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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1608**

Earl Seiler, individually, and as Trustee
for the Next of Kin of Danielle Seiler, Decedent,
Appellant,

vs.

Bruce McEachran,
Respondent.

**Filed May 21, 2012
Affirmed
Halbrooks, Judge**

Anoka County District Court
File No. 02-CV-09-2791

Robert D. Boedigheimer, Boedigheimer Law Firm, P.A., St. Paul, Minnesota (for appellant)

Timothy P. Tobin, Lynn Schmidt Walters, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion for a new trial in this wrongful-death action on several grounds, including that (1) Minn. Stat. § 390.11 (2010) is unconstitutional, (2) the district court abused its discretion by admitting certain

evidence, (3) irregularities in the proceedings prevented a fair trial, (4) the jury's award of damages and verdict is contrary to the evidence and law, and (5) the district court erred by awarding respondent close to \$7,000 in expert-witness fees. We affirm.

FACTS

This case arises out of a motor-vehicle accident that occurred in 2006 at the intersection of State Highway 65 and Klondike Boulevard in East Bethel. According to several witnesses, Danielle Seiler failed to yield at a yield sign and, attempting to cross the highway, drove directly into the path of respondent Bruce McEachran's truck as he entered the intersection. Respondent swerved into the right lane and hit the brakes, but still struck Danielle Seiler's car. The two vehicles rolled into the ditch at the northeast corner of the intersection. Danielle Seiler and her male passenger died on impact, and respondent suffered minor injuries.

Danielle Seiler's father, appellant Earl Seiler, commenced a wrongful-death action against respondent, alleging that respondent's negligent and careless driving caused the collision that ended Danielle Seiler's life and that as a result of her death, he has been injured "in property, means of support, loss of companionship, counsel, guidance, aid, advice, comfort, assistance, protection, and other damages." Before trial, appellant moved the district court to exclude the portion of the coroner's report indicating that Danielle Seiler had an alcohol concentration of 0.032 and to preclude respondent's expert witness, Daniel Lofgren, from testifying that the alcohol-concentration level may have impaired Danielle Seiler's driving. The district court denied both motions. The jury placed 100% of the fault for the accident on Danielle Seiler and awarded appellant zero

dollars in damages. Appellant moved for a new trial, and the motion was denied. This appeal follows.

DECISION

I.

Appellant argues that Minn. Stat. § 390.11, subd. 7b, is unconstitutional because it violates the separation-of-powers doctrine by removing “the judiciary’s power to regulate evidentiary matters.” The statute provides:

Records and reports, including those of autopsies performed, generated, and certified by the coroner or medical examiner shall be admissible as evidence in any court or grand jury proceeding. The admissibility of such evidence under this subdivision shall not include statements made by witnesses or other persons unless otherwise admissible.

Minn. Stat. § 390.11, subd. 7b. This court reviews the constitutionality of a statute *de novo*. *Hamilton v. Comm’r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

Respondent asserts that appellant has waived the issue on appeal because he failed to preserve the issue of constitutionality of this statute in the district court. *See, e.g., Erickson v. Fullerton*, 619 N.W.2d 204, 208-09 (Minn. App. 2000) (declining to review constitutional challenge to a statute because it was not raised or considered by the district court and appellate record was insufficient for review). Appellant concedes that the issue was not properly preserved, but contends that this court should address the issue in the interest of justice. We decline to do so.

II.

Appellant asserts that the district court abused its discretion by admitting evidence contained in the coroner's report that Danielle Seiler had an alcohol concentration of 0.032 as measured soon after her death. This court will not reverse a district court's ruling on the admissibility of evidence unless the ruling reflects an abuse of discretion resulting in prejudice to the objecting party. *May v. Strecker*, 453 N.W.2d 549, 554 (Minn. App. 1990), *review denied* (Minn. June 15, 1990).

A.

Relying on *Mueller v. Sigmond*, 486 N.W.2d 841 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992), appellant argues that the evidence of Danielle Seiler's intoxication was inadmissible. *Mueller* involved a driver, Sigmond, who failed to stop at a stop sign and collided with a vehicle driven by Mueller. Mueller sued Sigmond for negligence. 486 N.W.2d at 843. Evidence that Mueller had an alcohol concentration of 0.076 at the time of the accident was not admitted at trial. *Id.* In considering whether the evidence was presumptively admissible under Minn. Stat. § 169.96 (1990), as prima facie evidence of Mueller's negligence, this court observed:

[I]n civil actions, violation of chapter 169 "is not negligence per se" but is "prima facie evidence of negligence only." Absent additional evidence that Mueller was driving while intoxicated, her .076 blood alcohol concentration is not a "violation." Although the underlying blood alcohol concentration evidence may be relevant, even probative, in an action for negligence, subdivision 2(b) does not create a presumption of relevance in such a civil case unless a violation is shown.

Id. (citation omitted). We therefore concluded that the district court did not abuse its discretion by excluding the evidence. *Id.* at 844. Applying the same reasoning, we must conclude that the evidence is presumed admissible in this case because Danielle Seiler's alcohol concentration proves an actual violation of driving laws; unlike Mueller, Danielle Seiler, a minor, was proscribed from having any level of alcohol in her body. *See* Minn. Stat. § 169A.33, subd. 2 (2010) ("It is a crime for a person under the age of 21 years to drive . . . a motor vehicle . . . while there is physical evidence of the consumption [of alcohol] present in the person's body."). The evidence was therefore presumptively admissible under *Mueller*.

B.

Appellant contends that the coroner's report was inadmissible for any purpose other than cause of death. He cites *Hestad v. Penn. Life Ins. Co.*, 295 Minn. 306, 310, 204 N.W.2d 433, 436 (1973), for the proposition that a coroner's report is inadmissible as evidence of manner of death and only admissible as evidence of cause of death. *Hestad* involved a coroner who wanted to testify that the decedent's death, which was caused by carbon monoxide poisoning from a defective tractor, was a suicide. 295 Minn. at 309, 204 N.W.2d at 435. The district court did not allow the evidence, in part, because the coroner was not qualified to render such an opinion about the decedent's state of mind. *Id.* at 310, 204 N.W.2d at 436. The supreme court also stated that a coroner's report cannot be used to show manner of death because "[s]tatements as to the manner of death in a death certificate constitute conclusions and hearsay." *Id.*

Hestad is distinguishable from this case. Appellant does not argue that the coroner is unqualified to render an opinion about Seiler's alcohol concentration. Rather, appellant argues that the toxicology finding within the coroner's report is inadmissible hearsay under *Hestad*. "Hearsay is not admissible except as provided by [the Minnesota Rules of Evidence] or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802. The Minnesota Legislature has expressly provided that coroner reports are admissible. Minn. Stat. § 390.11, subd. 7(b) (2010) ("Records and reports, including those of autopsies performed, generated, and certified by the coroner or medical examiner shall be admissible as evidence in any court or grand jury proceeding."); *see also* Minn. R. Evid. 802 1977 comm. cmt. ("The authority of the legislature to create various exceptions to the hearsay rule is well established.").

C.

Appellant argues that there are two conflicting statutes regarding whether the alcohol-concentration level in the coroner's report is admissible. He asserts that because Minn. Stat. § 169.09, subd. 11 (2010), is more specific than Minn. Stat. § 390.11, subd. 7b, it controls. He also asserts that Minn. Stat. § 169.09, subd. 11, makes the report inadmissible. Minn. Stat. § 169.09, subd. 11, provides:

Every coroner or other official performing like functions shall report in writing to the commissioner of public safety the death of any individual within the coroner's jurisdiction as the result of an accident involving a vehicle and the circumstances of the accident. The report must be made within 15 days after the death.

In the case of drivers killed in vehicle accidents . . . the coroner . . . shall examine the body and shall make tests as are necessary to determine the presence and percentage concentration of alcohol, and drugs if feasible, in the blood of the victim. This information must be included in each report submitted pursuant to the provisions of this subdivision and shall be tabulated on a monthly basis by the commissioner of public safety. *This information may be used only for statistical purposes that do not reveal the identity of the deceased.*

(Emphasis added.)

Appellant reads Minn. Stat § 169.09, subd. 11, to govern the admissibility of a coroner's report at trial. But in fact, it relates to the permissible uses of the report the coroner makes to the commissioner of public safety. There is no conflict between Minn. Stat. § 169.09, subd. 11, and Minn. Stat. § 390.11, subd. 7b.

D.

Appellant makes two final arguments on this issue: that respondent cannot establish a prima facie case of negligence without alcohol-concentration evidence and that he was unfairly prejudiced by the admission of the alcohol-concentration evidence. Because we conclude that the admission of alcohol-concentration evidence was not error, we do not reach these arguments. But we do note that the jury was presented with other evidence of Danielle Seiler's negligence, including the testimony of witnesses to the accident.

III.

Appellant argues that the district court erred by permitting Daniel Lofgren to testify about the effects of alcohol on Danielle Seiler's driving. The district court's

decision to permit an expert witness to testify is reviewed under an abuse-of-discretion standard. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). “This is a very deferential standard.” *Id.* at 761 “[E]ven if this court would have reached a different conclusion as to the sufficiency of the foundation, the decision of the district court judge will not be reversed absent clear abuse of discretion.” *Id.* (quotation omitted).

A.

Appellant asserts that Lofgren’s testimony was inadmissible under Minn. R. Evid. 702 because Lofgren did not establish that the test used to determine the alcohol-concentration level is “reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” Minn. R. Evid. 702 2006 amend. advisory comm. cmt. This argument fails because Lofgren did not testify that Danielle Seiler’s alcohol-concentration level was 0.032; he testified about what effects that level of alcohol concentration would have had on her ability to drive. With respect to Lofgren’s testimony, no test was used, and, therefore, there was no need to prove that the test was reliable under Minn. R. Evid. 702.

B.

Appellant argues that Lofgren, who is not a toxicologist, was not qualified to render an expert opinion regarding the probable effect of Danielle Seiler’s alcohol concentration on her driving. Minn. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability.

Lofgren is an expert in accident reconstruction with 11 years of experience in law enforcement. This court has held that a police officer with 21 years of experience who investigated an accident and had taken classes on accident investigation could testify that, in his opinion, a driver's intoxication was a major contributing factor to an accident. *May*, 453 N.W.2d at 555. But the officer's testimony in *May* was provided in conjunction with testimony by a toxicologist that an individual with the alcohol-concentration level of the driver would show signs of obvious intoxication. *Id.* at 554. *May* does not support the proposition that the testimony of an accident reconstructionist, by itself, obviates the need for a toxicologist's opinion that the particular alcohol concentration of the driver would lead to signs of obvious intoxication. Although Lofgren might have had foundation to testify that a person who is obviously intoxicated might have trouble driving, he is not trained to render an opinion about the effect of alcohol on a driver based on alcohol concentration alone. Here, as in *May*, the opinions of both a toxicologist and an accident reconstructionist were needed. Because Lofgren was not qualified to opine about the effects of Danielle Seiler's alcohol concentration on her ability to drive, it was error to admit that testimony.

But we will not reverse unless the error prejudiced appellant. *See id.* at 554. Here, we conclude that it did not. Even without evidence of Danielle Seiler's intoxication, or its effect on her driving, the jury heard testimony from witnesses to the accident that it was caused by her failure to yield the right of way, a fact that was undisputed at trial.

The jury rejected any evidence that respondent's driving contributed to the accident, as evidenced by its finding that he was zero percent at fault.

C.

Appellant also challenges the admissibility of Lofgren's testimony regarding the effect of Danielle Seiler's alcohol concentration on her driving on the ground that it is speculative. Because we have concluded that this testimony was inadmissible because it lacked proper foundation, we do not need to address whether it was also inadmissible because it was speculative.

IV.

Appellant argues that irregularities in the proceedings entitle him to a new trial. *See* Minn. R. Civ. P. 59.01 (providing that a new trial may be granted when irregularities in the proceedings deprive the moving party of a fair trial). "An irregularity is a failure to adhere to a prescribed rule or method of procedure not amounting to an error in a ruling on a matter of law." *Boschee v. Duevel*, 530 N.W.2d 834, 840 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. June 14, 1995).

Appellant contends that an irregularity occurred when the district court judge refused to disqualify herself after disclosing that "some months ago" she heard a remark in the courtroom from her bailiff (who was also a deputy at the scene of the accident) that he was "surprised that this case was being sued." She also disclosed that she had recently officiated the wedding of the decedent's younger sister. The district court judge stated that she did not think that either of those experiences had any impact on her ability to hear the case, particularly because she would not be the trier of fact.

Minn. Code Jud. Conduct 2.11(A)(1) states:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to . . . [the fact that] [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

The supreme court has held that “‘personal knowledge’ pertains to knowledge that arises out of a judge’s private, individual connection to particular facts[;] . . . it does not include the vast realm of general knowledge that a judge acquires in her day-to-day life as a judge and citizen.” *State v. Dorsey*, 701 N.W.2d 238, 247 (Minn. 2005) (analyzing nearly identical language in canons of judicial conduct). We conclude that the experiences disclosed by the district court judge would not reasonably call into question her impartiality. Hearing that her bailiff was surprised that a case was being litigated is not personal knowledge of the case, even if the bailiff had personal knowledge from his experience as a deputy. With respect to the district court judge’s alleged bias stemming from her involvement in the wedding of Danielle Seiler’s sister, the bias, if any, would be in appellant’s favor. Appellant fails to explain how the district court judge’s connection with Danielle Seiler’s family prejudices his case.

The district court judge did not err by failing to disqualify herself. But even if she did err, appellant fails to show that he was deprived of a fair trial. *See* Minn. R. Civ. P. 59.01 (permitting new trial when irregularities deprived moving party of fair trial). Appellant asserts that his deprivation of a fair trial is demonstrated by the fact that the district court judge’s law clerk communicated with respondent’s attorney and the judge

reprimanded his attorney during trial. We do not agree. The communication by the law clerk was innocuous, and the reprimand was warranted.

V.

Appellant argues that he is entitled to a new trial because the jury awarded him no damages. The district court may grant a new trial based on insufficient damages if the evidence demonstrates that the damages award could have resulted only from passion or prejudice. Minn. R. Civ. P. 59.01(e). In a wrongful-death action, a parent may be entitled to “pecuniary loss resulting from the death.” Minn. Stat. § 573.02, subd. 1 (2010). When determining what amount to award for pecuniary loss, the jury is to consider the decedent’s:

- (1) past contributions,
- (2) life expectancy at the time of death,
- (3) health, age, habits, talents, and success,
- (4) occupation,
- (5) past earnings,
- (6) likely future earning capacity and prospects of bettering oneself had he or she lived,
- (7) living expenses,
- (8) legal obligation to support spouse or next of kin and the likelihood of fulfilling that obligation,
- (9) reasonable funeral and necessary medical expenses,
- (10) probability of paying off existing debts,
- (11) future counsel, guidance, and aid, and
- (12) future advice, comfort, assistance, and protection.

Youngquist v. W. Nat’l Mut. Ins. Co., 716 N.W.2d 383, 386 (Minn. App. 2006) (citing 4A *Minnesota Practice*, CIVJIG 91.75 (1999)).

At the time of Danielle Seiler’s death, she no longer lived with her parents and had no job. Her parents were unaware of where she was living, and although her mother had met her boyfriend, she did not know it was her boyfriend at the time. Although her parents undoubtedly suffered greatly from losing their oldest daughter, the jury’s

determination that they did not lose compensable support or companionship is supported by the record.

Appellant also asserts that he is entitled to a new trial because the jury's verdict is contrary to the evidence. The district court may grant a new trial based on a verdict that is not justified by the evidence. Minn. R. Civ. P. 59.01(g). But the jury's verdict on negligence "should not be disturbed unless there is no evidence which reasonably supports the verdict or it is manifestly contrary to the evidence." *Smith v. Carriere*, 316 N.W.2d 574, 575 (Minn. 1982). Appellant argues that the jury's finding that respondent had no negligence is "contrary to the facts and the law" because the "only testimony admitted into evidence at trial regarding Respondent's pre-impact speed was established by Dan Lee as being in excess of 70 mph." Appellant's assertion is incorrect. Several witnesses, including the state's expert, testified that respondent was driving at or below the speed limit of 65 miles per hour at all times.

VI.

Appellant argues that the district court abused its discretion by awarding \$6,916.66 in expert-witness fees to respondent. "In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred," Minn. Stat. § 549.04, subd. 1 (2010), and these disbursements include the "just and reasonable" fees of expert witnesses, Minn. Stat. § 357.25 (2010). This court reviews a district court's award of expert-witness fees under an abuse-of-discretion standard. *State v. Lopez-Solis*, 589 N.W.2d 290, 296 (Minn. 1999).

Appellant contends that the witness fee should be reduced by more than one-half because some of the claimed fees related to the expert's attendance at trial to hear appellant's expert's testimony, meeting respondent's counsel on "several occasions," and reviewing his file on "multiple occasions" are unreasonable. Appellant seems to be arguing that reasonable expenses must be necessary expenses for trial; but in truth, they only need to be reasonable. *See Larson v. Hill's Heating & Refridgeration of Bemidji, Inc.*, 400 N.W.2d 777, 783 (Minn. App. 1987) (observing that reasonable expenses is broader than the language under the old statute, which required that the expenses be necessary for trial), *review denied* (Minn. Apr. 17, 1987). We conclude that appellant has failed to show that respondent's expert-witness fees are unreasonable.

Appellant also claims that the district court's award of costs and disbursements should be vacated pending this court's decision. Because he offers no case citation or argument, we do not address that claim. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

Affirmed.