STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2409

Jim Kollross,
Appellant,

vs.

Park Avenue of Wayzata,
Respondent.

Filed January 29, 2008
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-05-001913

Michael E. Marks, Saliterman & Siefferman, 2000 U.S. Bank Plaza, 220 South Sixth Street, Minneapolis, MN 55402 (for appellant)

Katherine A. McBride, Meagher & Geer, 33 South Sixth Street, Suite 4400, Minneapolis, MN 55402; and

Gregory L. Wright, Taylor & Lance, 6131 Blue Circle Drive, Eden Prairie, MN 55343 (for respondent)

Considered and decided by Willis, Presiding Judge; Wright, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

WRIGHT, Judge

Appellant challenges the district court's denial of his motion for a new trial, arguing that the district court erred by declining to permit him to reopen his case-in-chief for additional testimony after resting. We affirm.

FACTS

In late March 2003, appellant Jim Kollross slipped and fell as he was entering Oak Point Apartments, which is owned and operated by respondent Park Avenue of Wayzata (Park Avenue). After the fall, he complained of radiating pain from his right hip. On November 17, 2004, Kollross initiated a personal-injury action against Park Avenue, alleging that Park Avenue's failure to properly maintain the sidewalk and stairway caused his fall, which resulted in "serious injuries and medical expenses."

Park Avenue engaged Dr. Paul Cederberg to perform an independent medical examination of Kollross. Dr. Cederberg testified at a deposition regarding his examination. When both parties submitted their proposed witness lists for trial, Park Avenue indicated that it anticipated calling Dr. Cederberg as an expert witness. Kollross did not list Dr. Cederberg as a witness but reserved the right to call any witness on Park Avenue's witness list.

At trial, Kollross called neither his listed medical experts nor Dr. Cederberg before resting his case unconditionally. Park Avenue moved for a directed verdict based on Kollross's failure to prove causation. In response, Kollross sought to reopen his case-in-chief to present the testimony of Dr. Cederberg.

The district court denied Kollross's motion, reasoning that Park Avenue was under no obligation to present Dr. Cederberg's testimony and stating that Kollross could not avail himself of Dr. Cederberg's testimony because the doctor was Park Avenue's paid medical expert. Finding that without any medical evidence regarding causation there was not a question of fact for the jury, the district court granted Park Avenue's motion for a directed verdict.

Thereafter, Kollross moved the district court for a new trial, arguing that the district court erred by denying his motion to reopen his case-in-chief. The district court denied the new-trial motion, concluding that Kollross's "lack of due diligence" did not warrant reopening his case. This appeal followed.

D E C I S I O N

Kollross challenges the district court's denial of his new-trial motion, arguing that the district abused its discretion by declining to permit him to reopen his case-in-chief for Dr. Cederberg's testimony. We review the district court's disposition of a new-trial motion for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

A new trial may be granted if the moving party demonstrates a deprivation of a fair trial because of an abuse of discretion by the district court. Minn. R. Civ. P. 59.01(a). Because Kollross's motion for a new trial was premised on the district court's denial of his motion to reopen the record, a decision that rests within the sound discretion of the district court, *Golinvaux v. Comm'r of Pub. Safety*, 403 N.W.2d 916, 919 (Minn. App. 1987), we first consider whether the district court abused its discretion by declining to

reopen the record. If so, we evaluate whether denial of the new trial motion on this ground warrants reversal. *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) (party appealing denial of new trial must demonstrate both abuse of discretion and prejudice).

A party generally is expected to present all of its evidence during its case-in-chief. *Gathright v. St. Louis Teacher's Credit Union*, 97 F.3d 266, 268 (8th Cir. 1996); *see* Minn. R. Civ. P. 41.02(b) (permitting defendant to move for dismissal after "plaintiff has completed the presentation of evidence"). Thus, in a negligence case, the plaintiff is expected to present evidence addressing the elements of a negligence claim—the existence of a duty, breach of that duty, harm, and causation—before resting. *See State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 887 (Minn. 2006) (defining elements of negligence). A party's failure to act with due diligence to present the necessary evidence does not warrant reopening the case to supplement the record. *White v. City Nat'l Bank of Norman*, 271 P.2d 713, 717 (Okla. 1954); *see also Simon v. Shearson Lehman Bros., Inc.*, 895 F.2d 1304, 1322-23 (11th Cir. 1990) (finding tactical reasons insufficient); *Sec. State Bank of Howard Lake v. Dieltz*, 408 N.W.2d 186, 192 (Minn. App. 1987) (finding failure to prepare insufficient). In particular, the plaintiff's failure to call an available witness or produce existing evidence ordinarily does not constitute grounds to reopen a case. *Gathright*, 97 F.3d at 268.

Kollross acknowledges that Dr. Cederberg's testimony was necessary to establish the causation element of his negligence claim. But rather than calling Dr. Cederberg as his witness, Kollross intended to "continue presenting his case-in-chief" through Park

Avenue's presentation of Dr. Cederberg's deposition testimony during Park Avenue's case-in-chief. Although Kollross never advised the district court of his intent before resting, he maintains that he acted diligently by referring to Dr. Cederberg's testimony in Kollross's opening statement and by relying on Park Avenue's declarations that it would call Dr. Cederberg.

Kollross's discussion of Dr. Cederberg in his opening statement does not constitute due diligence. Kollross's failure to list Dr. Cederberg as a witness for trial made his discussion of Dr. Cederberg in opening statement simply a discussion of the anticipated evidence, not an indication that Dr. Cederberg's testimony should be considered part of Kollross's case-in-chief. Consequently, the district court reasonably found Kollross's reliance on his opening statement insufficient. Likewise, Kollross's reliance on Park Avenue's indications that it would call Dr. Cederberg to establish due diligence is misplaced. Although Park Avenue indicated in its witness list and at trial that it would call Dr. Cederberg as a witness, the district court properly observed that Park Avenue was not required to address the issue of causation or to present any evidence at all. Therefore, Park Avenue was under no obligation to call Dr. Cederberg.

Furthermore, it is within the district court's discretion to control the order of proof. *Norwest Bank Midland v. Shinnick*, 402 N.W.2d 818, 824 (Minn. App. 1987). The district court properly observed that, even if Kollross had actually requested leave to alter the order of proof, the district court would not have been required to permit Kollross to proceed with his unconventional presentation of his case. Since Kollross offered no reason to deviate from the customary presentation of evidence, it was well within the

district court's discretion to require Kollross to present all of his evidence during his case-in-chief.

The district court's conclusion that Kollross's failure to present the necessary evidence was "due solely to a lack of due diligence" is consistent with the record before us. In light of Kollross's failure to act with due diligence in procuring Dr. Cederberg's testimony, we need not consider whether Kollross was prejudiced by the district court's denial of his motion to reopen. The district court did not abuse its discretion by denying Kollross's motion to reopen his case-in-chief. Accordingly, its denial of Kollross's new-trial motion was not an abuse of discretion.

Kollross's additional claim that he is entitled to a new trial because the district court erroneously concluded that Park Avenue "owned" Dr. Cederberg's testimony also is unavailing. Because the district court declined to permit Kollross to reopen his case because of his lack of due diligence, the admissibility of Dr. Cederberg's testimony based on witness "ownership" was not before the district court. Indeed, the district court may have erred in hypothesizing on this matter. But the district court did not abuse its discretion by denying Kollross's motion for a new trial because it denied the motion based on other sufficient grounds.

Affirmed.