STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0974

Bradley Frey,
Appellant,

vs.

Daniel G. Hottinger,
Respondent.

Filed May 19, 2009
Reversed and remanded
Stoneburner, Judge

Ramsey County District Court
File No. 60C906001919

Stephen R. O'Brien, 247 Third Avenue South, Minneapolis, MN 55415 (for appellant)

Edward G. White, Votel, McEachron & Godfrey, 1250 UBS Plaza, 444 Cedar Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Poritsky, 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

STONEBURNER, Judge

On appeal from a jury verdict finding him 70% at fault for a motorcycle-SUV collision, appellant motorcycle rider asserts that the district court erred by denying his motions in limine to exclude (1) evidence of his driving conduct that was not relevant to causation and (2) a double-hearsay statement relating to his speed contained in a "Trauma Team Activation Report." Appellant argues that because inadmissible evidence was the only evidence of his fault, the district court erred by denying his motion for judgment as a matter of law. We conclude that the district court did not err by denying appellant's motion for judgment as a matter of law, but the admission of irrelevant driving conduct and hearsay references to speed resulted in prejudicial error. We therefore reverse and remand for a new trial.

FACTS

In April 2004, appellant Bradley Frey opened a motorcycle shop at 401 East Fourth Street, St. Paul, where he built and tuned motorcycles for track racing. Frey worked at the shop after he completed work at his full-time job. At approximately 5:00 p.m. on a weekday in late April, Frey was warming up a customer's motorcycle, intending to put it on his Dyno, a machine that measures a motorcycle's RPMs at various speeds. Frey testified that to warm up a motorcycle for the Dyno, he typically drives west from his shop a short distance to the point where Fourth Street makes a 90-degree turn and then turns around and returns to his shop.

On the day of the accident, as Frey drove the motorcycle west from his shop and entered the shadow of an overpass that immediately precedes the 90-degree turn, a Chevrolet SUV turned directly into Frey's lane of travel. Frey was unable to avoid a collision, and his front tire struck the back passenger wheel of the SUV when the SUV was about three-quarters of the way through its turn. Frey was thrown from the motorcycle and injured. He sued the driver of the SUV, respondent Daniel G. Hottinger. The parties stipulated to a jury trial on liability only.

There were three eyewitnesses to the collision, all experienced motorcycle riders. Two witnesses were standing outside of a business and saw the collision right in front of them. They both testified that they observed Frey traveling within the 30 mile-per-hour speed limit and saw the SUV turn directly into Frey's path. One of these witnesses testified that the configuration of the street made it not "plausible" for a motorcycle to be driven at a speed of 60 miles per hour in that location. The third eyewitness, Michael Perron, who worked in the area, testified that he was aware of motorcycles in the area at the time of the accident. He testified that he saw the motorcycle operated by Frey for one to two seconds just before the collision. When questioned about the speed of Frey's motorcycle, Perron testified: "I would have to guess, being by what I witnessed, 30 to 40 miles per hour. Somewhere in there." At his pretrial deposition, Perron testified that he thought that the SUV backed out of a parking space into Frey. All of the eyewitnesses testified that motorcycles were common in the area and that, near the time of the accident, other motorcycles were in the area.

Thomas Koopmeiners, who did not see the collision, testified that, at the time of the accident, he was walking to his car, which was parked on the south side of Fourth Street, near the scene of the accident. He saw the SUV traveling "five, ten miles an hour. 15 . . . not very fast." Koopmeiners testified that he also saw a motorcycle. Using a drawing of the area that is not part of the record on appeal, Koopmeiners indicated that the motorcyclist he saw "was going up and down this street . . . going this way . . . they were turning around, going back that way." He initially testified that he saw that motorcycle turn around "from running up and down this street here" (indicating on drawing). When asked if he could describe how that motorcycle accelerated, Koopmeiners said: "Well, yeah. It popped a wheelie. The front end came up." Koopmeiners testified that the motorcycle he observed doing a "wheelie" was traveling east.

Koopmeiners said he heard this motorcycle accelerate but never heard it slow down, that he only saw the "wheelie" motorcycle for about a second as it went east, and that he did not see what happened to it after it left his sight. Koopmeiners said he next saw the motorcycle lying in pieces on the other side of the van. When asked about other motorcycles in the area, Koopmeiners said that he was not certain if there were two. He did not know the color of the motorcycle (or motorcycles) that he saw.

Frey's medical records from the accident contain a "Trauma Team Activation" report that was dictated from memory by the emergency-medicine physician, Dr. Tanya Decker, between two and 12 hours after Frey arrived at the hospital emergency room. This report states in relevant part: "This is a 37-year old male who was driving a

motorcycle at fairly significant speed, T-boned an SUV and was ejected off the motorcycle. Patient apparently said that he was going at approximately 60 miles per hour and the other care [sic] was traveling about 10 miles per hour."

Dr. Decker testified at a deposition that she obtained information about Frey's "apparent" statement from someone other than Frey. She testified that "most likely . . . the paramedic personnel, they come in and they're giving a story of what had happened and what he was saying at the scene." Dr. Decker testified that the information about speed was not relevant to Frey's diagnosis, but was used "to cause trauma team activation."

Frey moved to exclude Koopmeiners's testimony about a motorcycle doing a "wheelie" as irrelevant to the cause of the accident because there is no evidence that the motorcycle doing a wheelie was the motorcycle driven by Frey and no temporal or spacial connections between the wheelie and the collision. The district court denied the motion, concluding that the evidence had to do with how Frey was driving.[1]

Frey moved to exclude from the medical report all references to speed as double hearsay unrelated to medical treatment or diagnosis. The district court denied the motion, concluding that the references to speed were admissible under Minn. R. Evid. 803 (4), as statements made for purposes of medical diagnosis.

[1] Frey also moved to exclude the third witness's estimate of speed at 30-40 miles per hour and briefed denial of that motion on appeal. But at oral argument on appeal, Frey conceded that the minimal time that the third witness had to observe the motorcycle goes more to the weight of his testimony than to admissibility. We consider Frey to have withdrawn this issue, and to the extent that Frey did not intend to withdraw the issue, we hold that the district court did not err by denying the motion to exclude the third witness's testimony.

At trial, Hottinger conceded that Frey had the right-of-way and that he never saw the motorcycle. Hottinger's defense was based on the assertion, described in his opening statement, that Frey was "going up and down the roadway speeding and doing wheelies" and thereby lost the right-of-way. In closing argument, Hottinger argued that he had proved that Frey was traveling up and down the street numerous times speeding and doing wheelies and emphasized that the medical record stated that Frey said he was going 60 miles per hour. Hottinger argued that the medical record "is a window in the past for you to see what was really going on." The jury returned a verdict finding both drivers causally negligent and apportioning the fault 70% to Frey and 30% to Hottinger. This appeal followed.

D E C I S I O N

The decision to admit or exclude evidence is committed to the broad discretion of the district court, and its evidentiary rulings will not be disturbed unless they are based on an erroneous view of the law or constitute an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997). In order to obtain a new trial on the grounds of improper evidentiary rulings, the complaining party must demonstrate prejudicial error. *Id.* at 46.

I. Koopmeiners's testimony

Admissibility of evidence concerning the manner in which a driver involved in an accident was driving before he reached the scene of the accident generally depends on whether there is a high degree of probability that the conduct continued up to the time of the accident. *Janssen v. Neal*, 302 Minn. 177, 186, 223 N.W.2d 804, 809 (1974). In

Janssen, the supreme court noted that it is primarily for the district court to determine the probative value of such evidence, and the district court's determination will not be reversed "unless [the evidence] is so remote in point of time or space as to be of no probative value and is so prejudicial that in all probability it did influence the outcome of the case." *Id.* (citing *Atkinson v. Mock*, 271 Minn. 393, 396, 135 N.W.2d 892, 894 (1965)). In *Janssen*, the supreme court concluded that the district court committed prejudicial error by admitting testimony concerning the speed of a motorcycle prior to execution of a 90-degree turn that occurred before the accident. *Id.* at 187, 223 N.W.2d at 810. The supreme court stated that the probability that the motorcycle's speed at the time of the accident was close to what it was prior to the intervening 90-degree turn is "highly speculative." *Id.*

Likewise, we conclude that Koopmeiners's testimony in this case about the manner in which a motorcycle (not identified definitively as Frey's motorcycle) was being driven eastbound is sufficiently remote from the time and place of the SUV's collision with Frey's westbound motorcycle as to be of no probative value regarding Frey's driving conduct just before the collision. Koopmeiners's evidence was plainly prejudicial and influenced the verdict.

Assuming that Frey was the rider of the eastbound motorcycle that Koopmeiners saw do a "wheelie," it is highly speculative to conclude that this observation has any relevance to Frey's operation of his motorcycle as he traveled west to the site of the collision. The "wheelie" motorcycle would have had to execute a 180-degree turn shortly after Koopmeiners saw it to arrive at the scene of the accident. And such a turn would

have required the motorcycle to be traveling very slowly. None of the eyewitnesses to the collision saw Frey execute a wheelie or engage in any other unusual driving as he traveled west towards the collision site. Therefore, even if it was Frey who "popped a wheelie" while eastbound, it is highly speculative that Frey continued to execute "wheelies," was speeding, or was engaged in any unusual driving conduct immediately prior to the collision. The driving conduct testified to by Koopmeiners is not relevant to Frey's conduct at the time of the collision, and admission of the evidence constituted prejudicial error, entitling Frey to a new trial.

II. Evidence of speed in medical record

The district court admitted evidence of Frey's speed contained in the Trauma Team Activation Report under the exception to the hearsay rule for "[s]tatements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Minn. R. Evid. 803 (4). Frey challenges admission of the statements relating to speed as double hearsay not related to diagnosis or treatment. Frey relies on the well-established principle that care must be exercised to distinguish "between statements made to a physician relating to conditions and symptoms of the injury or ailment for which treatment is sought and statements made to the physician as to . . . the circumstances concerning the manner in which the accident occurred. [The latter] statements are inadmissible." *Peterson v. Richfield Plaza, Inc.*, 252 Minn. 215, 228, 89 N.W.2d 712, 721-22 (1958).

In resolving the issue of the admissibility of the evidence relating to speed in this case, the parties and the district court focused on whether the evidence of the speed was *used* by medical personnel for the purpose of diagnosis or treatment. Dr. Decker testified that it was not used for diagnosis but that it was used to summon a trauma team. Frey argues that the trauma team in this case was assembled before any evidence of the speed involved in the accident was conveyed to the doctor, but on this record we cannot say that the district court erred or abused its discretion by concluding that evidence of the speed involved in the accident was pertinent to medical response.

If *use* of the information were the test, we would conclude that there was no error or abuse of discretion in admitting the statement. The test, however, is the *purpose* for which the statement was made, because the rationale behind admitting such hearsay is the presumed trustworthiness of statements made to a physician by a patient seeking treatment for some injury "since a patient would not be apt to state untrue facts to his physician when proper treatment depends upon a diagnosis which may be based, at least in part, on what the patient tells the doctor. . . ." *Id*. at 227, 89 N.W.2d at 721.

In this case, there is only speculation that Frey made the comments about his speed, and there is no evidence in the record of when, to whom, or under what circumstances the comments were made or any evidence from which it can be assumed that Frey made the comments for the purpose of aiding diagnosis or treatment. Absent any evidence that the declarant made statements for the *purpose* of medical diagnosis or treatment, Rule 803 (4) does not apply, and the district court erred by admitting the

references to speed contained in the record.[2] The assertion that Frey said he was going 60 miles per hour was the cornerstone of Hottinger's defense and was plainly prejudicial. This evidence surely affected the verdict, requiring reversal and remand for a new trial.

III. Denial of judgment as a matter of law

Frey asserts that absent the testimony regarding wheelies and excessive speed, no reasonable jury could have concluded that he was 70% negligent, therefore he was entitled to judgment as a matter of law. We conclude that even without the prejudicial testimony, the apportionment of fault remains a jury question, and the district court did not err by denying judgment as a matter of law.

Reversed and remanded.

[2] Both the reference to "excessive speed" and the reference to "60 miles per hour" should have been excluded.