STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1388

Herbert B. Fick,
Respondent,

vs.

Eric J. Edwardson, et al.,
Appellants.

Filed April 16, 2018
Affirmed
Cleary, Chief Judge

Dakota County District Court
File No. 19HA-CV-16-911

Mark R. Kosieradzki, Andrew D. Gross, Kosieradzki Smith Law Firm, LLC, Plymouth, Minnesota (for respondent)

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota; and

Lee L. LaBore, LaBore, Giuliani & Viltoft, Ltd., Hopkins, Minnesota (for appellants)

Considered and decided by Cleary, Chief Judge; Reilly, Judge; and Stauber, 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

CLEARY, Chief Judge

Appellants Eric J. Edwardson and John M. Edwardson (the Edwardsons) challenge the district court's denial of their motion for judgment as a matter of law, new trial, or remittitur on the grounds that the jury's awards for past medical expenses, future medical expenses, and pain and suffering were not supported by sufficient competent evidence. Because the jury's awards for past and future medical expenses and pain and suffering were supported by the evidence presented at trial, we affirm.

FACTS

While riding his bicycle on August 1, 2010, respondent Herbert B. Fick collided with a vehicle operated by Eric Edwardson. Fick "went butt first into the road" after being thrown from his bicycle and sustained an injury to his lower back. Fick testified that he had pain in his lower back and pelvic area immediately after the collision and that his pain has intensified since. More than five years after the collision, Fick commenced suit against the Edwardsons, alleging that his injury was caused by the Edwardsons' negligence and carelessness.

Prior to the collision, Fick was active and relatively healthy. In the days following the collision, Fick sought treatment from a chiropractor and a massage therapist. An MRI revealed Fick had a fractured sacrum. It is undisputed that Fick's sacrum was fully healed by November 4, 2010. Fick testified that his pain continued after that date and he sought sporadic massage and chiropractic treatments from 2010 to 2013. In 2013, Fick saw Dr. Adam Todd, a licensed physician specializing in nerve pain. Dr. Todd conducted a

physical exam and diagnosed Fick with severe pudendal neuropathy. Dr. Todd opined that the condition was a permanent injury resulting from the collision. Dr. Todd referred Fick to Dr. Stanley Antolak, prescribed him some anti-inflammatories, and "believe[d]" he recommended physical therapy and massage therapy to treat the nerve pain.

Later that year, Fick sought treatment from Dr. Antolak, a licensed urologist specializing in pelvic nerve pain. Dr. Antolak conducted a physical exam and two separate nerve tests, and diagnosed Fick with pudendal neuropathy. Dr. Antolak stated that "without a doubt with medical certainty that the accident" was the cause of the injury. Dr. Antolak testified that he explained to Fick the various treatment options, which ranged from self-care, prescription medications, injections, and surgery. He prescribed physical therapy and pain psychology treatment for Fick.

Fick declined to take any medications or injections prescribed by Dr. Antolak or Dr. Todd. Fick testified that, over the course of his life, he has avoided all medication that is "not necessary or critical," if he has any choice at all. He explained that his doctors informed him of the side effects and that he believed them to be "life threatening." He further explained that he may reconsider his refusal to take medication when he could no longer handle the pain but was "afraid of what it might do for the long run." Dr. Todd testified that it was reasonable for Fick to choose not to take the prescribed medications or submit to the injections as a means of treatment.

Prior to trial, Fick was examined by Dr. Fredrick Strobl, a licensed neurologist retained by the Edwardsons. Dr. Strobl conducted a physical exam and opined that Fick did not sustain a permanent injury from the collision. He stated that all treatment Fick

received from the time of the collision to November 4, 2010—the date his fractured sacrum was healed—was reasonable and necessary. He opined that Fick's treatment thereafter was not related to the collision and must be related to Fick's pre-existing degenerative back condition or his "excessive biking."

Fick presented evidence of his past medical expenses related to the collision in the form of medical bills totaling $78,988.59. These bills included massage therapy, chiropractic treatment, physical therapy, pain psychology, diagnostic imaging and other forms of treatment from the date of the collision to the time of trial. The parties stipulated to the foundation for all the bills but only stipulated to the reasonableness and necessity of the medical treatments through November 4, 2010. Fick presented evidence on the reasonableness and necessity of his past medical treatment in the form of his own testimony, that of his doctors, and his physical therapist. At the close of Fick's case, the Edwardsons moved for judgment as a matter of law (JMOL) on the issue of past and future medical expenses, arguing that Fick failed to prove his past medical expenses were reasonable and necessary and that he failed to meet his burden on the issue of future medical care. The district court acknowledged that the evidence on both issues was "thin" but held that there was sufficient evidence on the issues to submit to the jury. The jury received separate exhibits detailing the stipulated past medical expenses and contested past medical expenses.

The special-verdict form submitted to the jury listed $12,142.15 as stipulated past health-care expenses and left blanks for "contested past health care expenses" and "past pain and suffering." The special-verdict form listed two blanks for "future pain and

suffering" and "future health care expenses." The jury found that the collision was caused by the negligence of both parties, apportioning 87% of the fault to the Edwardsons and 13% of the fault to Fick. The jury awarded a total of $1,062,809.15 in damages, of which Fick was entitled to $924,643.96. The jury's award for Fick's past damages included $12,142.15 for stipulated past medical expenses and $61,667 for contested medical expenses as well as $175,000 for past pain and suffering. The award for Fick's future damages included $175,000 for future medical expenses and $639,000 for future pain and suffering.

After trial, the Edwardsons moved for JMOL, a new trial, or remittitur of the damages for past and future medical expenses, and pain and suffering, on grounds that Fick failed to mitigate damages, and Fick's counsel made improper statements during closing argument. All motions were denied. This appeal follows.

D E C I S I O N

I. The jury's award for past medical expenses is supported by sufficient evidence.

The Edwardsons argue that they are entitled to judgment as a matter of law or a new trial on the issue of past medical expenses because Fick did not meet his burden of proving his past medical expenses. We disagree.

Judgment as a matter of law should be granted:

> [O]nly in those unequivocal cases where (1) in light of the evidence as a whole, it would clearly be the duty of the district court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Jerry's Enters., Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted). We view the evidence in the light most favorable to the nonmoving party and make an independent determination of whether there is sufficient evidence to present an issue of fact for the jury. *Id.* We review the denial of a motion for judgment as a matter of law de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

We review a district court's new-trial decision for a clear abuse of discretion. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). We "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. Cnty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted).

The Edwardsons argue that the award for past medical expenses was unsupported by the evidence and that the district court abused its discretion by failing to order a new trial. The district court found that the jury's verdict on past medical expenses had "reasonable support in fact and [was] not contrary to law" based on the testimony of the doctors and Fick as well as the detailed list of medical expenses contained in the contested past medical expenses exhibit.

The plaintiff has the burden of proving past damages by a preponderance of the evidence. *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). Past damages for health-care expenses include medical supplies, hospitalization, and health-care services of every kind necessary for treatment up to the time of the verdict. 4A *Minnesota Practice*, CIVJIG

91.15 (2014). The measure of damages for past medical expenses is the reasonable value of the services received. *Swanson v. Brewster*, 784 N.W.2d 264, 281 (Minn. 2010). "There is no fixed standard by which loss for injuries can be determined." *Brannan v. Shertzer*, 242 Minn. 277, 287, 64 N.W.2d 755, 761 (1954). The assessment of damages is within "the peculiar province of the jury." *Myers v. Hearth Techs. Inc.*, 621 N.W.2d 787, 794 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Mar. 13, 2001).

It is undisputed that Fick was injured as a result of the August 1, 2010 collision and suffered a fractured sacrum that was fully healed by November 4, 2010. The Edwardsons presented expert testimony that all medical expenses related to that injury were necessary and reasonable and that any medical expenses incurred by Fick after November 4, 2010 were not related to the injury he sustained from the collision and therefore not necessary or reasonable.

But Fick presented evidence through his own testimony and that of his treating physicians that his past medical expenses were reasonable and necessary to treat the nerve injury he suffered in the collision. Fick testified about his pain and his pain management practices before and after the injury. Fick described the pain and sensations associated with his injury and testified that this pain was the reason he sought the various medical treatments he did from the time of the collision to the time of trial. Both Dr. Todd and Dr. Antolak diagnosed Fick with pudendal neuropathy and opined that this injury was caused by the August 1, 2010 collision. And both doctors testified that the injury was permanent. Both doctors endorsed physical therapy and massage therapy as treatments for Fick's nerve pain and Dr. Antolak recommended he see a pain psychologist in addition to

these treatments. Further, all Fick's past medical bills were submitted to the jury and included descriptions of the treatment he received, a breakdown of the cost of each treatment, and treatment notes. No evidence was presented questioning the reasonableness of the billing practices of any treatment provider.

Viewed in the light most favorable to Fick, this evidence is sufficient to support the award for past medical expenses. As the district court found, Fick's own testimony and that of his treating physicians, combined with the detailed list of medical expenditures, established the reasonableness and necessity of his past medical expenses. Accordingly, we conclude that the Edwardsons were not entitled to judgment as a matter of law or a new trial on the issue of past medical expenses.

II. The jury's award for future medical expenses is supported by sufficient evidence.

The Edwardsons argue that they are entitled to judgment as a matter of law or a new trial on the issue of future medical expenses because Fick did not meet his burden of proving his future medical expenses. We disagree.

As discussed above, we review the district court's denial of the Edwardsons' motion for judgment as a matter of law de novo and the denial of a motion for a new trial for abuse of discretion. "In a civil action the plaintiff has the burden of proving future damages to a reasonable certainty" to ensure that "there is no recovery for damages which are remote, speculative, or conjectural." *Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980). But it is not necessary that "the evidence be unequivocal or that it establish future damages to an absolute certainty." *Id.* Rather, the "plaintiff must prove the reasonable certainty of

future damages by a fair preponderance of the evidence." *Id.* To establish damages for future medical care, a plaintiff must (1) demonstrate that "future damages in the form of future medical treatments will be required" and (2) establish the amount of the future medical expenses by expert testimony. *Lind v. Slowinski*, 450 N.W.2d 353, 358 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990). Future medical expenses will not be allowed "without an estimate of what they might be" because future medical expenses are "a matter which the jury cannot compute blindly without expert testimony" and thus "cannot be left to their speculation." *Lamont v. Indep. Sch. Dist. No. 395*, 278 Minn. 291, 295, 154 N.W.2d 188, 192 (1967). The jury is not permitted to "award any amount based on a showing that expenses are likely to occur. The plaintiff must also present some evidence of what the expenses will be." *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. App. 1987).

In this case, the first requirement of *Lind* is met: Dr. Antolak and Dr. Todd both testified that Fick sustained a permanent injury from the collision. And Dr. Antolak testified that it is more likely than not that Fick would continue to have nerve pain for the rest of his life, regardless of the course of treatment he chose. On this expert testimony, the jury could have found that it was reasonably certain that Fick would incur future medical expenses. *See Krutsch v. Walter H. Collin GmBh Verfahrenstechnik Und Maschinenfabric*, 495 N.W.2d 208, 213 (Minn. App. 1993) (concluding need for future medical care was established through expert testimony that the plaintiff's condition was "permanent" and would "require continual medical treatment"), *review denied* (Minn. Mar. 22, 1993).

With respect to the second requirement, this case is similar to *Kwapien*. In *Kwapien*, the plaintiff presented evidence she had a permanent injury and that physical therapy or similar treatment would be required for the rest of her life. 400 N.W.2d at 184. The plaintiff presented evidence of the cost of her past physical therapy sessions but did not provide a specific estimate of the total cost of her future medical expenses. *Id.* This court upheld the jury's award of future medical expenses because, based on that evidence, "it was possible for the jury to take [the plaintiff's] life expectancy and factor it against the cost of her past physical therapy treatments to arrive at an approximate figure for future medical expenses." *Id.* "A figure arrived at in this manner based upon the evidence presented would not have been pure speculation." *Id.*

Here, Fick presented "some evidence" of what his future medical expenses would be through expert testimony from Dr. Todd and Dr. Antolak. As in *Kwapien*, there was no expert testimony providing a specific estimation of the cost of the future medical treatment Fick would require. But both doctors testified that they recommended physical therapy and massage therapy prior to trial. And Fick presented evidence that the weekly costs of his physical therapy and massage therapy were $110 and $160 respectively. Further, expert testimony established that the potential cost of surgery was in excess of $50,000 and the potential cost of prescription medication would be between $300 and $6,000 per month depending on the type of medication and dosage required. While there was no specific statement about how much future medical treatment Fick would need—whether it would be more or less physical therapy and massage, a specific dosage of medication per month,

surgery, or a combination of all three—the jury was presented with sufficient evidence to make an approximation of future expenses that was not "pure speculation."

Viewed in the light most favorable to Fick, the award for future medical expenses has ample support in the record. There was testimony that his condition was permanent and that he would continue to need medical treatment for the rest of his life, regardless of which treatment path he chooses. The jury heard evidence about the costs of each of the three treatment paths: self-care, medication, and surgery and it was possible for them to arrive at an approximate figure based on the projected costs of each of these three treatments or a combination of the three and Fick's life expectancy. Accordingly, we conclude that the Edwardsons are not entitled to judgment as a matter of law nor a new trial on the issue of future medical expenses.

III. The jury's award for pain and suffering is supported by sufficient evidence.

The Edwardsons argue that Fick's "abject refusal to accept" some of his doctors' recommendations, specifically those involving pain medication, constitutes a failure to mitigate damages that justifies a remittitur or new trial on the jury's award for pain and suffering. This issue was raised posttrial and the district court denied the Edwardsons' motion, finding that "there was sufficient evidence presented to the jury for it to find that [Fick] exercised reasonable precaution in the care and treatment of his injury" and that the evidence presented was "more than sufficient to uphold the jury's verdict regarding past and future pain and suffering." On this record, the district court did not abuse its discretion in denying the Edwardsons' motion for a new trial.

"The discretion to grant a new trial on the ground of excessive damages rests with the [district] court, whose determination will only be overturned for abuse of that discretion." *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984). It is within the district court's discretion to determine whether damages are excessive and whether the cure therefor is remittitur or a new trial. *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 368 (Minn. App. 2003), *aff'd*, 684 N.W.2d 404 (Minn. 2004). "Remittitur may be granted on the ground that an excessive verdict appears to have been given under the influence of passion and prejudice or on the ground that the damages are not justified by the evidence" and the district court's decision on whether to grant a remittitur will not be overturned absent a clear abuse of discretion. *Kwapien*, 400 N.W.2d at 184.

The Edwardsons argue that medical treatment may only be rejected where it poses a risk to life, such as a major surgery or operation. But there is no such bright line rule. Rather, a "[p]laintiff has a duty to mitigate damages by acting reasonably in obtaining treatment for her injury." *Adee v. Evanson*, 281 N.W.2d 177, 180 (Minn. 1979) (citing *Couture v. Novotny*, 297 Minn. 305, 211 N.W.2d 172 (1973)). This reasonableness standard does not require the plaintiff to "submit to a major surgical operation" nor a form of medical treatment "when the prospect of success is uncertain or when there is a chance of unsatisfactory results." *Couture*, 297 Minn. at 309-10, 211 N.W.2d at 174-75. Instead, the plaintiff "may choose to bear his affliction and be compensated for it." *Id.* at 309, 211 N.W.2d at 175. But in doing so, a plaintiff may not insist on one form of medical care

instead of another "and thereby aggravate damages, unless the jury could find that a reasonable person would do so." *Adee*, 281 N.W.2d at 181.

Here, there was sufficient evidence to establish that Fick mitigated his damages by acting reasonably in obtaining treatment for his injury. And while Fick insisted on a form of treatment other than prescription medications, injections, or surgery, he presented sufficient evidence to establish that a reasonable person would do so. The jury heard evidence about Fick's lifestyle changes and treatment strategies: his standing rather than sitting at most opportunities, his modified bike seat, the special pad he uses when he is required to sit, as well as his physical therapy, massage therapy treatments, and pain psychology treatments. The jury heard about Fick's concerns related to the side effects of prescription drugs, including the long-term consequences of lifelong medication and his decision not to treat his nerve injury with injections or surgery. Further, there was expert testimony about the success rates and side effects of the medical procedures and medications. Dr. Todd testified about the side effects of the medication Fick was initially prescribed and stated that they ranged from dizziness and weight gain to fatigue and effects on a person's brain and ability to think. Similarly, Dr. Antolak testified that the main side effect of the drug was "thinking problems." Both doctors testified that prescription medication could not heal a nerve and could not guarantee it would eliminate his pain. There was also substantial testimony about the invasiveness and pain associated with the injections and surgery included as possible treatment methods for Fick's injury and neither doctor testified that either method would provide Fick with lasting relief to a medical

certainty. Moreover, Dr. Todd testified that it was reasonable for Fick to refuse to take the medications prescribed or submit to the surgical procedure or injections.

The jury heard evidence about the possible avenues of treatment, their respective success rates and side effects, and Fick's reasons for choosing not to pursue those treatments. On this record, Fick presented sufficient evidence to permit the jury to find his treatment strategies were reasonable despite the availability of other treatment options. Accordingly, the district court did not abuse its discretion in denying the Edwardsons' motion for a new trial or remittitur.

Affirmed.