

*This opinion is nonprecedential except as provided by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
A22-0209**

A minor child by his mother and natural guardian,
Chelsea Rose,
Appellant,

vs.

Dr. Patricia Kohls, et al.,
Respondents.

**Filed October 17, 2022
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CV-18-19570

Christopher Kuhlman, Kuhlman Law, PLLC, Minneapolis, Minnesota (for appellant)

Beth A. Jenson Prouty, Cecilie M. Loidolt, Christine W. Chambers, Arthur, Chapman,
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Considered and decided by Bjorkman, Presiding Judge; Slieter, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this medical-malpractice appeal, appellant challenges the district court's denial of judgment as a matter of law, denial of a new trial, and award to respondent of costs and

disbursements. The district court did not err by denying appellant's motion for judgment as a matter of law and a new trial because there is competent evidence to support the jury's verdict and appellant was not prejudiced by the district court's evidentiary rulings. And the district court's award of costs and disbursements was within its discretion. We affirm.

FACTS

In November 2018, appellant Chelsea Rose sued respondents obstetrician/gynecologist (OB/GYN) Dr. Patricia Kohls and her employer, Premier OBGYN of Minnesota, PA, for medical malpractice. She alleged that Dr. Kohls failed to meet the applicable standard of care when delivering her child, K.R.-L. (the child), and that this was a substantial contributing factor in the child's brachial plexus injury. The following facts, which are favorable to the verdict, derive from the jury trial.

In October 2016, Rose gave birth to the child. The delivery involved shoulder dystocia, which occurs during delivery when the baby's shoulder "gets stuck behind the pubic bone." Dr. Kohls recorded in her delivery note that she used generally accepted maneuvers to relieve the shoulder dystocia and deliver the child. Also in her delivery note, Dr. Kohls recorded that the child had "some apparent weakness and [was] not lifting the right arm." In November 2016, the child was diagnosed with a brachial plexus injury impairing the functioning of the child's right arm.

The brachial plexus is a "web" of five nerves running through the shoulder. These nerves control the muscles in the shoulder, arm, and hand. The nerves can be damaged by stretching or squeezing during birth, which shoulder dystocia can cause.

Most brachial plexus injuries in newborns heal naturally within six months of birth. When the child's ability to use his right arm had not recovered within six months, he underwent two surgeries to improve arm functioning. These surgeries returned the child's range of motion to one that, according to the surgeon, "wasn't normal, but it was very good."

In September 2021, the district court conducted an eight-day jury trial. During trial, Rose presented cellphone videos from the delivery room, which had been taken by her sister-in-law. One of the videos (the birth video) shows the child's head appearing and Dr. Kohls diagnosing the shoulder dystocia. Both parties called expert witnesses regarding the standard of care, causation, and damages. The jury found that Dr. Kohls was not negligent and, therefore, did not answer the causation or damages questions on the special-verdict form. The district court entered judgment accordingly.

Dr. Kohls applied for taxation of \$73,867.50 in costs and disbursements, which Rose opposed. Rose moved for judgment as a matter of law or a new trial. The district court denied Rose's motion and awarded Dr. Kohls \$31,025 in costs and disbursements. Rose appeals.

DECISION

I. Judgment as a Matter of Law

"We review de novo a district court's decision to deny a motion for judgment as a matter of law, applying the same standard used by the district court and viewing the evidence in the light most favorable to [the nonmoving party]." *See Christie v. Est. of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018) (quotation omitted); *see also Kedrowski*

v. Lycoming Engines, 933 N.W.2d 45, 54-55 (Minn. 2019). “Judgment as a matter of law may be granted only when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome.” *Kedrowski*, 933 N.W.2d at 55 (quotations omitted). In applying this standard, we consider all of the evidence in the light most favorable to the verdict, and do not weigh the evidence or judge credibility. *Id.* We must affirm a district court’s denial of judgment as a matter of law “if, in the record, there is any competent evidence reasonably tending to sustain the verdict. Unless the evidence is practically conclusive against the verdict, [appellate courts] will not set the verdict aside.” *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotations omitted).

A medical-malpractice claim requires the plaintiff to prove, through expert testimony, “(1) the standard of care recognized by the medical community as applicable to the particular defendant’s conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant’s departure from the standard was a direct cause of the patient’s injuries.” *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 329 (Minn. 2013) (quoting *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982)). In medical-malpractice cases, “expert testimony is generally required to establish the standard of care and the departure from that standard for the conduct of physicians.” *Tousignant v. St. Louis County*, 615 N.W.2d 53, 58 (Minn. 2000). It is only “exceptional cases in which expert testimony is not necessary.” *Id.* (quotation omitted).

Rose does not argue that this is the “exceptional case” in which expert testimony is not required. Instead, Rose argues that, despite contrary expert testimony, the birth video shows Dr. Kohls “pulling [the child]’s head down and toward[] the floor, two times, which

is lateral traction” and a violation of the standard of care. And this “conclusively shown physical fact[]” negates expert testimony that Dr. Kohls did not violate the standard of care. We are not persuaded.

Rose’s expert, Dr. Kenneth Naylor, explained that pulling down on the baby’s head is not a proper maneuver and falls below the standard of care for an OB/GYN in a shoulder-dystocia delivery. He clarified that the key reference point to determine if the baby’s head is pulled down is the baby’s spine, and that any pulling force must be in line with the axis “along the spine on the baby,” and any “[n]on-axial traction would bend the head.” Nonaxial traction is also known as lateral traction and that, according to Dr. Naylor, is an improper maneuver. Dr. Naylor testified that, based on the angle of Dr. Kohls’s arm, the birth video shows Dr. Kohls using “non-axial traction,” which was a violation of the standard of care.

Dr. Kirk Shibley, Dr. Kohls’s standard-of-care expert, agreed that the delivery doctor “should not bend the [baby’s] neck.” Dr. Shibley noted that the birth video shows the child’s head moves when Dr. Kohls grasps it to apply traction, and he explained that in most births the baby’s head “rotat[es] a little bit laterally,” so, before applying traction, the doctor must assess the position of the spine by feel and adjust the baby’s head so traction is applied axially. Dr. Shibley testified that he did not see any lateral bending of the neck in the video and “that the standard of care was followed.”

Dr. Kohls, who testified as her own expert witness, also agreed that, during a shoulder-dystocia delivery, a doctor “should [n]ever bend the head down.” However, she explained that although the birth video shows “some minimal movement of the head,” “it’s

still in alignment with the spine.” And that, despite the child’s head appearing to be pulled downward when “comparing it to horizontal,” “it’s still in alignment with the spine, with the baby’s angle within the mom.” Dr. Kohls further explained that her usual practice, which she followed in this delivery, is to “crouch[] in order to be in better alignment with the baby . . . so the direction of [her] pull with the baby is axial and is in alignment with the spine.”

Despite this conflicting expert testimony regarding what the birth video shows, Rose argues that the birth video “conclusively show[s]” Dr. Kohls applying lateral traction, in violation of the standard of care, citing for support *Cofran v. Swanman*, 29 N.W.2d 448, 450 (Minn. 1947). *Cofran* involved a car crash where the only evidence supporting the jury’s verdict that the defendant negligently entered oncoming traffic was testimony of the plaintiff-passengers. *Cofran*, 29 N.W.2d at 450, 452. The district court entered judgment notwithstanding the jury’s verdict, citing physical and testimonial evidence that “overwhelmingly and conclusively . . . negate[d] the testimony of plaintiffs.” *Id.* at 452. We do not find *Cofran* helpful because it did not involve competing expert testimony and here the competing expert testimony does not “overwhelmingly and conclusively” contradict the jury’s verdict. *Id.*

As we have already noted, Rose does not argue this is the “exceptional case” of medical malpractice that does not require medical experts. And the jury properly relied upon the expert testimony, which—as is not unusual in such cases—disagreed as to whether the standard of care was violated. We do not interfere with the jury’s credibility finding as between these experts. *Kedrowski*, 933 N.W.2d at 61-62 (concluding that an

expert's testimony involving questions of weight and credibility are for the jury to decide); *see also Knuth v. Emergency Care Consultants, P.A.*, 644 N.W.2d 106, 112 (Minn. App. 2002) (noting that the jury "weighs the credibility of an expert's testimony"), *rev. denied* (Minn. Aug. 6, 2002).

As Rose's expert Dr. Naylor explained, the key reference point for whether traction is acceptable axial traction or unacceptable lateral traction is not the floor, it is the baby's spine. And, as Dr. Naylor further explained, the direction of traction relative to the floor is irrelevant in this case because, when a mother is on a delivery table in the position Rose was, the baby's spine "rotates th[e] axial plane so that it's . . . actually about a 25-degree angle." In that situation, the doctor would not pull "straight parallel with the bed," but "would be pulling a little bit at an angle to get that axial traction." Thus, axial traction would be toward the floor because the child's spine was angled toward the floor. And Drs. Shibley and Kohls explained that any movement of the baby's head was due to Dr. Kohls aligning the head with the spine before applying traction.

In sum, the jury viewed the birth video multiple times—after it was initially introduced through the sister-in-law who recorded it and along with each expert who explained the standard of care and whether Dr. Kohls violated it. Because proper delivery maneuvers are not "within the general knowledge and experience of lay persons," the jury properly relied on the expert testimony. *Tousignant*, 615 N.W.2d at 58 (quotation omitted). And we will not reweigh the jury's determination of the experts' credibility. *Kedrowski*, 933 N.W.2d at 55.

II. Denial of a New Trial

Rose argues that the district court made five erroneous evidentiary rulings, any one of which should have required a new trial: (1) allowing Dr. Michele Grimm to testify, (2) prohibiting Dr. Naylor from testifying regarding Dr. Kohls's shoulder-dystocia education, (3) prohibiting Dr. Naylor from testifying regarding the adequacy of Dr. Kohls's delivery note, (4) excluding audio of a physician assistant commenting on the child's arm in a postdelivery video, and (5) admitting into evidence Rose's unredacted medical records.¹

“We review a district court’s decision to grant or deny a new trial for an abuse of discretion.” *See Christie*, 911 N.W.2d at 838 (citing *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010)). “We will not set aside a jury verdict on an appeal from a district court’s denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Navarre v. S. Wash. County Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Kedrowski*, 933 N.W.2d at 62 (quotation omitted); *see also* Minn. R. Civ. P. 61 (“No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.”). “An

¹ Rose also asks for a new trial because “the verdict was manifestly contrary to the clear weight of the evidence.” As we have discussed, the evidence supports the verdict.

evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial.” *Kedrowski*, 933 N.W.2d at 62 (quotation omitted). “Evidence that would have virtually no value in resolving the disputed fact questions is not prejudicial.” *Id.* (quotation omitted).

We need not determine whether the district court abused its discretion in its evidentiary rulings because none of the rulings would “reasonably have influenced the jury” and, therefore, prejudiced Rose.

Dr. Grimm’s Testimony

Dr. Grimm is a biomedical engineer who testified regarding her research into brachial plexus injuries, and that the forces exerted by a mother during delivery are “enough to cause a permanent injury in some children when we compare [the stretch in the baby’s brachial plexus caused by the mother’s labor forces] to what we know about how much nerve roots need to stretch in order to fail.” Rose argues that she was prejudiced by admission of Dr. Grimm’s testimony because “the most plausible explanation for the jury’s verdict as to no negligence . . . would be that they were confused by [Dr.] Grimm’s overlapping ‘causation’ testimony.”

Dr. Grimm testified that she was “being asked to give an opinion on causation” and “would let the OB[/GYN]’s talk about standard of care.” Additionally, Dr. Kohls’s counsel emphasized during her closing statement that the jury should consider only the testimony of “[Dr.] Naylor, Dr. Kohls and Dr. Shibley -- to arrive at your answer to Question Number 1 [negligence].”

Unlike cases that have been reversed because the jury's finding of negligence but not causation suggests confusion, the jury in this case found Dr. Kohls not negligent and nothing in the record suggests that this was the result of confusion. *Cf. George v. Est. of Baker*, 724 N.W.2d 1, 11 (Minn. 2006) (remanding for new trial where jury found negligence but no causation and district court gave conflicting standard-of-care instructions which "analytically and practically" impacted causation analysis); *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 688 (Minn. 2004) (concluding that district court properly granted new trial where the wording of jury verdict was unclear and negligence and causation findings for two defendants were inconsistent).

Because Dr. Kohls's counsel and Dr. Grimm emphasized that Dr. Grimm's testimony was solely on causation, there is no basis to suggest that it "might reasonably have influenced the jury." *Kedrowski*, 933 N.W.2d at 62 (quotation omitted).

Dr. Kohls's Shoulder-Dystocia Training

Rose argues that Dr. Naylor was improperly precluded from testifying "that Dr. Kohls'[s] lack of any focused education and training in shoulder-dystocia management after her graduation from medical school played a role in [the child]'s injury and why Dr. Kohls could not recall the specific internal rotational shoulder-dystocia maneuvers and instead applied downward 'lateral traction.'"

However, during trial, Dr. Naylor acknowledged that he had "no evidence" that Dr. Kohls was not prepared to appropriately respond to shoulder-dystocia delivery and was not claiming that she was unprepared. Rose had the opportunity to cross-examine Dr. Kohls about her education and training and introduce, through a different witness,

evidence of the potential benefits of ongoing physician training in decreasing the risk of brachial plexus injury. Moreover, whether Dr. Kohls had the most up-to-date training does not change the direct evidence of Dr. Kohls's actions provided by her testimony and the birth video. Therefore, excluding Dr. Naylor's testimony regarding Dr. Kohls's shoulder-dystocia training was not prejudicial because it "would have virtually no value" in helping the jury determine whether Dr. Kohls was negligent. *Id.* (quotation omitted).

Adequacy of Dr. Kohls's Delivery Note

Rose argues that Dr. Naylor was improperly precluded from testifying "as to what must be included in a labor and delivery note" and that Dr. Kohls's failure to record that she applied traction "was a strong indication of culpability."

Rose's claim is not based on the adequacy of Dr. Kohls's notetaking but on the delivery procedures she used, and these are shown in the birth video and were explained by the experts. The jury viewed the birth video multiple times and heard extensive expert testimony explaining what the video showed and whether it showed Dr. Kohls acting within the applicable standard of care. In light of this direct evidence, testimony about the adequacy of Dr. Kohls's delivery note "would have virtually no value" in helping the jury determine whether Dr. Kohls was negligent. *Id.* at 62 (quotation omitted).

Postdelivery Statement

Rose argues that it was prejudicial error to exclude from one of the videos the comment of a physician assistant that the child's "shoulders were stuck, sometimes it takes a little stretching to get out."

The physician assistant came into the delivery room “as [the child] was being delivered or in the first minute after [delivery].” Thus, because he did not witness the maneuvers Dr. Kohls performed, his comment would not help the jury determine whether her actions violated the applicable standard of care.

Rose’s Medical Records

Rose argues that, because they contain “a plethora of irrelevant, yet highly prejudicial historical information,” admission of her unredacted medical records was prejudicial error.

Rose’s medical records were over 1,400 pages long, and the jury deliberated for less than two hours. As explained above, the evidence presented at trial supports the jury’s verdict. Submitting Rose’s unredacted medical records to the jury could not reasonably have affected the jury’s verdict and, therefore, was not prejudicial error.

III. Costs and Disbursements

“In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred . . .” Minn. Stat. § 549.04, subd. 1 (2020). For expert witnesses, the district court “may allow such fees or compensation as may be just and reasonable.” Minn. Stat. § 357.25 (2020). The reasonableness of a fee is determined by the cost “for such services in the community where the trial occurred and in the field of endeavor in which the witness has qualified as an expert.” Minn. R. Gen. Prac. 127.

We review an award of costs and disbursements pursuant to either statute for an abuse of discretion. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 155 (Minn. 2014); *see also Quade & Sons Refrigeration, Inc. v. Minn. Mining & Mfg. Co.*, 510 N.W.2d 256,

260-61 (Minn. App. 1994), *rev. denied* (Minn. Mar. 15, 1994). “A district court abuses its discretion when its decision is against logic and facts on the record.” *Blehr v. Anderson*, 955 N.W.2d 613, 624 (Minn. App. 2021) (quotation omitted).

Rose makes two arguments. First, she argues that the district court’s award was not reasonable. Second, she urges us to adopt the federal rule allowing “judges the discretion to not award costs if it would put the party in a precarious financial situation.”

The record supports the district court’s award. Dr. Kohls submitted receipts and invoices for the costs, and Rose does not dispute the accuracy of this documentation. The district court reduced several costs it found unreasonable, ultimately awarding Dr. Kohls less than one-half the amount she requested. Even if an expert-witness fee “seems somewhat high,” we will affirm a district court’s award that is supported by the record, and the district court’s award in this case is supported by the record. *Quade*, 510 N.W.2d at 261.

Additionally, Rose did not argue to the district court that it should consider her ability to pay, which generally precludes us from reviewing an issue on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we did reach this issue, it is not the role of this court to make new law unless there is no statutory or judicial precedent to follow. *In re Trusteeship of Tr. of Williams*, 631 N.W.2d 398, 410 (Minn. App. 2001), *rev. denied* (Minn. Sept. 25, 2001). And the supreme court has held that an award of costs and

disbursements pursuant to Minn. Stat. § 549.04, subd. 1 “does not depend on the non-prevailing party’s ability to pay.”² *Dukowitz*, 841 N.W.2d at 155.

Affirmed.

² We note that Minn. Stat. § 357.25 uses slightly different language when authorizing the district court to “allow such fees or compensation as may be just and reasonable” for expert witnesses, and that determining what fees are “just” could implicate broader fairness considerations. *See Capacity Wireless, LLC v. Bd. of Regents of Univ. of Minn.*, 978 N.W.2d 275, 281 (Minn. App. 2022) (concluding that the district court did not abuse its discretion by declining to award fees for experts who testified on issues the nominally prevailing party did not prevail on), *petition for rev. filed* (Minn. Aug. 10, 2022).