STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2008

John Hogan,
Appellant,

vs.

Michelle Kothe, et al.,
Respondents.

Filed July 27, 2010
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CV-08-9047

Charles D. Slane, TSR Injury Law, Bloomington, Minnesota (for appellant)

Angela C. Shackleford, Lori L. Jensen-Lea, La Bore, Guiliani, Cosgriff & Viltoft, Ltd., Hopkins, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

In this appeal following a negligence verdict arising from a car accident, appellant-plaintiff argues that the district court erred by (1) deducting from plaintiff's

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

award collateral offsets without a precise itemization of damages; and (2) declining to give the jury an eggshell-plaintiff instruction, a concurring-cause instruction, and a specialized aggravation instruction. We affirm.

FACTS

Following an automobile collision between the parties, appellant John Hogan sued respondent Michelle Kothe for negligence. During trial, Hogan submitted medical records and depositions from treating physicians to show damages. His bills totaled over $200,000. Those expenses were mainly for diagnostic tests and surgery performed on his lower back and shoulder after the accident.

Based on evidence revealing that Hogan had a preexisting back condition, Kothe disputed that the accident caused the need for back surgery. Hogan argued that the accident aggravated his back condition.

Hogan also claimed he developed impingement syndrome in his shoulder as a result of the accident and required surgery. Hogan's shoulder had a type II acromion. According to undisputed expert testimony, every person has an acromion, which is a bone ending of the shoulder blade and is classified as either type I, II, or III. Expert testimony stated that most people have type II or III acromions, which are more prone to cause impingement syndrome than those that are type I.

Hogan requested that the jury complete a special-verdict form to precisely itemize medical bills compensated in the award. Hogan also requested special jury instructions regarding the eggshell-plaintiff and concurring-cause rules, and a specially tailored

aggravation instruction. The district court denied these motions, using general causation instructions and a standard aggravation instruction.

The jury found Kothe negligent but also found Hogan 40% responsible. It awarded the following damages: (1) past pain, disability, and emotional distress: $15,504; (2) past wage loss: $0; (3) past health-care expenses not including diagnostic tests: $31,008; and (4) diagnostic-test expenses: $1,292. This verdict award accounted for only a fraction of Hogan's claimed damages. Judgment was entered.

Kothe moved for the award to be collaterally offset to account for $20,000 in no-fault benefits Hogan received from his insurer. Hogan challenged the motion, arguing that Kothe could not prove duplicate recovery because the award for past medical expenses did not break down which $31,008 in bills were compensated out of the $200,433 in bills that he submitted. While the collateral-offset motion was pending, Hogan moved for a new trial. He argued, among other things, that the awarded damages were unsupported by the evidence and the jury instructions were improper. The district court granted the collateral-offset motion and denied the new-trial motion.

Hogan filed an appeal challenging the grant of collateral offsets and denial of a new trial. Kothe challenged the timeliness of the appeal and whether Hogan properly raised the collateral-offset issue. This court issued an order on January 12, 2010 that ruled the appeal timely but deferred a ruling on the propriety of the collateral-offset issue.

D E C I S I O N

I.

We first address Kothe's threshold argument that the collateral-offset issue was not properly preserved for appeal. A reviewing court generally only considers matters presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Procedural matters are generally subject to appellate review only if they were argued as error in a new-trial motion. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). The purposes of the *Sauter* rule are (a) the occasional avoidance of appellate review by allowing the district court to correct errors and, (b) if appellate review occurs, the development of critical aspects of the record. *Id.* The rule, however, does not bar review when the issue is a substantive legal question that was raised and considered before the district court. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003).

In this case, the collateral-offset issue was raised and decided but was not part of Hogan's new-trial motion. Kothe moved for collateral offsets. Opposing that motion, Hogan made arguments he presents in this appeal—namely, that Hogan's no-fault benefits should not be deducted from the award because it is impossible to discern double recovery without the damages being itemized bill-by-bill. While the collateral-offset motion was pending, Hogan moved for a new trial. That motion raised a related issue concerning whether the verdict was invalid without the jury's bill-by-bill itemization of damages, but it did not specifically raise the collateral-offset issue. Hogan claims he did

not raise this issue because it was already pending in Kothe's then-undecided motion for collateral offsets.

Hogan's argument that Kothe failed to establish a duplicative recovery for purposes of reducing the award is a substantive issue of law that is exempt from the *Sauter* rule. As such, the issue is appropriately before this court because it was adequately raised during the district court proceeding. It was addressed thoroughly in the motion by Kothe for collateral offsets. Related arguments concerning the failure to break down past medical expenses were also raised before the verdict and in the motion for a new trial. We therefore conclude that the issue is properly before us and we proceed to decide it on the merits.

II.

Hogan argues the district court erred in deducting his no-fault benefits because it is not possible to identify whether those benefits specifically duplicate the damage award. A district court's application of damage-offset laws to established facts is a legal issue reviewed de novo. *Heine v. Simon*, 702 N.W.2d 752, 764 (Minn. 2005).

Minnesota law prevents plaintiffs from receiving a double recovery for damages. Minn. Stat. § 548.251 (2008)—the collateral-source statute—calls on courts to reduce awards for compensation plaintiffs have already obtained from "collateral sources," including no-fault insurance benefits. *See Wertish v. Salvhus*, 555 N.W.2d 26, 28 (Minn. App. 1997) (noting collateral-source definition includes automobile-accident insurance), *rev'd on other grounds*, 558 N.W.2d 258 (Minn. 1996). Chapter 65B (2008)—the no-fault act—similarly provides that motor-vehicle negligence awards shall be reduced by

"the value of basic or optimal economic loss benefits paid or payable." Minn. Stat. § 65B.51, subd. 1 (2008); *Tuenge v. Konetski*, 320 N.W.2d 420, 421 (Minn. 1982). These statutes both have the purpose of preventing a plaintiff's double recovery. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn.1990) (collateral-source statute); *Bartel v. New Haven Tp*., 323 N.W.2d 806, 809 (Minn. 1982) (no-fault act). This court has held that the two provisions are not inconsistent with one another.[1] *See Lee v. Hunt*, 642 N.W.2d 57, 60 (Minn. App. 2002) (reading the collateral-source statute as "a procedural statute intended to supplement the substantive provisions of the no-fault act").

The collateral-source statute provides the procedure for measuring collateral offsets. Minn. Stat. § 548.251. Following submission of written evidence, the district court is called on to determine, first, applicable collateral sources paid to the plaintiff as a result of the injury and, second, amounts paid by the plaintiff to secure those payments. *Id*., subd. 2. The district court deducts the difference between the first amount and the second amount from the award the plaintiff received at trial. *Id*., subd. 3.

Here, the jury awarded $15,504 for past pain, disability, and emotional distress; and $32,300 for past health-care expenses (including diagnostic tests). The district court made findings that the $20,000 plaintiff received in no-fault benefits was a collateral-

[1] Although Hogan argues on appeal under the no-fault act, the motion was brought and argued under the collateral-source statute. Because chapter 548 was the statutory authority asserted and decided on below, we treat that statute as the primary basis for this analysis. *See Braginsky v. State Farm Mut. Auto. Ins. Co*., 624 N.W.2d 789, 796 n.3 (Minn. App. 2001) (applying collateral-source statute and not no-fault act when motion was brought under collateral-source statute). Regardless, neither party points to any salient discrepancies between the statutes for purposes of this case. *See Foust v. McFarland*, 698 N.W.2d 24, 36 (Minn. App. 2005) (noting that no-fault act and collateral-source statute apply in similar fashion), *review denied* (Minn. Aug. 16, 2005).

source payment, credited Hogan's costs for obtaining the benefit (i.e., attorney fees and premiums paid), and deducted the difference from the award. Based on the plain language of the statute, the district court properly deducted collateral offsets. *See* Minn. Stat. § 645.16 (2008) (instructing courts to apply plain language of the statute).

But Hogan claims that the district court thwarted the statute's purpose of avoiding double recoveries because, without giving the jury interrogatories regarding each submitted medical expense, the district court could not precisely offset bills compensated in the jury award by bills paid by his insurer. To support this argument Hogan relies on *Tuenge*. There, a car-accident victim received an $11,115 benefit from a no-fault insurer to compensate specifically for past wage loss. 320 N.W.2d at 421. A jury awarded $39,700.52 to compensate for various damages, including $3,063 for past wage loss. *Id.* Applying the no-fault act, the district court deducted the $11,115 in wage-loss benefits from the entire award. *Id.* The supreme court reversed, concluding that the wage-loss insurance award could only be deducted from the wage-loss damages. *Id.* at 422. By deducting from the total award, the district court "effectively invaded plaintiff's recovery for uncompensated items of damage." *Id.*

Tuenge applies the collateral-offset statute to prevent certain collateral sources from being deducted from the wrong categories of awarded damages—e.g., past wage loss or past medical expenses. *See Gunderson v. Olson*, 399 N.W.2d 166, 169 (Minn. App. 1987) (applying *Tuenge* to hold that offset for no-fault benefits paid for medical expenses and lost earnings should have only been applied to those specific awards), *review denied* (Minn. Mar. 18, 1987). It does not, however, direct district courts to break

down and offset expenses to the degree of specificity proposed by Hogan. Minnesota courts have rejected making such exacting, bill-by-bill comparisons. *See, e.g.*, *Tuenge*, 320 N.W.2d at 422 n.2 (noting frequent disparity between no-fault benefits paid for wage loss and jury award for wage loss, stating such disparity "is a matter between plaintiff and her insurer and does not influence our construction of the [No-Fault] Act"); *Fahy v. Templin*, 361 N.W.2d 158, 160 (Minn. App. 1985) (declining to harmonize discrepancy between jury award and no-fault benefits paid), *review denied* (Minn. Apr. 18, 1985).

The district court here effectively reduced the award for past medical expenses by the amount received from the insurer for past medical expenses. This satisfies the collateral-source statute, the no-fault statute, and caselaw interpreting those statutes.

III.

The third issue is whether the district court committed reversible error by rejecting Hogan's requested jury instructions. District courts have "considerable latitude" in selecting jury instructions. *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005) (quotation omitted); *accord Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). The appeals court will not reverse a denial of a new-trial motion based on jury instructions unless there is an abuse of discretion. *Kohoutek v. Hafner*, 383 N.W.2d 295, 300-02 (Minn. 1986). Even if this standard is met, the court only reverses if the abuse was prejudicial. *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 885 (Minn. 1986). Reversible error does not exist if, in review of the entirety of trial, the jury received a description of the law that is clear and correct. *Cameron v. Evans*, 241 Minn. 200, 208-09, 62 N.W.2d 793, 798-99 (1954). It is not error to refuse to give an

instruction where "the substance of it is adequately covered by other instructions." *Botz v. Krips*, 267 Minn. 362, 369, 126 N.W.2d 446, 451 (1964).

Hogan first argues that the district court should have given an instruction on the eggshell-plaintiff rule. *See* 4A *Minnesota Practice*, CIVJIG 91.41 (2006). The eggshell-plaintiff rule holds that a tortfeasor is liable for the "proximate results of [the plaintiff's] injury" even if the plaintiff is more vulnerable and "the consequences are more serious than they would have been" if the plaintiff was in perfect health.[2] *Rowe*, 702 N.W.2d at 741 (quotation omitted). Put simply, the defendant takes the plaintiff as she finds him. Dan Dobbs, *The Law of Torts* § 188, at 464-65 (2000). Hogan claimed that evidence of his type II acromion justified the instruction. The district court, though, declined to read the specific instruction and opted for a general instruction on causation. It found that Hogan's type II acromion did not make him "unique, so as to justify the giving of the eggshell plaintiff instruction" because testimony showed that "most of us" have type II acromions.

Based on testimony that all persons have an acromion and that a substantial portion of the population has a type II or type III acromion, the district court did not abuse its discretion when it declined to give the eggshell-plaintiff instruction. The fact

[2] This instruction is distinct from the aggravation instruction, addressed further below, which provides that a person with a preexisting *symptomatic* injury is entitled to recover for the worsening of symptoms that is caused by the accident. In contrast, the eggshell-plaintiff rule applies when there were *asymptomatic* conditions, or mere vulnerabilities existing prior to the accident. *See Rowe*, 702 N.W.2d at 741 (noting difference between aggravation and eggshell-plaintiff rules); 4A *Minnesota Practice*, CIVJIG 91.40 (2006) use note.

that some people have a shoulder that is less susceptible to injury than Hogan's does not necessarily make him an eggshell plaintiff. To justify an eggshell-plaintiff instruction, the frailty must be abnormal. *See Ross v. Great N. Ry. Co*., 101 Minn. 122, 125, 111 N.W. 951, 953 (1907) ("[T]he measure of damages is the injury done, even though such injury might not have resulted, but for the *peculiar* physical condition of the person injured." (Emphasis added)); Restatement (Second) of Torts § 461 cmt. a (1965) (noting that eggshell-plaintiff rule applies to "peculiar physical condition" of the plaintiff); CIVJIG 91.41 use note (noting that eggshell plaintiff "suffers an injury that a normal person would not have suffered or suffered as severely in the same accident"). Thus, the district court acted within its discretion when it did not give the eggshell-plaintiff instruction.

Hogan also argues that the district court erred by refusing to give a specialized instruction on aggravation. The aggravation instruction is given when a preexisting, symptomatic injury or condition was exacerbated by the accident. *Rowe*, 702 N.W.2d at 735-36; Dobbs, *supra*, § 177 at 433-34. In such cases, the defendant is liable but only for "additional injury over and above the consequences which normally would have followed from the preexisting condition absent defendant's negligence." *Schore v. Mueller*, 290 Minn. 186, 189, 186 N.W.2d 699, 701 (1971).

The district court read CIVJIG 163 (1986):

> A person who has a defect or disability at the time of an accident is nevertheless entitled to damages for any aggravation of such pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to such pre-existing condition.

> Damages are limited, however, to those results which are over and above those which normally followed from the pre-existing condition, had there been no accident.

Hogan's proposed instruction took CIVJIG 91.40 (2006)—an instruction that mirrors CIVJIG 163 (1986)—and added sentences (emphasized below):

> A person who has a pre-existing disability or medical condition at the time of an accident is entitled to damages for aggravation of that pre-existing disability or condition directly caused by the collision. *Defendant is responsible for all the damages directly caused by her negligence even though the consequences are more serious that they would have been for an individual in perfect health.* Damages are limited to those that are over and above the damages that would have normally followed from the pre-existing disability or medical condition without the collision. *If you are unable to separate damages that pre-existed the collision from those that are directly caused by the collision due to confusion, conflicting testimony, indecision or disagreement, then you should make a rough apportionment so that Plaintiff receives fair compensation.*

Hogan proposed the first emphasized sentence to clarify the aggravation rule's distinction from the eggshell-plaintiff rule. Because we conclude above that the district court properly excluded the eggshell-plaintiff rule, there was no need to clarify a difference between the eggshell-plaintiff and aggravation rules and it was not error to refuse the first additional sentence proposed by Hogan.

Hogan proposed the second emphasized sentence to accommodate *Rowe*, 702 N.W.2d at 733-34. In that case, the supreme court found that the aggravation instruction given in that case, an older version of CIVJIG 91.40, inappropriately shifted the burden

of proof to the defendant. *Id*. at 742.[3] The district court noted that a "better option" would be for "the jury to make a rough apportionment so that the plaintiff receives fair compensation for her injuries." *Id*.

We do not read *Rowe*, however, to require that the "rough apportionment" statement be included in the aggravation instruction. *Rowe* merely denounced a sentence that placed the burden of proof for damages on the defendant. No such sentence existed in the instruction given here. Hogan claims that *Rowe*'s "rough apportionment" statement is necessary to guide the jury. We disagree. Instructions regarding the burden of proof already provide this kind of guidance. *See* CIVJIG 14.15. For this reason, the post-*Rowe* version of CIVJIG 91.40 does not include an additional statement like the one Hogan proposed. We conclude that this revised CIVJIG 91.40 (2006) and its predecessor CIVJIG 163 (1986) clearly and correctly describe the law. The district court's refusal to add Hogan's suggested sentences was not erroneous.

Hogan lastly argues that the district court erred by not giving a concurring-cause instruction. *See* 4 *Minnesota Practice*, CIVJIG 27.15 (2008). Concurring causes are direct or proximate causes that occur so close in time that the chain of causal events is not broken, and that together cause the injury, which would not have resulted in the absence of either cause. *See Haugen v. Dick Thayer Motor Co*., 253 Minn. 199, 206, 91 N.W.2d 585, 590 (1958). Such causes arise from acts of third persons or forces of nature. *E.g.*,

[3] The rejected clause read, "[i]f you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then [the defendant] is liable for all of the damages." 702 N.W.2d at 734.

Matthews v. Mills, 288 Minn. 16, 21, 178 N.W.2d 841, 844 (1970); *Sauer v. Rural Co-op. Power Ass'n of Maple Lake*, 225 Minn. 356, 361, 31 N.W.2d 15, 17 (1948); Restatement (Second) of Torts § 439.

Hogan claims his physical conditions were "act[s] of God" that count as concurring causes. This argument is unavailing because such events involve environmental forces, not preexisting medical conditions. *See, e.g*, *Sauer*, 225 Minn. at 361, 31 N.W.2d at 17 (lightning bolt); *Swanson v. La Fontaine*, 238 Minn. 460, 467-68, 57 N.W.2d 262, 267 (1953) (wind). This makes sense because preexisting medical conditions do not, save the extraordinary instance, arise "at the same time" as the tortfeasor's negligent acts. *See* CIVJIG 27.15. Also, other instructions discussed above are directly related to preexisting medical conditions and obviate the need for concurring-cause instructions in cases like this. For these reasons, it was not an abuse of discretion to omit the concurring-cause instruction.

The district court did not err in granting collateral offsets and denying Hogan's motion for a new trial.

Affirmed.