STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1341

Heidi M. Owens,
Appellant,

vs.

Andrew J. Wescott, et al.,
Respondents.

Filed July 14, 2009
Affirmed
Peterson, Judge

St. Louis County District Court
File No. 69DU-CV-06-3227

James W. Balmer, Andrew P. Pierce, Falsani, Balmer, Peterson, Quinn & Beyer, 1200 Alworth Building, 306 West Superior Street, Duluth, MN 55802 (for appellant)

Theresa A. Bofferding, Marianne Settano, Settano & Van Cleave, 3600 American Boulevard West, Suite 425, Bloomington, MN 55431 (for respondents)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

PETERSON, Judge

In this appeal from a judgment following a jury trial in a personal-injury case, appellant argues that the district court erred in denying her motion for a new trial on the issue of damages based on newly discovered evidence that respondent's medical expert

charged nearly double the amount that he testified to during discovery and at trial. We affirm.

FACTS

In October 2006, appellant Heidi M. Owens was injured in a motor-vehicle accident. Appellant brought this action against respondents Andrew J. Wescott and William F. Vollmar, the car's driver and the car's owner, claiming that as a result of the accident, she suffered persistent head and neck pain and numbness and burning in her hands and wrists.

The parties disagreed about the severity of appellant's neck injury. T. Mark Seidelmann, M.D., opined that appellant suffered an ongoing significant muscle spasm through the neck and shoulder girdle area that limited her range of motion when turning her head to the left and to the right. But John A. Dowdle, Jr., M.D., who performed an independent medical examination on appellant, opined that appellant did not have a muscle spasm or any limitations on her range of motion and that any neck injury suffered in the accident had healed.

The parties also disagreed about whether the accident exacerbated a preexisting wrist condition, thereby contributing to appellant's needing carpal-tunnel surgery in January 2007. Based on an examination of appellant and a review of her medical records, Janus Butcher, M.D., opined that appellant "sustained significant exacerbation to her prior carpal tunnel problems as a result of the . . . accident." But Dowdle opined that the accident did not aggravate appellant's preexisting wrist condition.

Dowdle was deposed on December 17, 2007, more than two weeks before trial began. At the videotaped deposition, appellant's counsel established that Dowdle was a part-owner of a company named EvaluMed and that Dowdle performed about six to eight independent medical exams per week for EvaluMed. The following questioning then took place:

> Q. Now, how much does EvaluMed charge [a] law firm for one of these exams?
> A. I don't know off the top of my head. It's about $1,200, I believe.
> Q. Okay. Now it was 1,200 bucks as long ago as the year 2000, have your rates not gone up in the last seven years?
> A. Well, I don't know that, but I think it's – a lot of the things are done by State law as to what you can charge for it.
> Q. I think that's the Workers' Comp. stuff, and this is not a Workers' Comp. claim, is it?
> A. No, it's an auto accident.
> Q. Do you – are you aware of any restrictions on what you can charge to do an adverse medical exam for a motor vehicle claim?
> A. Well, number one, I never do an adverse medical exam, I do independent medical exams. And I don't know that – I don't know the billing practices, is how that is. It's not – I think it's compatible or similar to what the Workers' Comp – that's my understanding – as to what the Workers' Comp. rules are.
> Q. More than half the work that EvaluMed and you do, though, in the way of these kinds of exams is for defendants or their insurance companies; true?
> A. Well, it's . . . for whoever schedules the exam, but most of them are probably defendants, dependents or insurance company, yes.
> Q. Okay. Then you also testify, as you are now, in a deposition; true?
> A. True.
> Q. And you do one of those a week, typically?
> A. Well, that's a ballpark.
> Q. And the charge is 1,200 bucks an hour for the deposition time?

> A. Video, I believe it's 1,200. Again, I can get the right numbers for you, but I don't know exactly.
> Q. If . . . you think they might be much different than this –
> A. No, I think that's what that is.

Appellant sought $22,000 in damages for past expenses for medical treatment for her head, neck, wrist, and hand injuries. The jury awarded appellant $2,971 for past health-care expenses and $1,800 for past diagnostic expenses. Respondents served a posttrial notice of taxation of costs on appellant, seeking $2,287.60 for EvaluMed's charges in connection with the independent medical examination and $1,800 for EvaluMed's charges in connection with Dowdle's videotaped deposition.

Appellant moved for a new trial on damages on the ground that EvaluMed's charges for the independent medical examination and the videotaped deposition constituted newly discovered evidence. The district court denied the motion. This appeal followed.

D E C I S I O N

"A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and the court's discretion is to be exercised sparingly." *Wurdemann v. Hjelm*, 257 Minn. 450, 465, 102 N.W.2d 811, 821 (1960) (quotation and footnote omitted). Under Minn. R. Civ. P. 59.01(d), a new trial may be granted based on newly discovered, material evidence, "which with reasonable diligence could not have been found and produced at the trial." For newly discovered evidence to be considered, the moving party must show that "proper diligence to discover it before the trial was exercised, and, further, it must appear that the newly discovered evidence is

such that it probably will lead to a different result in a new trial." *Bruno v. Belmonte*, 252 Minn. 497, 503, 90 N.W.2d 899, 903 (1958) (footnote omitted). Reasonable diligence requires the use of "available discovery tools," and "reasonable investigation efforts." *Regents of Univ. of Minn. v. Medical, Inc.*, 405 N.W.2d 474, 479 (Minn. App. 1987), *review denied* (Minn. July 15, 1987).

During his deposition, Dowdle testified that he did not know the exact amount that EvaluMed charged for its services, and he offered to get the exact amount for appellant's counsel. But appellant's counsel did not pursue the matter further. The district court found:

> [Appellant's] assertion that the true cost of Dr. Dowdle was not discoverable does not withstand scrutiny. The transcript of the deposition of Dr. Dowdle shows a witness who is uncertain about the exact cost of his services. During the deposition, [appellant's] attorney asked Dr. Dowdle numerous times what the actual cost of his services was and the doctor consistently replied he did not know exactly what the cost was. [Appellant] could have ascertained the true cost of the services of Dr. Dowdle with additional discovery . . . .

In her reply brief, appellant points out that EvaluMed's bills for Dowdle's services, including the bill for prepayment of the video-deposition fee, were submitted to respondents' counsel in August and October 2007, months before the deposition occurred. Even if respondents' failure to supplement their discovery responses with the amount of EvaluMed's charges violated discovery rules, we have found no authority showing that any such violation excused appellant's failure to act with reasonable diligence to discover that information.

Appellant also asserts that "Dowdle provided undeniably false information in his sworn deposition." Dowdle testified that he did not know the exact charges and offered to provide that information to appellant's counsel. The evidence supports the district court's finding that Dowdle was "uncertain about the exact cost of his services."

Because appellant did not exercise proper diligence to discover the amount of EvaluMed's charges after Dowdle testified during his deposition that he did not know the exact charges, the district court did not abuse its discretion in denying appellant's new-trial motion.

Affirmed.