

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0536**

Megan Ashley Spindler,
Respondent,

vs.

Donald Lee Westman,
Appellant.

**Filed February 8, 2021
Affirmed; motion denied
Slieter, Judge**

Anoka County District Court
File No. 02-CV-18-5550

Scott Wilson, Scott Wilson Law Firm, PLLC, Minneapolis, Minnesota; and

Nathan H. Bjerke, TSR Injury Law, Bloomington, Minnesota; and

Lance Redlinger, Redlinger Law Firm, P.A., Shoreview, Minnesota (for respondent)

Richard S. Stempel, Luke G. Peters, Stempel & Associates, PLC, Excelsior, Minnesota
(for appellant)

Considered and decided by Cochran, Presiding Judge; Jesson, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant Donald Lee Westman appeals from judgment following a damages-only jury trial regarding respondent Megan Ashley Spindler's injuries arising from a car

accident. Westman challenges the denial of his motion for a new trial based on misconduct by Spindler's counsel during closing argument. Because we defer to the district court judge who presided over the trial and carefully considered the impact of the purported improper statements, and who found the jury was not prejudiced thereby, we affirm.

FACTS

Westman was involved in a 2013 automobile-collision with Spindler. Westman stipulated to liability. Therefore, the jury's sole issue was to determine the extent of Spindler's injuries and the resulting damages amount. Spindler introduced evidence from three doctors, all of whom opined that she exhibited symptoms of complex regional pain syndrome (CRPS). Dr. Susan Evans and Dr. Sanjeev Arora noted that Spindler exhibited symptoms of CRPS as early as October 30, 2014, and Dr. Andrew Will stated that Spindler's pain was chronic, progressive, and incurable. Spindler provided one witness who testified as to physical changes in Spindler's arm, and Spindler also testified that she experienced progressive pain that caused adverse effects on her daily life. Dr. Will testified regarding the future medical treatment he recommended for Spindler, including a spinal cord stimulator at an initial cost of \$290,000. He also testified that a battery for the spinal cord stimulator costs \$100,000 and Spindler would require between five and ten replacement batteries over her lifetime.

As part of his defense, Westman presented video recordings showing Spindler engaging in the following activities at two fitness centers between December 2014 and April 2015: swinging on the parallel bars, swinging a sledgehammer, ring activities, and weight lifting. Westman also presented evidence that Spindler had entered a bodybuilding

competition after the car accident. Westman presented Dr. Burgarino's conclusion, based upon his independent medical evaluation (IME), that Spindler required no medical treatment after May 2013. Pursuant to the court's *in limine* order, the jury did not hear Dr. Burgarino's opinion that Spindler did not have CRPS.

The jury ultimately awarded Spindler \$1,065,507.98 in damages. Westman subsequently filed a motion for a new trial based on purported attorney misconduct during closing argument, which the district court denied.¹ This appeal follows.²

DECISION

This court will not reverse a district court's decision to deny a new-trial request based on attorney misconduct absent a clear abuse of discretion. *Wild v. Rarig*, 234 N.W.2d 775, 785 (Minn. 1975); *see also Poston v. Colestock*, 540 N.W.2d 92, 94 (Minn. App. 1995) ("Appellate courts rarely disturb a district court's response to improper remarks in closing arguments."), *review denied* (Minn. Jan. 25, 1996). The purpose of granting a new trial "is not to punish counsel, but to cure prejudice." *Sather v. Snedigar*, 372 N.W.2d 836, 839 (Minn. App. 1985). "[T]he primary 'consideration in determining whether to grant a new trial is prejudice.'" *Johnson v. Wash. Cnty.*, 518 N.W.2d 594, 600 (Minn. 1994) (quoting *Wild*, 234 N.W.2d at 786). Misconduct may be prejudicial in its cumulative effect. *See Wild*, 234 N.W.2d at 786. We defer to the district court's superior ability to gauge the

¹ As part of this motion, Westman also sought judgment as a matter of law, remittitur, and a further stay of enforcement of judgment. Only the denial of the motion for a new trial is raised on appeal.

² Spindler filed a motion to strike two issues raised in Westman's appellate brief. Because we affirm the district court's conclusion of no resulting prejudice, we deny this motion as unnecessary.

impact of the challenged statements in view of the trial as a whole. *See Fischer v. Mart*, 241 N.W.2d 320, 321-22 (Minn. 1976). Finally, “[i]f the [district] court instructed the jury to disregard the improper remarks or arguments, a new trial will rarely be granted” by appellate courts. *Wild*, 234 N.W.2d at 785-86.

Westman alleges misconduct in three segments of Spindler’s closing argument: (1) counsel’s reference to a purported agreement by defense counsel as to Spindler’s requested future damages, and defense counsel’s purported knowledge of Spindler’s condition; (2) counsel’s mischaracterization of the IME’s opinion; and (3) counsel’s “bully” story.

Purported Agreement as to Future Damages; Spindler’s Condition

And I will tell you what, he thinks the same, [appellant’s counsel] does. You heard him say that, in terms of future pain, you know, we have close to a \$1 million in medical expenses. He acknowledges that. And he said, so, you know, \$2 million for the pain – remember when he said that at the end of his closing – he is just saying that she doesn’t have this condition when he knows that she does. This number makes sense to the defense, it makes sense to us, and it makes sense given the facts in this case and the costs of the care to treat it.

The IME’s Opinion

Even Dr. Burgarino, okay, he never comes out and says, “This woman does not have CRPS.” There is no opinion from him on that. None. What he said is that from this crash, she has a strain-sprain injury. He never says, “She doesn’t have CRPS,” because she does. And even Dr. Burgarino knows that she does. So, the only evidence you have on this is that she has the condition. Everyone agrees that she has it and every doctor agrees that she can’t fake it, the symptoms, that they have been seen and documented.

Counsel's "bully" story

Jimmy has been bullying us for as long as I can remember. Jimmy walks up and he picks up the ball . . . And Jimmy looks at me and he says, "What are you going to do about it?" What are you going to do about it. . . . I punched this kid square in the jaw . . . he hits me in the ear, hard, like hard. So, I go down . . . but he never bugged us again. The reason that made me think of this is the because of the way the defense has behaved in this case. For six years, they have spied on her. They accused her of being a fake. They flew in Dr. Bugarino. And now, well, the whole, they have been saying, what are you going to do about it? . . . So, what are you going to do about it, now, is up to you. We're asking you for a verdict that says to Megan Spindler, we hear you and we believe you and we're going to do something about it.

Westman's counsel objected to the statement regarding his purported agreement on damages and requested a curative instruction, which he drafted, the parties agreed to, and the district court gave to the jury before deliberation as part of the standard final pre-deliberation instruction. The jury was instructed as follows: "what the attorneys say during closing arguments are not evidence. So, if [Spindler's counsel] made a comment about [Westman's counsel]'s closing arguments and it differs from your recollection of what [Westman's counsel] said, you're to rely on your own recollection."

Denying Westman's motion for a new trial, the district court concluded that Westman failed to establish that prejudice resulted from the statements made in closing arguments. In doing so, the district court determined that each complained-of statement was counsel's "non-evidentiary opinion," rather than a "misstatement of facts in evidence," and therefore did not constitute prejudicial misconduct.

The district court also determined that the evidence offered at trial supported the verdict. Spindler requested up to \$4,240,000 for pain, disability, and emotional distress,

and up to \$1,474,150 in future health-care expenses. Westman requested that the jury return no future damages. The jury awarded Spindler \$470,000 in future health care expenses, and \$470,000 in future pain, disability, and emotional distress. In sum, the jury awarded Spindler \$1,065,507.98.³

In addition to the curative instruction, the district court three times, as part of its preliminary instructions, reminded the jury that statements the attorneys make are not evidence. Before closing arguments, the jury was again so instructed. Westman's attorney gave a similar statement during his closing argument. The jury was therefore instructed by the court on multiple occasions to return a verdict based not on the attorneys' statements but on the evidence at trial, and appellate courts "presume that juries follow the instructions they are given." *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 630 (Minn. 2012).

Given the district court's measured determination that the evidence supported the verdict and the subsequent finding of no prejudice, and the instructions given to the jury, this is not the "rare" case in which we overturn the district court's decision to deny a new trial. *See Wild*, 234 N.W.2d at 786 (granting new trial due to both parties' misconduct which "permeated" the record with "personality conflicts . . . 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"). We defer to the district court's superior ability to gauge the impact of the challenged statements in view of the trial as a whole and discern

³ Included in this sum is the award of \$125,507.98 for past damages, which is not challenged on appeal.

no abuse of discretion in so concluding no prejudice to the jury was caused by counsel's statements.

Affirmed; motion denied.