STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0699

Lisa M. Sipe,
Respondent,

vs.

Fleigles Transportation & Services, Inc.,
Appellant.

Filed May 13, 2008
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-CV-05-010247

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Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

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

MINGE, Judge

Appellant challenges the denial of its motion for a new trial, arguing that it should have been granted because (1) appellant was prejudiced by the admission of evidence that should have been excluded based on pretrial orders; (2) evidence of a medical procedure known as radiofrequency neurotomy should have been excluded; and (3) the question of future medical expenses should not have been submitted to the jury. We affirm.

FACTS

On October 7, 2002, respondent Lisa Sipe was injured in a car accident. The vehicle at fault was operated by an employee of appellant Fleigles Transportation & Services, Inc. (FT&S). Sipe's injuries resulted in chronic neck pain, and she sued FT&S.

Sipe experienced difficulty in obtaining relief for her neck pain. Ultimately, she went to Dr. Thomas Cohn, who specializes in pain medicine, for a procedure called radiofrequency neurotomy. A radiofrequency neurotomy involves isolating the medial branch nerve in the spine that is causing the pain and then destroying the nerve with a needle that emits microwaves. Because the nerve apparently regrows over the course of six months to one year and the pain then reappears, the relief experienced by Sipe from the neurotomy procedure was temporary. Sipe had successfully undergone the procedure three times at the time of trial.

The issue of Sipe's future medical expenses and Dr. Cohn's testimony regarding future neurotomies to treat her condition was contested by FT&S. Several months before trial, Sipe had moved the court for an order regarding the admissibility of Dr. Cohn's

testimony. FT&S objected and moved for the exclusion of evidence regarding neurotomies, claiming that the procedure was relatively new and did not meet the *Frye-Mack* standard for scientific evidence. The district court entered an order dated March 29, 2006, which stated:

> 1. The Court may take appropriate action at any time after a hearing or trial in making advanced rulings on the admissibility of the testimony of Plaintiff Sipe's treating physician, Dr. Thomas Cohn. Minn. R. Civ. P. 16.03(c). Dr. Cohn is allowed to testify as a fact witness and give his opinion regarding the diagnosis and treatment of Plaintiff Lisa Sipe. However, Dr. Cohn shall not give testimony about or give his opinion about the results or number of other private patients that Dr. Cohn treated for Chronic Pain symptoms.
>
> 2. Dr. Cohn's expert[] fact testimony regarding the regeneration of nerves and the radiofrequency neurotomy treatments that Dr. Cohn performed on plaintiff Sipe is based upon well-established scientific principles that have been practiced in the United States for over 30 years, thus the Court finds no necessity to determine the admissibility of Dr. Cohn's testimony under the *Frye-Mack* standard.

The district court attached an affidavit of Dr. Cohn to its March 29 order, striking portions that Dr. Cohn would not be allowed to address in testimony. The crossed-out portions included Dr. Cohn's conclusions about the experiences of other patients and how common the radiofrequency neurotomy procedure was. The remaining (unstruck) portions included Dr. Cohn's statements that (1) in his experience, patients receive pain relief from the procedure for 12-18 months, and pain will gradually return as the nerve regenerates; (2) when the pain returns, he repeats the procedure; (3) there is no evidence that the nerves will ever stop regenerating; (4) Sipe has had three sets of neurotomies;

and (5) Dr. Cohn expects that Sipe will receive about 12 months of relief from her most recent neurotomy and all future neurotomies.

Four months later, FT&S again moved to exclude the testimony of Dr. Cohn, arguing that any testimony regarding the need for future neurotomies must be suppressed as the need to repeat the neurotomies is untested. In support of its motion, FT&S cited three Minnesota district court cases from 2000 through 2002 that determined that such evidence was inadmissible as untested. In response, the district court issued an order dated September 15, 2006, stating that "Dr. Thomas Cohn's testimony regarding Plaintiff Sipe's need for future neurotomies is EXCLUDED." In its accompanying memorandum, the district court stated that

> [f]or reasons stated in this court's March 29, 2006 Order, Dr. Thomas Cohn will be permitted to testify about neurotomies already performed on the plaintiff . . . . However, because the use of past neurotomies to determine the need of future neurotomies is a procedure yet to withstand scientific scrutiny, such testimony is speculative and may not be offered into evidence.

In response to the September 15 order, Sipe moved for clarification or reconciliation with the March 29 order. At the hearing for Sipe's motion and in Sipe's filings, Sipe's counsel expressed concern that the March 29 and September 15 orders were inconsistent and that the second order may "artificially limit [Sipe's] claims for future medical treatment" because the jury would not be able to consider her future need for neurotomies. At the hearing to clarify the two orders, Sipe's counsel asked whether the jury was going to be allowed to consider future medical expenses. The district court stated that there was nothing in the September 15 order that would prevent future medical

expenses from going to a jury, but that "[r]adiofrequency neurotomies are excluded from my order. That's the only thing that's excluded. Future." Directly after this exchange, FT&S's counsel argued that the March 29, 2006 and the September 15, 2006 orders are consistent and stated that Sipe's counsel was just trying to get the district court to reconsider the September 15 order. The district court agreed.

At the subsequent jury trial, Sipe testified that she went to Dr. Cohn for the neurotomy procedure after physical therapy and chiropractic care had failed to provide relief for her pain and headaches. She testified that the procedure gave her very effective pain relief for a period of time. When asked whether she expected the pain to be permanently relieved after the procedure, she stated, "No. . . . Dr. Cohn said it would more than likely come back. The nerves regrow. They regenerate and . . . it's more than likely going to come back." She further stated that she expected to have pain relief from one to two years after the procedure, but that her headaches and pain gradually returned. She also testified that she had undergone the procedure three times: in August 2004, March 2005, and February 2006, and had experienced the same degree of pain relief, accompanied by the gradual return of her pain and headaches each time. At the time of trial, her pain was just beginning to return, and Sipe testified that she intended to continue getting the procedure whenever she needed to.

Dr. Cohn also testified. He was allowed to testify at trial in accordance with the first order of March 29, 2006, and the accompanying affidavit of his testimony as modified by the district court. He indicated that he believed Sipe's injury was permanent and that the neurotomy treatment was necessary. In regard to the potential for Sipe's

future treatment, Dr. Cohn testified that (1) he did not expect Sipe's pain to be permanently relieved by the procedure because he expected the nerve to regrow until Sipe's death; (2) the length of time the patient experienced pain relief depended on how much of the nerve was destroyed; and (3) he had performed the procedure on Sipe three times. Dr. Cohn stated that the effects of the procedure would subside over time and that the procedure would therefore be repeated every six to 12 months. FT&S objected to this testimony at various points as unduly speculative, but was overruled by the district court.

The district court stated before trial that it did not intend to exclude the question of future medical expenses from the jury. On November 8, 2006, during the preparation of jury instructions, the issue of future medical expenses again arose. In considering whether future medical expenses as a result of future neurotomies should be submitted to a jury, the district court stated:

> Now, about my [pretrial] order, my order dealt with – I clarified it – dealt with just the approach from a study standpoint, not a clinical standpoint, and it didn't deal with the individual person, it dealt with the average. And *after I heard the testimony of Dr. Cohn, I clarified my order to allow it* and I did rule on that in the motion we had before today, it was yesterday, that I considered him an expert in that area.

(Emphasis added.) The district court appears to refer to a November 7, 2006 oral motion and responsive oral order. Neither that oral order nor the motion that led to the order were in the record on appeal. However, FT&S's counsel stated at oral argument that he recalled the November 7, 2006 motion to concern the admissibility of evidence under the second order and the issue of future medical expenses. This representation is consistent

with the district court's statement, referring to FT&S's motion to exclude Dr. Cohn's testimony made the preceding day, as quoted above.

The question of Sipe's future medical expenses was submitted to the jury, and the jury awarded her $130,100 for such expenses. Sipe's need for future neurotomies was the sole basis for that award. FT&S's motion for a new trial on the ground that future medical expenses should not have been an element of damages was denied. This appeal follows.

D E C I S I O N

I.

The first issue is whether FT&S was unfairly prejudiced and should be granted a new trial because the district court erred by allowing testimony that violated its pretrial orders, effectively overruling itself, and that FT&S could not, under the circumstances, prepare and present its case. A new trial may be granted for "[e]rrors of law occurring at trial." Minn. R. Civ. P. 59.01(f). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990) (citation omitted) (superseded by statute in part on other grounds). Absent an abuse of discretion, the district court's decision regarding whether to grant a new trial will ordinarily be upheld on appeal. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or

constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted).

"A trial court judge is not firmly bound by its own prior decision in the same way a trial court is bound by the decision of a higher court of review." *Employers Nat'l Ins. Co. v. Breaux*, 516 N.W.2d 188, 191 (Minn. App. 1994), *review denied* (Minn. Sept. 16, 1994). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Kornberg v. Kornberg*, 525 N.W.2d 14, 18 (Minn. App. 1994) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 2178 (1988)), *aff'd*, 542 N.W.2d 379 (Minn. 1996).

Furthermore, "where there is no objection at the time the evidence is offered, no claim of surprise and no request for a continuance, trial courts are well within their discretion to deny a motion for a new trial." *Dostal v. Curran*, 679 N.W.2d 192, 195 n.3 (Minn. App. 2004) (quoting *Gunderson v. Olson*, 399 N.W.2d 166, 168 (Minn. App. 1987)), *review denied* (Minn. July 20, 2004).

Here, the district court issued pretrial orders that conflicted, then conducted the trial and allowed future damages to go to the jury largely in accordance with its initial March 29 order. Although this clearly created a risk of prejudice to FT&S, whether there was actual prejudice and whether it requires reversal necessitates an evaluation of the larger context in which this occurred.

First, we note that, although FT&S regularly objected to Dr. Cohn's testimony regarding his certainty about Sipe's future need for neurotomies, it made no objection to

testimony that neurotomies generally provided relief for a limited period of time, that Sipe had experienced relief as a result of previous treatments, that Sipe's injury was permanent, that past treatments provided Sipe with only temporary relief, and that the treated nerve would continually regrow.[1] In fact, FT&S's expert testified that he would expect an average of about 400 days of pain relief as a result of a neurotomy. This uncontested testimony covers significant dimensions of Sipe's case. These various items of uncontested testimony are intertwined with the larger issue of district court inconsistency. The failure of FT&S to object allowed major parts of the neurotomy topic into the record when FT&S knew or should have known of the inconsistencies in the pretrial orders.

Secondly, we note that at trial, FT&S made no claim of surprise or a motion for continuance. Had FT&S been truly surprised or unable to prepare for Dr. Cohn's testimony regarding Sipe's need for future neurotomies, it could have moved for a continuance and minimized the unfair prejudice complained of.

Third, based on the part of the proposed affidavit of Sipe's expert, Dr. Cohn, accepted in the March 29 pretrial order, FT&S knew before trial that Sipe intended to

[1] For example, FT&S's counsel raised no objection to Dr. Cohn's testimony that he expected Sipe to experience between six months and one year of pain relief from her most recent neurotomy, but when Dr. Cohn stated that he might expect to see her again for treatment before February of 2007, counsel objected to the testimony as unduly speculative and was overruled. Likewise, no objection was raised to Dr. Cohn's testimony that he had never seen anything in his own experience or in medical literature that indicated that Sipe's nerves would ever stop regrowing. But when Dr. Cohn was asked if death would cause them to stop regrowing, counsel objected because he felt the question was argumentative. Again, he was overruled. Regardless, counsel never objected during trial to the admissibility of the expert testimony on the basis that it was excluded by the pretrial court orders.

submit evidence of her future medical expenses based on her need for neurotomies. The district court edited that affidavit, explicitly stating that Dr. Cohn would be allowed to testify to items that would ordinarily provide a basis for future medical expenses. In addition, during a pretrial hearing, the district court informed the parties that it would not exclude future medical expenses. In fact, a special-verdict form, which included a line for future medical expenses, was drafted by Sipe and submitted to the district court and counsel for FT&S before the trial.

In sum, we recognize that the statements made by the district court were confusing and inconsistent. However, FT&S knew before trial that future medical expense was a relevant issue. It knew that parts of Dr. Cohn's affidavit concerning Sipe's experience with neurotomies would be admitted. It knew or should have known that the district court had taken conflicting positions on Dr. Cohn's testimony about neurotomies and about future damages. The district court had some discretion to modify its position on these matters. In short, FT&S should have been prepared to address these matters at trial. To the extent that it was not prepared, FT&S could have asked for a continuance but did not do so. Rather than taking steps to resolve inconsistencies or what, at a minimum, it should have recognized as confusing statements by the district court, FT&S argued to the district court that the pretrial orders were consistent. Appellant appeared willing to take the risk that further rulings or the jury verdict would break its way. Having taken that risk, FT&S was a party to the troubled situation. In the unique circumstances of this case, we conclude that FT&S has not shown that it is entitled to a new trial because of

any prejudice resulting from the district court's inconsistencies, and that the district court did not abuse its discretion by denying the motion for a new trial.

II.

The second issue is whether the district court erred in refusing to grant a new trial on the basis that it allowed evidence of neurotomies without finding that such evidence met the standard for admission of scientific evidence. A new trial may be granted for "[e]rrors of law occurring at trial." Minn. R. Civ. P. 59.01(f). Absent an abuse of discretion, the district court's decision regarding whether to grant a new trial will ordinarily be upheld on appeal. *Halla Nursery*, 454 N.W.2d at 910. In addition, "[t]he admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning*, 567 N.W.2d at 45-46.

If expert-opinion testimony "involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community." Minn. R. Evid. 702. By caselaw, a two-prong test has been adopted: (1) a novel scientific technique must be generally accepted in the relevant scientific community; and (2) the particular evidence derived from that technique must have a foundation that is scientifically reliable. *Goeb v. Tharaldson*, 615 N.W.2d 800, 810 (Minn. 2000). This is the so-called *Frye-Mack* standard, which has been adopted in Minnesota. *See id.* at 809-10 (discussing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *State v. Mack*, 292 N.W.2d 764 (Minn. 1980)). If particular scientific evidence is not novel or emerging, its admission is not subject to the two-prong *Frye-*

Mack test set forth above. *See State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994) (considering whether drug-recognition protocol involves novel scientific theory); *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994) (ruling that bite-mark analysis does not involve novel scientific theory).

FT&S points out that in the September 15 order, the district court stated that the use of past neurotomies to predict the need for future neurotomies was speculative, did not withstand scientific scrutiny, and could not be offered into evidence; and that Dr. Cohn's testimony regarding the duration of relief a patient can expect from a neurotomy procedure, as well as when or if he could expect Sipe to require the procedure again, was novel and unduly speculative evidence. Yet four months earlier, on March 29, the district court had determined that radiofrequency neurotomies had been used by the medical community for approximately 30 years and that there was no need to determine the admissibility of Dr. Cohn's testimony under the *Frye-Mack* standard. This is part of the conflict between the March 29 and September 15 orders. Ultimately, the district court decided, *sub silentio*, to adhere to the March 29 order that no *Frye-Mack* hearing was needed, allowed Dr. Cohn to testify regarding neurotomies, and permitted the case to go to the jury.

The record contains several studies considering the use of radiofrequency neurotomies to control joint pain. All of them acknowledge that the treatment is temporary and that because the nerve involved regenerates, it has to be repeated. *E.g.*, Susan M. Lord et al., *Cervical Zygapophyseal Joint Pain in Whiplash Injuries*, *in* 12 State of the Art Reviews 301, 318 (Hanley & Belfus, eds., 1998) ("Patients [receiving

radiofrequency neurotomies] obtained complete relief of their primary pain complaint for a median duration of 263 days (compared with 8 days in the placebo group) . . . . Pain is expected to return following such procedures as the distal axons regenerate . . . . [R]ecent work has demonstrated that if the first procedure is successful in providing more than 90 days of complete pain relief, then subsequent repeat procedures have an 82% success rate."); Greg J. McDonald et al., *Long-term Follow-up of Patients Treated with Cervical Radiofrequency Neurotomy for Chronic Neck Pain*, 45 Neurosurgery 61, 64 (1999) (determining that the median duration of relief from repeated procedures for patients who had successful treatment was 218.5 days).

Based on the studies in the record, which were published in the late 1990's, it does not appear that testimony allowed by the district court regarding the need for repeated radiofrequency neurotomies after the effects of a prior treatment wear off represents new or novel evidence. In fact, the challenged evidence requires little more than logical extrapolation from known facts. Sipe had undergone the procedure three times; she had obtained relief three times; and three times she had experienced the gradual return of her pain over the course of six months to a year. The procedure was acknowledged to provide for temporary relief; it was not a cure. The jury was capable of inferring that the procedure needed to be regularly repeated because it did not provide permanent relief from a permanent injury and of extrapolating that need into the future when contemplating an award of damages for future medical expenses. Hence, it does not appear that the evidence as submitted was "novel" scientific evidence that required the application of the *Frye-Mack* test.

Here, there was adequate scientific material in the record to support the decision to allow evidence of the benefits of neurotomies. What was lacking was a reasoned analysis from the district court that addressed the issue and tied the facts in the record to the conclusion. Again, we note that FT&S had assured the district court that its pretrial orders were consistent and that it did not have to clarify matters. Sipe recognized the inconsistencies and the need for a clarification. Given the judicial resources invested in trying this case, the failure of FT&S to press the district court for deeper consideration of this issue and the extensive record supporting admission of the testimony, we decline to remand this case for an after-the-fact, written district court explanation of how and why the neurotomy procedure is admissible and how and why the contested neurotomy evidence as it applies to future medical costs should be admitted.

III.

The third issue is whether the district court erred by allowing the jury to consider and award damages for future medical expenses, given that it had determined in its September 15 order that expert testimony regarding the use of past neurotomies to determine the need for future neurotomies was inadmissible. District courts have broad discretion in framing special-verdict questions to the jury. *Dang v. St. Paul Ramsey Med. Ctr., Inc.*, 490 N.W.2d 653, 658 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). A decision to exclude expert testimony is similarly within the broad discretion of the district court. *Benson v. N. Gopher Enters., Inc.*, 455 N.W.2d 444, 445-46 (Minn. 1990). A denial of a motion for a new trial is also reviewed for an abuse of discretion. *Stoebe v. Merastar Ins. Co.*, 554 N.W.2d 733, 735 (Minn. 1996). We review a jury's

verdict in the light most favorable to the verdict and will reverse only if it is "manifestly and palpably contrary to the evidence viewed as a whole." *Roemer v. Martin*, 440 N.W.2d 122, 124 (Minn. 1989) (quotation omitted).

In asserting a claim for damages for future medical expenses, the plaintiff must (1) show that future medical treatments will be required; and (2) establish the amount of the damages. *Myers v. Hearth Techs.*, 621 N.W.2d 787, 793 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001). Both requirements must be substantiated through competent evidence, which is ordinarily expert testimony. *See Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980); *see also Lamont v. Indep. Sch. Dist. No. 395*, 278 Minn. 291, 295, 154 N.W.2d 188, 192 (1967). Before an instruction on future medical expenses is allowed, the plaintiff must prove the reasonable certainty of such expenses by a fair preponderance of the evidence. *Pietrzak*, 295 N.W.2d at 507.

FT&S vigorously claims that Sipe did not show that future medical expenses will be required. FT&S argues that because of the September 15 pretrial order explicitly excluding any expert testimony concerning the use of past neurotomies to predict the need for future neurotomies, there was only vague testimony on record to support Sipe's need for future medical expenses.

Both Sipe and her treating physician testified that (1) the neurotomy procedure gave her pain relief and other treatment did not; (2) the relief from the procedure was not permanent; (3) she had undergone the procedure more than once after the effects of the procedure wore off; (4) she intended to continue with neurotomy treatments for as long as she experienced pain in her neck; and (5) her neck injury is permanent. Sipe is required

to prove her need for future medical services by a fair preponderance of competent evidence. From the above testimony, the jury could infer that Sipe would need the neurotomy procedure, probably at annual intervals, to treat the pain that resulted from her permanent injury. This satisfied the first prong.

The other prong of the test for recovery is the amount of damages. Here, the jury determined that Sipe should be awarded $130,100 to cover her future medical expenses. The jury was given a summary of the medical expenses that had resulted from the accident to the date of trial. This included the bills for the previous three radiofrequency neurotomies and a life-expectancy chart. An itemized list of past expenses, which indicates the expected expense of a neurotomy procedure, constitutes "competent evidence" regarding the cost of the neurotomy procedure. Therefore, there is evidence of the costs she faces. The second prong is met.

Based on this record and our analysis of prior issues, we conclude that the jury's verdict is not contrary to the evidence viewed as a whole, and the district court did not abuse its discretion in allowing the jury award of future damages to stand.

Affirmed.

Dated: