STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0599

Anthony Kelley,
Respondent,

vs.

The Bernick's Company, et al.,
Appellants.

Filed January 30, 2023
Affirmed
Gaïtas, Judge

Hennepin County District Court
File No. 27-CV-18-17044

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota; and

Michael Hall, III, Hall Law, P.A., St. Cloud, Minnesota (for respondent)

Bruce Jones, Hannah M. Leiendecker, Faegre Drinker Biddle & Reath, LLP, Minneapolis, Minnesota (for appellants)

Considered and decided by Gaïtas, Presiding Judge; Bratvold, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

After a nine-day trial, a jury found appellants—Taylor Steinbach and his employer, The Bernick's Company, Chas. A. Bernick Incorporated, d/b/a Bernick's—liable for a serious injury to respondent Anthony Kelley caused by Steinbach's negligence in driving

a commercial truck through a work zone. Appellants now appeal the district court's denial of their motion for judgment as a matter of law (JMOL) and their motion for a new trial. They contend that the trial evidence was insufficient to prove that Steinbach's driving conduct caused Kelley's injuries and that Kelley's trial counsel committed pervasive misconduct during the trial. We conclude that the evidence of causation was sufficient to support the jury's verdict and that the district court did not abuse its discretion by denying appellants' motion for a new trial based on attorney misconduct, and we affirm.

FACTS

Kelley was a maintenance worker for the City of Minneapolis. In July 2013, Kelley was working to clear a sewer cave-in on Plymouth Avenue. The work zone was in the middle of the street, and traffic cones were set up to direct traffic to the outer lanes, away from the workers. Kelley was using a power washer that was being fed water by a fire hose attached to a hydrant on the side of the street. The hose was lying across an active lane of traffic. To stabilize the hose while he worked, Kelley wrapped it around a manhole cover. The posted speed limit on Plymouth Avenue was 30 miles per hour (mph).

Steinbach was driving a large beverage truck for Bernick's. He did not notice the work zone until he was about 30 feet away. When Steinbach drove over the hose, it became entangled in the truck's rear axle. Steinbach felt a "tug" and applied the brakes.

After becoming entangled in the truck's undercarriage, the hose was torn from the fire hydrant. Either the end of the fire hose or the manhole cover struck Kelley, partially severing his foot.

Kelley, who was 45 years old at the time of the accident, has since undergone multiple surgeries for severe injuries to his ankle and foot. He is permanently disabled.

Kelley filed suit against appellants, alleging negligence.[1] The case was tried to a jury.

At trial, Kelley's theory was that Steinbach drove through the work zone and over the hose at an unreasonable rate of speed, which caused the hose to become entangled in the truck's rear axle. Appellants sought to convince the jury that Steinbach's speed did not cause the hose to become entangled and that this was nothing more than an unfortunate accident unrelated to any negligence.

There was conflicting testimony as to how fast Steinbach was driving when the truck passed over the hose. Steinbach testified that he was going around 20 mph. The passenger in his truck testified Steinbach was driving 30 mph. Kelley's expert in accident reconstruction testified that he conservatively estimated that Steinbach was driving between 29.9 and 36.4 mph. And appellants' accident-reconstruction expert testified that Steinbach's speed was approximately 20 mph.

Expert witnesses also offered opinions about how the hose became entangled. Kelley called an expert in commercial trucking, who testified that large commercial trucks must be hypercautious in work zones. Truck drivers are trained to look out for hoses in the road, which can become entangled in a truck's undercarriage or burst. According to this

[1] Appellants sued the City of Minneapolis as a third-party defendant, but, by stipulation, the city was ultimately dismissed from the action. Although the city was dismissed as a party, it was included on the special verdict form for purposes of allocating fault.

expert, drivers should reduce their speed to about 10 mph before driving over a hose. Driving slowly, the expert testified, gives drivers a chance to both prevent hose entanglement and react appropriately to such an event.

Kelley also called Dr. Mariusz Ziejewski, an expert in impact mechanics and fluid dynamics. Using fluid dynamics and "the effect of increased velocity on those principles," Dr. Ziejewski offered his opinion about how the speed of a truck passing over a fluid-filled hose would impact the movement of the hose. Dr. Ziejewski testified that after the front wheels passed over the hose, it became entangled in the truck's rear axle and air chamber, which were about one foot off the ground. He explained that "the only way" this could have occurred was for the front wheels of the truck to "energize" the hose, causing the hose to jump up from the ground and to quickly connect with the rear axle while still suspended. According to Dr. Ziejewski, the scientific principle of a "water hammer" or "pressure wave" explains how the hose jumped and was momentarily suspended in the air before catching the rear axle. This phenomenon occurs when the front wheels of a truck drive over a hose, causing the flowing water to be displaced into two waves that collide after the wheels are gone. The collision of the waves causes the hose to jump vertically into the air.

Dr. Ziejewski then explained that the hose could have been suspended in the air for only 0.3 to 0.4 seconds. He testified that the truck must have been traveling fast enough for the rear axle to catch up to the suspended hose within that timeframe. Dr. Ziejewski told the jury that the distance between the truck's front wheels and the rear axle was 21.25

feet. Thus, according to Dr. Ziejewski, the truck must have been traveling fast enough that it traveled over 21 feet within the span of 0.3 to 0.4 seconds.[2]

Appellants' accident-reconstruction expert testified that he had "not determined any way to know how that hose got entangled back there. All the testing that's been done and reviewing any of the dimensions, I just—I don't have an explanation." In his opinion, it would have taken the truck 0.47 seconds to travel 21 feet at 30 mph and 0.35 seconds at 40 mph.

Following Kelley's presentation of evidence, appellants moved for JMOL, arguing to the district court that Kelley had failed to satisfy his burden of establishing that Steinbach's speed caused his injuries. The district court denied the motion and the case was ultimately submitted to the jury.

[2] The district court limited Dr. Ziejewski's testimony in a pretrial order addressing appellants' motions in limine. Before trial, Dr. Ziejewski attempted to recreate the conditions of the accident by driving a similarly sized truck over a fluid-filled hose at varying speeds. His experiment showed that the reaction of the hose was unpredictable. The district court's order prohibited Kelley from offering evidence of the experiment as a "recreation" of the incident but allowed the jury to consider it as a "demonstration of general scientific principles." Moreover, the district court's order permitted Dr. Ziejewski to testify about the general scientific principles of fluid dynamics and the "effect of increased velocity on those principles." But the district court excluded any opinion testimony regarding "the truck's specific speed at the time of the accident."

The jury found that Steinbach was negligent and allocated 70% of the fault to him.[3] It awarded Kelley $6,733,518.33 in damages for past medical expenses, past and future lost earnings, and pain and suffering.[4]

Appellants filed posttrial motions, again seeking JMOL or alternatively, a new trial. The district court denied appellants' posttrial motions, and appellants now appeal.

DECISION

I. Appellants are not entitled to JMOL.

Appellants challenge the district court's denial of their motion for JMOL. They contend that they are entitled to JMOL because Kelley's trial evidence was insufficient "to permit a reasonable jury to conclude that Steinbach's claimed negligence in driving his truck at 30 miles per hour in the work zone caused [Kelley's] injuries or that those injuries would not have occurred but for the speed of the truck."

The Minnesota Rules of Civil Procedure govern motions for JMOL. Such a motion may be made during the trial. If a party argues during trial that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party," the district court may grant JMOL. Minn. R. Civ. P. 50.01(a). And a party "may make or renew a request" for JMOL following a verdict. Minn. R. Civ. P. 50.02(a). Here, appellants made a motion for JMOL before the case was submitted to the jury and then renewed and supplemented that motion posttrial. The district court denied both motions.

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[3] The jury found that the City of Minneapolis was 25% at fault and Kelley was 5% at fault.

[4] After accounting for collateral offsets and Kelley's own negligence, the district court awarded prejudgment interest and entered judgment in the amount of $6,735,519.77.

The appellate court reviews de novo the denial of a motion for JMOL. *Christie v. Est. of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018). On review, the appellate court applies the same standard used by the district court and views the evidence in the light most favorable to the nonmoving party. *Id.* The appellate court must "determine whether the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact the moving party is entitled to [JMOL]." *Navarre v. S. Washington Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002). "If reasonable jurors could differ on the conclusions to be draw from the record, [JMOL] is not appropriate." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). "[JMOL] 'may be granted only when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome.'" *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 55 (Minn. 2019) (quoting *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983)) (other quotation omitted).

Here, the jury had to decide whether Steinbach's driving conduct was negligent, and whether that negligence caused Kelley's injury. "Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). To prove a claim of negligence, a plaintiff must establish that: (1) the defendant owed a duty of care, (2) the defendant breached that duty, (3) the plaintiff suffered harm, and (4) the defendant's breach was the proximate cause of that harm. *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 706 (Minn. 2012).

Appellants focus on the last element—causation. To establish a negligence claim, a plaintiff must prove that a party's negligence caused or was a substantial factor in causing

the injury or damage. *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620-21 (Minn. 2021). An individual's negligence is the proximate cause of an injury when it is "a material element or a substantial factor in the happening of that result." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 372 (Minn. 2008) (quotation omitted). Actual cause or "but-for" causation must also exist because negligence cannot be a substantial factor in an injury if the harm would have occurred even in the absence of the negligence. *George v. Est. of Baker*, 724 N.W.2d 1, 11 (Minn. 2006).

A plaintiff need not present eyewitness testimony or direct evidence of causation. *Staub*, 964 N.W.2d at 621. Inferences from circumstantial evidence can support the causation element of a negligence claim. *Id.* Whether a defendant's negligence caused the damage is generally a fact question for the jury. *Id.* But "when reasonable minds could reach only one conclusion," causation is a question of law. *Id.* (quoting *Canada ex rel. Landy v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997)).

Appellants argue that there was "no evidence that [Steinbach's] speed caused [Kelley's] injuries" because Kelley failed to establish "a direct causal link between the speed of the truck . . . and the reaction of the hose." They argue that expert testimony was necessary to prove that the truck's rate of speed caused the hose to leave the ground and then catch the rear axle of the truck. And they observe that no expert testified that the hose reacted this way because the truck ran over it too fast.

Although mere speculation is inadequate to show causation, there is no requirement that a plaintiff produce expert testimony or other direct evidence establishing proximate cause. *See Staub*, 964 N.W.2d at 629-30 (reversing a grant of summary judgment because

there was a genuine issue of material fact as to whether a decedent's fall was caused by the dangerous condition of the stair even when no one saw her fall); *see also Majerus v. Guelsow*, 113 N.W.2d 450, 455 (Minn. 1962) (determining that the issue of proximate cause was one for the jury when there was evidence that a dangerous staircase may have caused the decedent to fall, but no one saw him fall); *McCarthy*, 567 N.W.2d at 506 (concluding that a jury could find proximate cause between lead paint and a child's lead poisoning even when no one saw the child eat the paint). A jury can find proximate cause based entirely on reasonable inferences from circumstantial evidence. *Staub*, 964 N.W.2d at 621 (citing *Kludzinski v. Great N. Ry. Co.*, 153 N.W. 529, 530 (Minn. 1915)).

Here, there was both direct and circumstantial evidence from which the jury could reasonably find that Steinbach's failure to slow down and exercise reasonable caution when passing over the hose caused Kelley's injury. Kelley's trucking expert testified that there is always a risk of entanglement when a truck drives over a hose. To minimize the dangers posed by such a situation, the expert testified that a truck driver should slow down and pay close attention when it is necessary to pass over a hose. Steinbach admitted that he did not notice the work zone until he was about 30 feet away and that he only stopped when he felt the "tug" of the entangled hose. Dr. Ziejewski testified that "the only way" the hose could have become entangled in the rear axle was if a "pressure wave" phenomenon occurred, momentarily lifting the hose from the ground. According to Dr. Ziejewski, the truck had to be going fast enough for the hose, which rose from the ground after contact with the truck's front tires, to become entangled with the rear axle located 21.25 feet behind the front tires. He estimated that the hose was off the ground for 0.3 to 0.4 seconds.

Appellants' own expert estimated that the truck would have to travel at a rate of 30 to 40 mph for the truck to move 21.25 feet within 0.3 to 0.4 seconds. There was evidence that Steinbach may have been driving at a speed of up to 36.4 mph. And Kelley introduced photographs showing the hose wrapped around the rear axle of the truck. Viewed in the light most favorable to Kelley, this evidence amply supports the jury's finding of causation.

Appellants contend that the evidence of causation was insufficient because no expert established a direct causal link between the speed of the truck and the reaction of the hose. When the question of causation is outside the realm of common knowledge, expert testimony is required. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 762 (Minn. 1998). However, we reject appellants' premise that the question of causation in this case required expert testimony. Whether unsafe speed caused the circumstances that injured Kelley was a question that jurors could answer without expert testimony establishing a direct causal link. The trial evidence showed that the hose jumped upon contact with the truck's front tires and quickly became entangled in the rear axle. From this evidence alone, jurors could reasonably infer, without expert testimony, that the truck was driving too fast given the obvious hazard in the work zone. Of course, this was not the only evidence that the jurors heard. As noted, the totality of the evidence was sufficient to establish causation.[5]

[5] Appellants also argue that, because there was insufficient evidence admitted at trial to support a finding of causation, the jury necessarily must have relied on inadmissible testimony that was stricken. We reject this argument because we have concluded that the admissible trial evidence was sufficient to prove causation.

Viewing the evidence in the light most favorable to the verdict, we conclude that the jury's finding of causation is well supported by the trial evidence. Thus, appellants are not entitled to [JMOL].[6]

II. The district court did not abuse its discretion in denying appellants' motion for a new trial based on attorney misconduct.

Appellants argue that they are entitled to a new trial on the ground of attorney misconduct. According to appellants, Kelley's trial counsel committed pervasive misconduct that unfairly swayed the jury. Appellants contend that the district court abused its discretion in denying its motion for a new trial based on this persistent and prejudicial misconduct.

A district court's decision to deny a new trial is reviewed for an abuse of discretion. *Christie*, 911 N.W.2d at 838. "The decision to grant a new trial based on claimed attorney misconduct rests wholly within the district court's discretion." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006) (citing *Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994)), *rev. denied* (Minn. Aug. 23, 2006). The district court is afforded broad discretion for good reason. A district court judge—who is present in the courtroom throughout trial and directly observes the

[6] Because the trial evidence supports the jury's finding of causation, we also affirm the district court's denial of appellants' motion for a new trial based on insufficient evidence of causation. An appellate court "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*, 652 N.W.2d at 21 (quotations omitted). For the same reasons noted in our discussion of appellants' JMOL argument, we conclude that a new trial is not warranted on the ground of insufficient evidence of causation.

conduct of the attorneys and its immediate impact on the jury—is in the best position to determine whether alleged attorney misconduct prejudiced the jury, which is the ultimate question on a motion for a new trial. *Johnson*, 518 N.W.2d at 600-01. To warrant a new trial, prejudice from attorney misconduct "must be such that it affected the outcome of the case." *Lake Superior Ctr. Auth.*, 715 N.W.2d at 479.

Appellants acknowledge that they did not object to many of the instances of attorney misconduct raised in their motion for a new trial and now on appeal. To properly preserve the issue of attorney misconduct, opposing counsel must object to it and request a curative instruction. *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977); *see also Wild v. Rarig*, 234 N.W.2d 775, 786 (Minn. 1975) ("A party is not permitted to remain silent, gamble on the outcome, and, having lost, then for the first time claim misconduct in opposing counsel's argument."). On review, the appellate court generally will not order a new trial unless the district court refused to take necessary corrective action, or the misconduct was "so flagrant as to require the court to act on its own motion" or "so extreme that a corrective instruction would not alleviate the prejudice." *Hake*, 258 N.W.2d at 582. As we discuss below, the district court did not abuse its discretion in denying appellants' motion for a new trial because appellants forfeited most of their objections to the alleged misconduct and any misconduct did not affect the outcome of the case.

A. Alleged Misconduct During Voir Dire

Appellants first argue that Kelley's counsel committed misconduct during jury selection. Although appellants claim that Kelley's counsel made "multiple improper comments" during two hours of voir dire, they raise just one instance of misconduct in their

brief to this court—"informing the jury of his contingent fee arrangement and asking them to agree that his 'cut' was justified."

Preliminarily, we note that there is no record of voir dire. By agreement of the parties, the court reporter did not record jury selection, and therefore, there is no transcript of the proceedings. Thus, our review of the alleged misconduct during voir dire is based on a limited record. That limited record consists of affidavits that both parties submitted to the district court in connection with appellants' motion for a new trial, several transcript pages of discussion between the district court and the attorneys regarding appellants' objection to the alleged misconduct, and the district court's order denying appellants' motion for a new trial.

Although trial counsel's accounts of the exact remarks made by Kelley's attorney during voir dire differ, the record shows that the district court was concerned about the remarks. Following the remarks, the district court gave appellants an opportunity to seek curative measures, including a new jury panel. Appellants requested a curative instruction, which the district court ultimately provided to the jury. But appellants specifically declined an opportunity to request a new jury panel. The district court stated, and appellants' counsel agreed, that appellants were "knowingly choosing to proceed with this panel and . . . waiving any objection to this panel moving forward." Indeed, appellants later were offered a second opportunity to impanel a new jury due to COVID-19-related delays, and they again declined. Given these circumstances, we cannot conclude that the district court abused its discretion in denying appellants' motion for a new trial based on attorney misconduct during voir dire.

B. Alleged Misconduct During Opening Statement

Appellants allege that Kelley's counsel committed many instances of misconduct during his opening statement. Those instances fall into several general categories. First, appellants argue that the attorney unnecessarily used "inflammatory" terms to describe Kelley's injury, referring to it as "freakish" and "Frankenstein." Second, appellants contend that the attorney made improper "golden rule" remarks, inviting jurors to put themselves in Kelley's shoes. *See Bisbee v. Ruppert*, 235 N.W.2d 364, 370 (Minn. 1975) (stating that inviting "the jury to ask themselves what damages they would wish if they had suffered plaintiff's injuries" is impermissible); *see also* 75 Am. Jur. 2d *Trial* § 540 (2022) ("The 'golden rule' argument is a jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff."). Third, appellants allege that Kelley's attorney made improper "reptile theory" arguments. *See Giant of Md. LLC v. Webb*, 246 A.3d 664, 677 (Md. Ct. Spec. App. 2021) (stating that, "reptile theory" arguments, which, in Maryland, are improper appeals to passion and prejudice, "encourage[] jurors to favor personal safety and the protection of family and community").[7] And fourth, appellants allege that Kelley's counsel twice referred to evidence that the district court had expressly excluded.

Appellants did not object to any of the misconduct they now complain of on appeal. Moreover, after the opening statement, the district court offered the parties an opportunity to impanel a new jury and appellants declined. Because appellants did not raise their

[7] There are no Minnesota cases that specifically address "reptile theory" arguments.

concerns about the opening statement at trial and declined the opportunity to impanel a new jury, the district court did not abuse its discretion in denying appellants' motion for a new trial on the ground of alleged misconduct during opening statement. *See Wild*, 234 N.W.2d at 786.

C. Alleged Misconduct During Questioning of Expert Witnesses

Appellants identify several instances of alleged misconduct during the testimony of expert witnesses. First, appellants argue that Kelley's counsel improperly questioned Kelley's two medical experts about the conclusions of appellants' independent medical examiner, who did not testify. Initially, appellants' counsel did not object to this line of questioning. But appellants' counsel did object the second time Kelley's counsel pursued this line of questioning, and the district court sustained the objection. In denying appellants' motion for a new trial, the district court determined that the questions did "not result in any prejudice."

Second, appellants argue that, while questioning Dr. Ziejewski, Kelley's attorney went beyond the parameters of the district court's order limiting his testimony. The district court sustained all of appellants' objections to Dr. Ziejewski's testimony and gave limiting and curative instructions on a few occasions. In denying appellants' motion for a new trial, the district court stated that it had "reexamined its pretrial order" and that the opinions presented at trial "were not error," and alternatively, "were not prejudicial error."

Finally, appellants contend that Kelley's counsel improperly accused appellants' accident-reconstruction expert of perjury when he asked, "You know that that statement, that testimony from you is nowhere near true?" and "Do you know that it's not true?" The

district court sustained objections to both questions, and Kelley's counsel rephrased the question. The district court did not address these questions in its order denying a new trial. Kelley points out, however, that appellants take these questions out of context. The record confirms that Kelley's counsel was attempting to impeach the witness, and the witness eventually agreed that the statement was inaccurate.

After careful review of these exchanges, we conclude that there is nothing about these questions or the testimony elicited that could have affected the outcome of the case. Furthermore, the district court appropriately addressed objections in real time, and we presume that the jury followed the limiting instructions that the district court provided. *See Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 630 (Minn. 2012), *as modified* (Minn. Apr. 19, 2012) (stating that appellate courts presume juries follow instructions they are given). Thus, the district court did not abuse its discretion by denying appellants' motion for a new trial based on attorney misconduct during the testimony of expert witnesses.

D. Alleged Misconduct During Closing Argument

Appellants allege that Kelley's attorney committed misconduct during closing argument. They complain that the attorney's statements encouraging the jury to "do justice," to "speak as the conscience of the community," and to show that what happened to Kelley "matters" were impermissible "golden-rule" arguments. And they argue that the attorney committed misconduct by using "grotesque, inflammatory imagery," such as stating that Kelley's foot was "torn from its moorings" and "dangling." But appellants did not object to any of these statements.

Appellants did object to one statement that Kelley's attorney made during closing argument—"right now is our last and only chance to look out for our fallen brother." The district court sustained that objection.

Although the attorney's arguments were colorful—and may even have crossed the line on occasion—we are confident that they did not impact the outcome of the trial. The district court sustained an objection to the most concerning of these arguments and appropriately instructed the jury that the arguments of attorneys are not evidence. Moreover, the jury's verdict was consistent with the trial evidence and the award was half of what Kelley's counsel requested. We therefore conclude that the district court did not abuse its discretion by denying appellants' motion for a new trial based on the alleged misconduct during closing arguments.

E. Cumulative Impact of the Alleged Misconduct

Finally, appellants contend that, even if the incidents of alleged misconduct viewed in isolation were not prejudicial, the cumulative effect of these errors did impact the outcome of the trial. *See Sievert v. First Nat'l Bank in Lakefield*, 358 N.W.2d 409, 416 (Minn. App. 1984) ("A pattern of repeated attorney misconduct may necessitate a new trial, even where no one incident would be sufficiently prejudicial to require a new trial."), *rev. denied* (Minn. Feb. 5, 1985). We disagree.

Although appellants characterize the conduct of Kelley's attorney as outrageous, the district court did not accept this assessment of counsel's conduct. In the thorough and thoughtful order denying appellants' motion for a new trial, the district court judge—who was in the best position to evaluate the attorney's conduct and its impact on the verdict, *see*

Johnson, 518 N.W.2d at 601—determined that the alleged misconduct, most of which was unobjected to, did not affect the fundamental fairness of the trial or unduly prejudice appellants. We agree with the district court's assessment and conclude that it was not an abuse of discretion to deny appellants' motion for a new trial.

Affirmed.