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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0538**

Mark Kedrowski,
Appellant and Cross-Respondent,

vs.

Lycoming Engines, a division of AVCO Corporation,
Respondent and Cross-Appellant.

**Filed February 10, 2020
Affirmed and remanded
Hooten, Judge
Concurring specially, Randall, Judge***

Ramsey County District Court
File No. 62-CV-12-9581

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Minn. Const. art. VI, § 10.

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Randall, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

This action arising from injuries suffered by cross-respondent pilot in a plane crash is before this court, for the second time, on remand from the supreme court on the sole issue of whether a new trial on damages is warranted based on attorney misconduct. Cross-appellant fuel-pump manufacturer argues that the district court erred by analyzing its new-trial motion under Minn. R. Civ. P. 59.01(e) rather than Minn. R. Civ. P. 59.01(b) and in determining that a new trial is warranted on liability but not on damages. We affirm the district court's determination that a new trial on damages is not warranted and remand for a new trial on liability only.

FACTS

On September 3, 2010, cross-respondent Mark Kedrowski sustained life-changing injuries when his single-engine airplane crashed shortly after takeoff from the Lake Elmo Airport. *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 49 (Minn. 2019) (*Kedrowski II*).¹ Kedrowski brought products-liability claims against cross-appellant Lycoming Engines, which asserted a pilot-error defense. *Id.* at 50. The jury found in Kedrowski's favor on his manufacturing-defect and negligence theories, but rejected his design-defect

¹ The facts and procedural history of this case are recited at length in previous opinions by the supreme court and this court. See *Kedrowski II*, 933 N.W.2d at 49-54; *Kedrowski v. Lycoming Engines*, No. A17-0538, 2018 WL 2293332, at *1-2 (Minn. App. May 15, 2018) (*Kedrowski I*), *rev'd*, 933 N.W.2d 45 (Minn. 2019).

and failure-to-warn theories. It awarded Kedrowski \$27.7 million of the approximately \$32 million he sought in damages. *Id.* at 54.

The district court had denied Lycoming's midtrial motion for judgment as a matter of law (JMOL) under Minn. R. Civ. P. 50.01, but it granted Lycoming's posttrial JMOL motion under Minn. R. Civ. P. 50.02, concluding that the opinion of Kedrowski's sole causation expert lacked foundational reliability under Minn. R. Evid. 702 and should have been excluded in its entirety. *Id.* at 49, 53-54. The district court also conditionally granted Lycoming's new-trial motion with respect to liability, citing "the cumulative impact of plaintiff's repeated violations' of pretrial evidentiary orders." *Id.* at 54. But the district court denied Lycoming's new-trial motion (on the ground of attorney misconduct) with respect to damages, concluding that the misconduct it found "almost entirely related to liability issues."² See Minn. R. Civ. P. 50.03(a) ("If the motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.").

Kedrowski appealed the grant of JMOL and conditional grant of a new trial on liability, and Lycoming conditionally cross-appealed, arguing that if JMOL were reversed, a new trial should be granted on damages. *Kedrowski II*, 933 N.W.2d at 54. We affirmed

² The district court conditionally granted a new trial on damages unless Kedrowski accepted a remittitur of past medical expenses from \$2 million to \$1,827,365, to match billing records rather than an estimate given by a witness. The district court concluded that the discrepancy was a simple mistake, not the result of prejudice. This aspect of the district court's decision is not at issue on appeal.

the grant of JMOL over a dissent and did not reach the new-trial rulings. *Kedrowski I*, 2018 WL 2293332, at *9. Kedrowski filed a petition for further review, which the supreme court granted in part. *Kedrowski II*, 933 N.W.2d at 54.

The supreme court ruled that the district court's exclusion of Kedrowski's causation expert's opinion was overbroad and an abuse of discretion. *Id.* at 49. The supreme court explained that, although the district court properly concluded that Kedrowski's causation expert's flow-bench-testing methodology lacked foundational reliability, his opinion that the crash was caused by an insufficient flow of fuel from the fuel pump was not grounded solely on that methodology. *Id.* at 57-59. Accordingly, the expert's ultimate opinion on causation was admissible, and JMOL was not warranted. *Id.* at 61-62.

The supreme court next considered whether the erroneous admission of flow-bench-testing evidence required a new trial. *Id.* at 62 (citing Minn. R. Civ. P. 50.04). The supreme court concluded that the admission of the evidence was prejudicial—it might reasonably have influenced the jury and changed the result of the trial. *Id.* (citing Minn. R. Civ. P. 59.01(f)). The supreme court observed that, “A new trial may be granted ‘on all or part of the issues.’” *Id.* at 62 (quoting Minn. R. Civ. P. 59.01). “All that is necessary for the application of this rule is that the issues should be so distinct and separable that one issue can be justly determined without a determination of the other.” *Id.* at 62-63 (quoting *In re Buck's Estate*, 142 N.W. 729, 733 (Minn. 1913)). And, the supreme court concluded that, “Because the flow-bench testing relates only to the liability of Lycoming, and liability is ‘distinct and separable’ from the issues of damages, we grant a new trial only on the issue of liability.” *Id.* at 63 (citing *W.G.O. v. Crandall*, 640 N.W.2d 344, 350 (Minn. 2002)).

Because there can be only one grant of a new trial on the issue of liability, the supreme court concluded that Kedrowski's challenge to the district court's conditional grant of a new trial on liability based on attorney misconduct, which we did not reach in *Kedrowski I*, is moot. *Id.* at 63. The supreme court instructed, "Therefore, on remand, the court of appeals need only address whether a new trial is warranted on the issue of damages." *Id.* We ordered supplemental briefing, which the parties filed.

DECISION

Lycoming argues that the district court erred in conditionally granting a new trial on liability based on attorney misconduct without also granting a new trial on damages. It contends that the district court erred by analyzing Lycoming's request for a new trial on damages under Minn. R. Civ. P. 59.01(e) ("Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice"), rather than Minn. R. Civ. P. 59.01(b) ("Misconduct of the . . . prevailing party"), and that the issues of liability and damages are not distinct and separable in this context.³ Generally, appellate courts will only reverse the denial of a new-trial motion based on attorney misconduct "where there

³ In its new-trial motion papers, Lycoming cited Minn. R. Civ. P. 59.01(a), (b), (e), (f), and (g), but focused its argument on prejudicial misconduct under rule 59.01(b) and an excessive or unjustified verdict under rule 59.01(e) and (g). On appeal, Lycoming does *not* argue that a new trial on damages is warranted under rule 59.01(e) because the \$27.7 million verdict (as amended) is excessive and given under the influence of passion or prejudice, or under rule 59.01(g) because it is unjustified by the evidence.

has been a clear abuse of . . . discretion.” *Hall v. Stokely-Van Camp, Inc.*, 106 N.W.2d 8, 11 (Minn. 1960).⁴

“The determination of whether or not to grant a new trial because of attorney misconduct is not governed by fixed rules, but instead rests wholly within the discretion of the trial court.” *Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994) (citing *Wild v. Rarig*, 234 N.W.2d 775, 785 (Minn. 1975)). “The primary consideration in determining whether to grant a new trial is prejudice.” *Wild*, 234 N.W.2d at 786. The trial judge is in the best position to determine whether an attorney’s misconduct prejudiced the jury. *Johnson*, 518 N.W.2d at 601. The parties agree that a new trial is required when misconduct is so pervasive “that no jury could arrive at an impartial verdict.” See *Wild*, 234 N.W.2d at 786 (“The trial record is permeated by such personality conflicts, such obvious appeals to passion and prejudice, and such rude, abusive, and unlawyerlike trial antics and tactics that no jury could arrive at an impartial verdict.”).

With respect to liability, the district court found that, in the course of the four-week, hotly contested trial, Kedrowski’s counsel committed misconduct by: (1) referring to other alleged failures of LW-15473 fuel pumps; (2) using a Lycoming newsletter for purposes other than that for which it was admitted; and (3) making disparaging comments about Lycoming, its trial strategy, and corporate entities generally. Lycoming objected to some references to alleged pump failures and the use of the newsletter, but not to others. The

⁴ To the extent this appeal requires interpretation of the Minnesota Rules of Civil Procedure, our review is de novo. See *Gams v. Houghton*, 884 N.W.2d 611, 616 (Minn. 2016).

district court sustained some of Lycoming's objections, cutting off that challenged conduct, and gave certain curative instructions. It overruled other objections, and it denied two mistrial motions. Lycoming did not object to any of the disparaging comments.

As noted previously, the supreme court granted Kedrowski a new trial with respect to liability issues on grounds unrelated to attorney misconduct. On remand, the issue before us is whether the district court erred by refusing to grant a new trial with respect to damages. The district court based its denial on the ground that any attorney misconduct only affected the jury's determination of the liability issues and did not prejudice the jury's award of monetary damages. Because we conclude that the district court did not err in its denial with respect to damages, we need not review the district court's determination that attorney misconduct occurred. Our opinion only addresses the issue of whether, assuming without deciding that there was attorney misconduct, the district court erred by determining that such attorney misconduct did not prejudice the jury in its consideration of damages.

The district court characterized Lycoming's new-trial argument as follows: "[T]he jury's monetary award reflects juror prejudice incited by the misconduct of counsel, thereby warranting a new trial on the issue of damages in addition to liability." This characterization is consistent with Lycoming's motion papers and its oral argument to the district court. Lycoming nevertheless asserts on appeal that the district court erred in its analysis because the way that prejudice is measured is fundamentally different under rule 59.01(b) and rule 59.01(e). Lycoming contends that, although the standard for a new trial under rule 59.01(e) "focuses on the quantum of damages," "a new trial for misconduct *obviates* the need to separately analyze the verdict's excessiveness." We understand

Lycoming's argument to be that, under rule 59.01(b), if the district court finds prejudicial misconduct with respect to liability, the district court must grant a new trial on both liability and damages, regardless of whether the damages award is excessive.

Lycoming is correct that, had the district court granted a new trial on damages due to misconduct (under rule 59.01(b)), it would not have needed to address Lycoming's separate arguments that the verdict was excessive (under rule 59.01(e)) or not justified by the evidence (under rule 59.01(g)). The cases relied on by Lycoming, *Anderson v. Hawthorn Fuel Co.* and *Krenik v. Westerman*, support this proposition. *Anderson*, 277 N.W. 259, 261 (Minn. 1938) (concluding that "[s]ince there must be a new trial [based on misconduct], it is unnecessary to consider the other assignments of error," including the size of the verdict); *Krenik*, 275 N.W. 849, 849, 851 (Minn. 1937) (concluding that because a new trial was granted based on prejudicial misconduct, "it becomes unnecessary to consider the contention that the verdict is excessive"). But, *Krenik* and *Anderson* do not support Lycoming's argument that a district court errs as a matter of law by granting a new trial on liability based on prejudicial misconduct without also granting a new trial on damages. Nor does a third case cited by Lycoming, *Brown v. Saint Paul City Ry. Co.*, in which our supreme court made a fact-specific determination that a new trial (apparently on both liability and damages) was required after counsel referred to an excluded exhibit in closing argument and no corrective instruction was given. 62 N.W.2d 688, 694 (Minn. 1954).

None of these cases hold as a matter of law that a new trial on *liability* necessitates a new trial on *damages* when misconduct is found, even when the evidence is closely

balanced. As the supreme court articulated, a new trial on liability does not require a new trial on damages if the issues are “so distinct and separable that one issue can be justly determined without a determination of the other.” *Kedrowski II*, 933 N.W.2d at 62-63 (quoting *Buck’s Estate*, 142 N.W.2d at 733). Accordingly, we cannot conclude that a new trial on damages is required as a matter of law, even if prejudicial misconduct occurred with respect to liability.

Lycoming also argues that in analyzing prejudice under Minn. R. Civ. P. 59.01(b), the district court not only did not need to, but erred by, considering—among other factors—whether there was record support for the damages award. But, Lycoming urged the district court to consider the special verdict in its evaluation of prejudice, repeatedly arguing that the damages award “confirms” the prejudice to Lycoming. Furthermore, our supreme court in *Hall* indicated that it is not improper for the district court to consider the jury’s damages award in assessing prejudice with respect to a new-trial motion based on misconduct. 106 N.W.2d at 11. In *Hall*, the supreme court affirmed the denial of a new-trial motion on two grounds. *Id.* at 10-11. It rejected an argument that the verdict was excessive, concluding that the award did not reflect any influence of passion and prejudice. *Id.* at 10. It separately rejected an argument that misconduct warranted a new trial, concluding that, “it is difficult to see how” the verdict returned could be based on passion and prejudice. *Id.* at 11.

Based upon this record and the case law, we conclude that the district court did not err in considering record support for the damages award in reaching its determination that the damages award was not a product of any prejudicial misconduct by Kedrowski’s attorneys. We therefore reject Lycoming’s argument that the district court erroneously

analyzed Lycoming's request for a new trial on damages under Minn. R. Civ. P. 59.01(e) rather than Minn. R. Civ. P. 59.01(b).

Lycoming also contends that a new trial is required on damages because the asserted misconduct was so pervasive that "there is no tenable way to separate the prejudicial effect" between liability and damages. It argues that liability and damages are not "distinct and separable," asserting that "all the instances of prejudicial misconduct found by the district court occurred in a non-bifurcated trial and applied to both liability *and* damages, or else distinctly applied to damages." But Lycoming does not explain how or why the district court erred in coming to a different conclusion, and its argument in this respect is devoid of citations to the district court record.

The district court found that the misconduct it identified "almost entirely related to liability issues." It found that "Lycoming identified no direct link between any alleged misconduct and the damages award." On appeal, Lycoming does not explain how improper references to alleged prior failures and the newsletter and disparaging comments precluded the jury from impartially assessing medical bills, expert testimony on wage loss, or evidence relating to pain and suffering, particularly when curative instructions were given in some instances. Accordingly, Lycoming has not shown that the district court erred in concluding that, under the circumstances presented, the issues of liability and damages are distinct and separable.

Lycoming also argues generally that no jury could have arrived at an impartial verdict on damages in view of the misconduct identified by the district court. The district court disagreed, reasoning in part that this jury did so: "With regard to general damages,

there is overwhelming evidence in the record supporting the jury's verdict. Lycoming did not seriously contest damages."⁵

The district court catalogued Kedrowski's "massive injuries," including "permanent and life-changing injuries from head to toe." Specifically, the district court noted that Kedrowski's face and skull were crushed; part of his skull was removed due to brain swelling; his face required reconstruction after, as his doctor testified, "peel[ing] all of his face down at the bone"; he suffered brain damage resulting in partial paralysis and spasticity; his left leg was amputated at the knee; and his right ankle was reconstructed and fused. Kedrowski needed to relearn how to walk, read, and write; basic math is difficult for him. Kedrowski cannot live independently. Despite this and other evidence of

⁵ The district court's observation that Lycoming did not seriously contest damages is supported by Lycoming's closing argument:

And I told you before in opening that we're not here fighting about Mr. Kedrowski's damages and injuries. I mean, there are things that I'm going to talk to you about in that. This is the hardest thing there is to do. You have to answer it. I have to talk about it because, as the court said, you have to answer those questions.

I'm going to tell you, Lycoming doesn't believe – I don't believe that we should be responsible for whatever damages occurred, but it doesn't mean we don't think that he wasn't injured or hurt. We know what took place. We've never contested those kinds of things. So when you get to those questions . . . they are what they are. I mean, the past medical, nobody disputed that. We didn't sit there and fight that. The past loss of earnings . . . I'd suggest you take a look at that.

With respect to past and future pain and suffering, counsel stated that "there's no formula," "no specific measure," and "no yardstick." Counsel asked the jury to "be fair and reasonable" to both parties in evaluating pain-and-suffering damages.

catastrophic injuries, the jury did not accept Kedrowski's counsel's recommendation of \$20 million in general damages, awarding \$16 million instead. And there is no argument on appeal that the overall award is excessive or unjustified by the evidence. As the district court noted, "Overall, the jury did what it was charged to do. The damages evidence fairly justified a high-end award."

The district court judge is in the best position to determine whether an attorney's misconduct prejudiced the jury. *Johnson*, 518 N.W.2d at 601. Because the district court explained its determination that the misconduct it found with respect to liability did not prejudice the jury with respect to damages, and the district court's reasoning is supported by the record and our caselaw, the district court did not abuse its discretion in determining that the jury was capable of reaching an impartial verdict on damages. Lycoming has not shown that the district court erred. We therefore affirm the district court's conditional denial of Lycoming's motion for a new trial on damages and remand this matter to the district court for a new trial only as to the liability issues.

On remand, the parties will have the opportunity to propose jury instructions addressing the procedural history of this case. The concurrence seeks to address that issue now.

Counsel must ensure that proposed jury instructions align with their client's overall trial strategy. *Cf. State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (concluding that failure to request a jury instruction on intoxication defense was a strategic decision made by counsel). Not surprisingly, no party has asked this court to address the question of jury instructions on remand. "[W]e rely on the parties to frame the issues for decision and

assign to courts the role of neutral arbiter of matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 2564 (2008). And, even if the parties had briefed the issue of jury instructions for the new trial on liability on remand, there is no district court decision for us to review. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a “reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court”) (quotation omitted). “Because the nature of judicial decision-making is to resolve disputes, the ‘judicial function does not comprehend the giving of advisory opinions.’” *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007) (quoting *Izaak Walton League of Am. Endowment, Inc. v. Minn. Dep’t of Nat. Res.*, 252 N.W.2d 852, 854 (Minn. 1977)). Accordingly, resolving—or even recommending—jury instructions for the second trial on liability, as the concurrence urges, would be premature at best.

Affirmed and remanded.

RANDALL, Judge (concurring specially)

I concur with the result. The majority’s conclusion not to send this case back to the district court for a new trial on the issue of damages is correct and well-reasoned. At trial, the objections, counter-objections, and the arguments and motions concentrated on liability. As the district court judge and the majority both observed, the extent of the injuries was never in question. The district court found that the amount awarded by the jury was within reasonable limits.¹

The supreme court has dictated a new trial on the issue of liability. When it goes back to the district court for a second trial, I recommend that the district court’s instructions to the jury, while certainly concentrating on the issues of causation and negligence, should include a passing reference to the first trial, the one that decided damages and injuries. By the time the district court is done vetting the jury pool and the attorneys have finished voir dire, you should have a common sense jury—alert and ready to do the right thing. They are entitled to more than being told, “The plane went up, the plane went down, and your job is to decide why.”

As reasonable people, the first questions running through their minds—what they will want to know—is how many people were in the plane, if there was more than one, was anyone killed, was anyone injured? To help the jury concentrate on the issues of liability and causation without having the nagging questions to who was in the plane and was anyone hurt or killed, the jury should be given, as part of the overall instructions, a simple,

¹ \$27,700,000.

concise statement to the effect of, “The crash involved a single person, the pilot. There were extensive injuries and a prior jury assessed the monetary award for the injuries at \$27.7 million. That has been decided and is not before us today. This trial deals exclusively with the issues of causation and negligence.”

Because of the complex nature of the issues regarding negligence and causation, the district court’s instructions, I expect, will be lengthy and as detailed as need be. The reference to the prior trial, which just decided the monetary award for injuries, can be simple and to the point, and then the case can move on.

Jurors are entitled to be treated honestly. It serves no purpose to leave them completely in the dark as to what happened at the first trial. They need to concentrate on the issues for this trial, causation and negligence.