospective jurors subject to a challenge for cause under rule 26.02. *Anderson*, 603 N.W.2d at 356. The rule does not provide for a challenge to the spouse of an individual who is subject to a challenge for bias under the rule. Appellants' juror-bias claim as to W.F. therefore does not satisfy the first prong of the *Stufflebean* test. *See Stufflebean*, 329 N.W.2d at 316-18 (affirming district court's denial of a challenge for cause to a juror who was employed by a corporation owned by the victim's family and rejecting an expanded interpretation of the grounds for challenge enumerated in Minn. R. Crim. P. 26.02, subd. 5(1)6).

Actual Prejudice

Even when a juror is subject to a challenge for cause, he or she generally is subject to rehabilitation and "may sit on the jury if he or she agrees to set aside any preconceived notions and make a decision based on the evidence and the court's instructions." *See Brown*, 732 N.W.2d at 629 n.2. "If the opposing party objects to the sufficiency of a challenge for cause or the facts on which it is based, all issues of law or fact arising upon the challenge shall be tried and determined by the court." Minn. R. Crim. P. 26.02, subd. 5(3). The district court is "in the best position to determine whether jurors can be impartial because it hears the prospective jurors' testimony and observes their demeanor." *Drieman*, 457 N.W.2d at 708-09. "Thus, if jurors indicate their intention to set aside any preconceived notions and demonstrate to the satisfaction of the [district court] judge that they are able to do so, this court will not lightly substitute its own judgment." *Id.* at 709.

The district court concluded that appellants failed to prove any actual bias on the parts of R.L. and W.F. The district court noted that there was no evidence that either juror had an improper interest in the case such as a threat of lost employment or income, a promise of increased income, or a loss of future prospects within Mayo. The district court also noted that R.L. and W.F. did not know anything about the case prior to trial, and neither indicated that he or she would give more weight to the testimony of Mayo's witnesses.

At oral argument on appeal, appellants conceded that R.L.'s and W.F.'s responses to voir-dire questions do not demonstrate actual bias. When asked how she would feel

returning to work if she returned a large verdict against Mayo, R.L. stated "[i]t's called justice. You know? I–I believe if they're found, you know, liable then they'll pay." When W.F. was asked if his wife's status as a Mayo employee would have an impact during the deliberations, he responded that "I don't think that would affect my decision at all because I'm–this is my job right now to do this … and my duty as a citizen." The district court was apparently, and appropriately, satisfied that both R.L. and W.F. would consider the case as it was presented and without bias or prejudgment. We will not set aside this determination. Because R.L. and W.F. demonstrated no actual bias, appellants were not prejudiced as a result of their service on the jury. Appellants therefore fail to satisfy the second prong of the *Stufflebean* test. *See Anderson*, 603 N.W.2d at 356 (concluding that the record reflected no actual prejudice when the prospective jurors stated that their previous experiences as crime victims, which gave rise to challenges for cause, would not affect their ability to remain impartial).

Appropriate Objection

Finally, we consider the third prong of the *Stufflebean* test: whether appellants made an appropriate objection. The district court found that appellants "made a sufficient record of their challenge to R.L. and W.F." Our review of the record indicates that the record does not support this finding.

Prior to questioning any prospective jurors during voir dire, appellants made a broad request to "exclude at the outset any employee of [Mayo] or any juror whose spouse is an employee of [Mayo]", which the district court rejected, stating that it would not "automatically exclude a juror." The district court indicated that the prospective

jurors should be questioned to determine their ability to be fair and impartial. After the original veniremembers provided introductory information, appellants again made a general objection to "a couple of the jurors," but did not identify the jurors. W.F. was not a member of the venire at the time of this general objection.

After questioning the veniremembers, appellant challenged two prospective jurors, P.M. and S.D., for cause based on their employment relationship with Mayo, and the district court granted the challenges. Appellants then questioned R.L. and W.F. regarding their connections to Mayo but did not specifically challenge either individual for cause—even though the district court summoned the attorneys to the bench and invited challenges for cause at the end of the questioning. Instead of moving to dismiss R.L. and W.F. for cause based on their relationship with Mayo, appellants remained silent, apparently accepting them as jurors.[3] Appellants did not object to their service until after the jury rendered its verdict.

This procedural history is nearly identical to that in *Stufflebean*. Prior to voir dire, the criminal defendant in *Stufflebean* moved to dismiss two members of the jury panel because they were employees of a corporation owned in large part by the victim's family. 329 N.W.2d at 317. The district court denied the motion and informed the defendant that

[3] Despite appellants' fervent argument that it was inherently unfair to allow jurors who derived their income from Mayo to sit in judgment of Mayo, we note that appellants' acceptance of R.L. and W.F. appears strategically sound. R.L. and W.F. stated that Mayo was owed no deference, and R.L. stated that Mayo "make[s] mistakes like any other big clinic," "if they're found . . . liable then they'll pay," and that if money damages were awarded to the child (i.e., a Mayo patient) it "wouldn't be the first case." The potential benefit to appellants of having a Mayo employee on the jury who reports that Mayo makes mistakes, pays for its mistakes, and has paid for its mistakes in the past is obvious.

"during voir dire[] he would have an opportunity to examine the prospective jurors to determine if they had any knowledge, personal contact or personal acquaintance with either the victim or her parents" and "[a]t that time, a determination could be made as to whether any juror should be struck for cause." *Id.* During voir dire, the defendant had the opportunity to question both employees regarding their employment and their relationship to the victim. At the conclusion of voir dire, the defendant did not move to dismiss either employee for cause, but used a peremptory challenge to strike one of the employees. *Id.* The other employee served on the jury, which returned a conviction. *Id.*

The supreme court rejected an argument that the district court's failure to dismiss the two employees resulted in an unfair, partial jury. *Id*. The supreme court reasoned that the employees were not subject to challenge for cause under rule 26.02 and that there was no showing of actual bias or prejudice. *Id.* at 318. The supreme court also based its decision on the fact that the defendant failed to challenge the employees for cause after completion of voir dire, noting that "no post voir dire motion to strike for cause was made." *Id.* at 317-18. The procedural history here is nearly identical, and it does not support a finding that appellants made an appropriate objection. The district court's conclusion that appellants satisfied the third prong of the *Stufflebean* test was erroneous. *See Anderson*, 603 N.W.2d at 356 (holding that the three-prong test was not satisfied when the defendant did not object to the composition of the jury). But the error does not impact the district court's sound conclusion that appellants' juror-bias claim fails under the *Stufflebean* test because of appellants' "failure to establish bias or prejudice."

Because appellants did not satisfy the *Stufflebean* three-prong test, the district court correctly determined that their claim of juror bias fails, and the district court did not abuse its discretion by denying their motion for a new trial on this ground.

II.

Prior to trial on remand, appellants moved for partial summary judgment on the issue of negligence, alleging that there was no dispute of material fact regarding Mayo's negligence in failing to report its suspected abuse of the child before September 15, 1997. The district court denied the motion, relying on the supreme court's statements in *Becker* that its decision "does not preclude Mayo from presenting evidence that its physicians acted with ordinary skill and care or that [the child]'s injuries and her biological parents' behavior were such that the failure to report suspected child abuse was not a deviation from the standard of care." 737 N.W.2d at 217. Appellants renewed their argument at the close of the evidence at trial, this time in the form of a motion for judgment as a matter of law.[4] The district court denied the motion, concluding that the evidence was sufficient to create an issue of fact.

Appellants claim that the district court erred by submitting the issue of negligence to the jury and that the error warranted a new trial. At oral argument, appellants confirmed that their appeal is from the district court's denial of their motions for partial summary judgment and judgment as a matter of law. But the supreme court has recently

[4] Appellants' motion was captioned as a motion for directed verdict. Minn. R. Civ. P. 50 no longer provides for a motion for directed verdict. Motions for directed verdict are now considered motions for judgment as a matter of law. Minn. R. Civ. P. 50, 2006 comm. cmt.

held that a "district court's denial of a motion for summary judgment is not within the scope of review on appeal from a judgment entered after a jury verdict." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918-19 (Minn. 2009). Thus, appellants' claim that the district court erred by denying their motion for partial summary judgment is not properly before this court, and we do not consider it.

With regard to appellants' motion for judgment as a matter of law, a district court may grant judgment as a matter of law if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01. If reasonable jurors could draw different conclusions from the record, judgment as a matter of law is not appropriate. *Bahr*, 766 N.W.2d at 919. We apply de novo review to the district court's denial of a rule 50.01 motion and apply the same legal standard employed by the district court. *Id.* On review, "we view the evidence in the light most favorable to the prevailing party." *Id.*

To establish a claim of negligence, a plaintiff must prove that (1) the defendant has a legal duty to the plaintiff to take some action; (2) there was a breach of that duty; (3) the breach of the duty was the proximate cause of harm to the plaintiff; and (4) damages. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). Appellants argue that the record did not support submission of the negligence issue to the jury because Dr. Gregory Alberton admitted that he violated his duty to report suspected child abuse. The district court rejected this argument, concluding that Dr. Alberton's testimony, when considered in its entirety and proper context, was not an admission that he breached the duty of care, but rather a conditional statement: Dr. Alberton testified

that if a doctor suspects that a child has been abused, then the doctor is obligated to report the abuse. But Dr. Alberton consistently testified that by the end of his examination of the child on August 17, 1997, he did *not* suspect that the child's injuries were the result of abuse. While he initially suspected that the child's injury may have been caused by non-accidental trauma, he obtained a pediatric consult, and he and the consulting medical personnel concluded that the parents were telling the truth regarding the accidental cause of the child's injury. They based their conclusion, in part, upon the perfect match between the parents' description of the accident and the child's physical findings, which could not possibly have been known to the parents when they described the accident.

Second, even if Dr. Alberton's statements could be construed as an admission, they were based upon an incorrect understanding of the child-abuse reporting standard. Under Minnesota law, a doctor who "*knows or has reason to believe* a child is being neglected or physically or sexually abused … shall immediately report the information to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff." Minn. Stat. § 626.556, subd. 3(a) (2008) (emphasis added). The portions of Dr. Alberton's testimony that appellants cite to in support of their argument that he admitted negligence were based on his erroneous belief that a doctor should err on the side of caution and report abuse if he or she is at all suspicious that a child has been abused. However, this is not the correct standard, and Dr. Alberton's statements therefore did not eliminate all fact issues related to Mayo's negligence.

In sum, our review of the trial record indicates that the evidence, when construed in the light most favorable to Mayo, provided a legally sufficient basis for a reasonable jury to conclude that Mayo was not negligent. *See* Minn. R. Civ. P. 50.01 (establishing standard for judgment as a matter of law). The district court did not err by denying appellants' motion for judgment as a matter of law and submitting the question of negligence to the jury. Nor did the district court abuse its discretion by refusing to grant a new trial on this ground.

III.

"Procedural and evidentiary rulings are within the district court's discretion." *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). This court will not disturb a district court's evidentiary ruling unless the district court has erroneously interpreted the law or abused its discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). An appellate court will grant a new trial because of improper evidentiary rulings only if a party demonstrates prejudicial error. *Id.* at 46. Evidentiary error is prejudicial if it might reasonably be said to have changed the result of the trial. *Poppenhagen v. Sornsin Constr. Co.*, 300 Minn. 73, 79-80, 220 N.W.2d 281, 285 (1974). Appellants challenge the district court's admission of portions of the testimony of Dr. Robert Shapiro, Dr. William Shaughnessy, and Dr. Janice Ophoven. We address each witness's testimony in turn.

Dr. Robert Shapiro

In medical-malpractice actions, the plaintiff must offer expert testimony to establish both the standard of care and departure from that standard. *Cornfeldt v. Tongen*,

262 N.W.2d 684, 692 (Minn. 1977). The standard of care is the "reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." *Id.* (quotations omitted).

During re-direct examination, Mayo asked Dr. Shapiro, "as you've looked over this record and considered all that you know about this case, would you likely have made the same judgments that [doctors] of the Mayo Clinic made?" Appellants objected on grounds of relevancy, stating "[i]t's not what an individual doctor would do, but the standard of care." The district court overruled the objection, and Dr. Shapiro answered "Yes. I likely would have done the same thing." Appellants argue that this testimony was improper, relying on *Hoffman v. Naslund*, 274 Minn. 521, 144 N.W.2d 580 (1966), *overruled on other grounds*, *Anderson v. Florence*, 288 Minn. 351, 181 N.W.2d 873 (1970). In *Hoffman*, the supreme court stated that a "qualified medical expert should not be asked for his opinion as to whether the treatment or thing done was proper or improper, but rather whether or not it was according to the customary and usual practice of the ordinary skilled and careful practitioners of the same school in the community." *Id.* at 531, 144 N.W.2d at 589.

Dr. Shapiro's testimony on direct-examination addressed the customary and usual practice of the ordinary, skilled practitioners. On cross-examination, appellants asked numerous questions, based on articles written by Dr. Shapiro, suggesting that he disapproved of Mayo's actions in this case and would have proceeded differently. The district court correctly reasoned that the question that led to appellants' objection was primarily rehabilitative in nature. Mayo was not attempting to substitute Dr. Shapiro's

opinion for the generally accepted practices, but rather to eliminate the impression, created on cross-examination, that Dr. Shapiro personally disapproved of Mayo's actions. The district court did not abuse its discretion by allowing the testimony.

Dr. William Shaughnessy

Appellants argue that the district court improperly allowed Dr. Shaughnessy to testify that the county had "screened out," or did not pursue, a suspected child-abuse case involving another child that he reported to Olmsted County Child Protective Services. Appellants argue that the testimony was irrelevant and substantially more prejudicial than probative. However, appellants did not object to the testimony. Prior to soliciting the testimony, Mayo asked Dr. Shaughnessy: "And of the long bone fractures in infants that you've treated how many were fractured as a result of child abuse?" Appellants objected on the basis of foundation, and the district court overruled the objection. Approximately ten questions and two transcript pages later, Mayo asked Dr. Shaughnessy if he had ever reported any suspected child-abuse cases to Olmsted County. Appellants did not object at this point or at any point during the doctor's response. Appellants now contend that their earlier foundational objection to testimony regarding the types of fractures that Dr. Shaughnessy had treated in infants served as an objection to Dr. Shaughnessy's later testimony regarding his suspected child-abuse report in one of the cases. This contention is without merit. Appellants' foundational objection to an earlier, distinct line of questioning did not assign error to later testimony as being irrelevant and substantially more prejudicial than probative.

"[W]hen a party fails to object to evidence at trial, that party has generally waived any objection." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 481 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006); *see also* Minn. R. Evid. 103(a)(1) (prohibiting an assignment of error upon a ruling that admits evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection"). Moreover, because appellants did not object to the testimony at trial, the alleged error was not grounds for a new trial. *See* Minn. R. Civ. P. 59.01(f) (providing that a new trial may be granted based upon "[e]rrors of law occurring at the trial, and objected to at the time"). Because appellants did not object to the challenged testimony at trial, we will not assign error to the district court's allowance of the testimony.

Dr. Janice Ophoven

Appellants contend that Dr. Ophoven was improperly allowed to provide prejudicial hearsay testimony regarding unnamed, undisclosed medical studies that attribute bleeding in infants' heads to birth trauma. Dr. Ophoven testified regarding possible explanations for the blood in the child's head, stating:

> Well, on a baby this young, the first consideration is birth. Recent studies have indicated that in normal babies born vaginally with a regular delivery, studies have shown by CT and MRI scan that anywhere from 25 to 40 plus percent of babies have blood in their head after delivery that you wouldn't have appreciated.

Appellants objected to this testimony as hearsay and asked that the jury be instructed to disregard the answer. The district court overruled the objection.

Under the Minnesota Rules of Evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Minn. R. Evid. 703(a). However,

> Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

Minn. R. Evid. 703(b); *see also* Minn. R. Evid. 703, 1989 comm. cmt. ("Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion.")

Dr. Ophoven's testimony regarding the data that underlies her opinion is governed by Minn. R. Evid. 703(b). Because the district court did not make any findings regarding good cause or that the underlying data was particularly trustworthy, the testimony was inadmissible under the rule. The district court abused its discretion by allowing Dr. Ophoven to testify regarding the specific findings in unidentified studies.

But appellants fail to show that the error is prejudicial. Evidentiary error is prejudicial if it might reasonably be said to have changed the result of the trial. *Poppenhagen*, 300 Minn. at 79-80, 220 N.W.2d at 285. Dr. Ophoven's testimony indicated that the blood on the child's brain may have been the preexisting result of a

regular, vaginal delivery and not the result of abuse. Thus, the testimony suggests that Mayo's failure to report suspected abuse may not have been the proximate cause of that particular injury. But the blood on the child's brain was only one of the multiple injuries allegedly caused by Mayo's failure to report suspected abuse. And the jury did not find Mayo negligent with regard to *any* of the injuries. Given the jury's failure to find any negligence and the fact that Dr. Ophoven's testimony was limited to one of many injuries, the testimony was not likely the primary basis for the jury's negligence determination. Thus Dr. Ophoven's testimony cannot reasonably be said to have changed the result of the trial. Absent a showing of prejudice, the admission of Dr. Ophoven's testimony does not require a new trial. *See* Minn. R. Civ. P. 61 (requiring that errors which do not affect the substantial rights of the parties be disregarded). The district court did not abuse its discretion by refusing to grant a new trial based on its evidentiary rulings.

Affirmed.

Dated:

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Judge Michelle A. Larkin