This opinion is nonprecedential except as provided by Minn.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
A24-1770

Ty Bernard,
Appellant,

vs.

Superset Tile & Stone, LLC,
Respondent.

Filed September 8, 2025
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-22-9968

Claire Bruner-Wiltse, Schaefer Halleen, LLC, Minneapolis, Minnesota; and

Matthew Alan Frank, Premo Frank, PLLC, Minneapolis, Minnesota (for appellant)

Ryan R. Dreyer, Jamie P. Briones, Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota (for respondent)

Brandon E. Thompson, Colin F. Peterson, Ciresi Conlin, LLP, Minneapolis, Minnesota (for *amicus curiae* Minnesota Association for Justice)

Emma R. Denny, Andrew J. Kudlinski, HKM Employment Attorneys, LLP, Minneapolis, Minnesota; and

Christopher J. Moreland, MSB Employment Justice, LLP, Minneapolis, Minnesota; and

Brian T. Rochel, Kitzer Rochel, PLLP, Minneapolis, Minnesota; and

Leslie L. Lienemann, Celeste E. Culberth, Culberth & Lienemann, LLP, St. Paul, Minnesota; and

Zane Umsted, Madia Law LLC, Minneapolis, Minnesota (for *amicus curiae* Minnesota Chapter of the National Employment Lawyers Association)

Considered and decided by Ross, Presiding Judge; Bond, Judge; and Jesson, Judge.*

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury awarded Ty Bernard $250,000 in emotional-distress damages after finding that former employer Superset Tile & Stone LLC unlawfully discriminated against him because of his disability, but the district court remitted the award to $75,000. Bernard appeals, arguing that the district court should not have disturbed the jury's verdict. Superset cross appeals, arguing that the district court should have reduced the award even further or granted it a new trial. Because the district court acted within its discretion by remitting the damages and Superset's arguments differ materially on appeal from those it made to the district court, we affirm in part. But we reverse in part and remand for the district court to allow Bernard the option to accept either the remitted award or a new trial on damages.

FACTS

Ty Bernard successfully sued Superset Tile & Stone LLC, alleging that Superset discriminated against him in violation of the Minnesota Human Rights Act (MHRA), Minnesota Statutes section 363A.08 (2024), by discharging him because of his disability. The jury rendered a verdict for Bernard, finding that Superset discriminated against him. The following facts summarize the trial evidence.

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

Bernard worked as a tile-setter until he injured his back on the job in 2019. The injury caused him extreme, ongoing pain that, despite surgery and therapy, substantially restricts his ability to work manually. He applied for a position at Superset, and Superset co-owner Mark Hochstedler proposed a management job that Bernard believed would be a good fit. Bernard announced during his interview that he had injury-related work restrictions and, according to him, Superset agreed to accommodate his restrictions by not requiring heavy lifting. Bernard accepted the job.

During his Superset employment, which lasted seven months from November 2020 until June 2021, Bernard's back condition prevented him from accomplishing certain physical tasks, prompting negative comments from Hochstedler. According to Bernard, Hochstedler said several times, "If I knew [the] guy was so crippled, I wouldn't have hired him." Bernard said that Hochstedler would call him a "pussy" weekly when Bernard was struggling with tasks. Hochstedler compared Bernard's back injury to his own father's, which Hochstedler characterized as resulting in an easier recovery.

In Spring 2021 Superset offered Bernard a permanent position. Bernard felt a "little hurt" about it, believing the offered annual salary of $52,000 was too low and the offered 13-year-old company vehicle too old. Hochstedler acknowledged that Bernard's physical limitations prompted him to offer a lower salary than he would have otherwise proposed. Bernard did not accept the offer, and Superset rescinded it.

When Superset discharged Bernard, it did so abruptly, without following its usual progressive-discipline practice. Bernard testified that, as he was leaving the termination meeting, Hochstedler mentioned hiring someone who can "do more manual labor."

Bernard said the discharge was unexpected and "like a kick to the gut," and he started to almost "break[] down" because he thought he had a professional bond or was "tile brothers" with Hochstedler and was "very hurt." The discharge left Bernard questioning himself and his abilities; he had thought that the job was a perfect fit, a culmination of his years of experience. He did not immediately seek new employment because he was "not really in a great head space" after the discharge, feeling "lost" for weeks before beginning his job search.

Bernard eventually gave up searching for similar employment and returned to tile setting through a company he owned. This work caused him significant physical pain for minimal success. He said losing the Superset job created financial stress in his life, such that he was "up to [his] eyeballs" in debt, and it made him "feel like a loser." He testified that he worries about his finances every second of every day. He also said that after losing his job he was "kind of in a slump. Kind of depressionary kind of state." He elaborated that losing the job affected how he felt about his future, that it was a "gut punch," and it was "kind of hard to kind of get out of that hole, I guess." He elaborated that he "struggle[d] just to get out of bed, get motivated" and that he "just want[s] to, like, be cooped up in the house almost" and has let his relationships deteriorate.

Hochstedler also testified. He acknowledged that he knew that Bernard's back was impaired when he hired him. But he thought Bernard might improve and hoped that his complaining would "go away." He denied orally expressing frustration with Bernard's physical limitations. Hochstedler hired Bernard's replacement. He said that he is pleased the replacement can do more physical activity than Bernard.

Bernard's sister testified. She said that Bernard became "really depressed" after the termination, gained weight, and talked less often with her. She said he had a hard time "get[ting] by and pay[ing] his bills, and he was suffering emotionally," comparing his depression to what he experienced when their mother died.

The jury found that Superset's discrimination justified awarding Bernard $250,000 for past and future emotional distress but $0 for lost past and future income. Superset moved for judgment as a matter of law and for a new trial, arguing that the verdict was not supported by the evidence, violated the law, and included excessive damages. *See* Minn. R. Civ. P. 50.02, 59.01. The district court mostly denied Superset's motion, concluding that the evidence supported the jury's verdict as to Superset's liability but also concluding that the damages award "shock[ed] the conscience" and required reducing based on insufficient evidence to establish the magnitude of Bernard's claimed emotional injury. It reasoned that the evidence proved only Bernard's feelings of sadness or reduced self-worth. It observed that he had not sought therapy or mental-health treatment and had not been diagnosed as having a mental-health condition. It considered that his reactions to losing his job were reasonable but "very basic" and "not the kind of genuine injury contemplated by the law surrounding emotional distress," characterizing his harm as "garden variety." It based its remittitur decision on the additional grounds that the jury awarded Bernard $0 for lost income and Bernard's testimony suggested that his emotional distress "primarily stemmed from losing a source of income and the resulting financial turmoil." It continued, opining that "[a]ny emotional distress that he experienced due to lost income was not compensable according to the jury's own finding because he had no lost expected income."

It reduced Bernard's award to $75,000 without giving him the chance to opt instead for a new trial on damages.

Both parties appeal. The Minnesota Association for Justice (MAJ) and the Minnesota Chapter of the National Employment Lawyers Association (NELA) filed *amicus curiae* briefs supporting Bernard.

DECISION

Bernard appeals the district court's remittitur decision, arguing that the damages award should not have been reduced. Superset also appeals the remittitur decision, arguing that the award was not reduced enough. Superset argues too that the district court erroneously failed to grant its new-trial motion. We address each argument.

I

We first address Bernard's contention that the district court should not have granted Superset's remittitur motion. We do not disturb a district court's decision to set aside a verdict as excessive absent a clear abuse of discretion, as the district court "should not hesitate" to vacate a damages award when it believes that the evidence does not warrant the amount. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 162 (Minn. App. 2007); *see DeWitt v. Schuhbauer*, 177 N.W.2d 790, 795 (Minn. 1970). The district court in making remittitur decisions is similarly entitled to discretion, and we are "unlikely to tamper with" a remittitur determination when a district court notes its reasons for granting remittitur. *Sorenson v. Kruse*, 293 N.W.2d 56, 63 (Minn. 1980). But a district court should not set aside a jury's damages verdict unless the award is "manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Longbehn*, 727

N.W.2d at 162. A district court abuses its discretion when its fact findings lack record support, it improperly applies the law, or it resolves the issue in a manner contrary to logic and the facts on the record. *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022). Applying these standards, we conclude that the district court's decision was mostly but not entirely within its proper discretion.

The question is one of excess, and the fulcrum is the point at which an award begins to shock the conscience. More precisely, a district court may grant remittitur if a damages award is excessive, an award is excessive if it "shocks the conscience," and an award shocks the conscience if it is unsupported by the record. *See Verhel by Verhel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 591 (Minn. 1984) (citing *DeWitt*, 177 N.W.2d at 795); *Cox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 498 (Minn. App. 1996). The district court granted Superset's remittitur motion because it held that the magnitude of Bernard's damages award was not supported by the evidence. It rested on two major bases: that Bernard experienced only "garden variety" emotional distress and that his emotional harm arose largely from his loss of income, which was a loss the jury did not find compensable. Before we consider the district court's reasoning, we first address the generalized arguments against the remittitur decision.

Bernard contends that the district court failed to award him the "highest amount permitted by the record." The district court considering remittitur must leave the plaintiff with the "highest amount permitted by the evidence." *Thompson v. Hughart*, 664 N.W.2d 372, 378 (Minn. App. 2003), *rev. denied* (Minn. Sept. 16, 2003). We interpret the district court's order as indicating that it did apply this standard. It determined that the evidence was insufficient to support the award and suggested that it was reducing it to an amount that did not shock the conscience, implicitly determining $75,000 to be at the fulcrum, or the highest amount the evidence could justify. *Amicus* MAJ argues relatedly that, to apply this standard, the district court should have discussed the appropriate range by referring to other cases and expressly stated that $75,000 was the highest amount permissible. But "[i]n considering whether a verdict is excessive, a comparison with previous verdicts is [generally] not justified because of the variations in facts and fluctuations in the economy." *Stenzel v. Bach*, 203 N.W.2d 819, 822 (Minn. 1973); *Ahrenholz v. Hennepin County*, 295 N.W.2d 645, 649 (Minn. 1980). The district court indirectly found $75,000 to be the highest award the evidence proved and was not bound to compare awards in other cases.

Bernard also contends that the jury's award was supported by the record and "not shocking to the conscience" because the jury followed the district court's instructions. The district court instructed on emotional-distress damages as follows:

> Emotional distress includes, but is not limited to, such things as emotional pain, mental anguish, suffering, embarrassment, personal humiliation, worry, anxiety, grief, depression, loss of dignity or self-worth, loss of confidence, fear, and so forth. Proof of emotional distress does not require evidence of physical injury or evidence from a doctor to support an award.

He argues that the district court's remittitur reasoning added more requirements for an emotional-damages award than it had previously set out in its jury instructions, essentially violating "the law of the case." *Verhel*, 359 N.W.2d at 592. But the "law of the case" doctrine does not prohibit a district court from granting a new trial or remittitur based on its previous jury instruction. *See Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994) (describing the law of the case as a discretionary doctrine developed by appellate courts to effectuate the finality of appellate decisions, and "is not normally applied by a trial court to its own prior decisions"). Applying "law of the case" strictly to remittitur actions would be improper, because the condition that an award must not "shock the conscience" can fairly be said to govern in each damages award even though the instructions to the jury do not express the condition.

Bernard argues that the trial record supports the $250,000 emotional-harm damages award. The evidence that we have found of Bernard's emotional harm is chiefly as follows:

- Bernard was a lifelong and second-generation tile-setter who felt betrayed when discriminated against by someone with whom he thought he had a bond.
- He lost his "perfect" job because of discrimination after being forced from his previous job due to disability.
- He suffered verbal insults related to his disability regularly, some causing him to feel "not good," "less than," like he was "doing something wrong," or was "unwelcome."
- Because of his disability he was given an "insulting" job offer which left him "disappointed" and "a little hurt."
- His firing was a "kick to the gut," and he "almost" broke down, being "very hurt by it."
- He was left questioning himself and his abilities after the firing, being in a "slump" or "depressionary kind of state," akin to when his mother passed away.
- His depression after the firing manifested by his finding it difficult to get motivated, leave the house, and maintain social relationships.
- He suffered financial stress from debt, constantly worrying about finances.

Because the district court has broad discretion in its remittitur decision, *Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 792 (Minn. App. 2001), *rev. denied* (Minn. Mar. 13, 2001), we analyze the district court's stated rationale in light of this evidence.

It is true, as Bernard asserts, that the district court described Bernard's emotional harm as "garden variety," meaning ordinary and commonplace rather than severe harm. And the district court reduced his damages amount correspondingly. The district court's rationale echoes the reasoning in a federal district court's discussion in *Miller v. Bd. of Regents*, 402 F. Supp. 3d 568, 582 (D. Minn. 2019). The *Miller* court analyzed a remittitur motion on a $3 million noneconomic-damages award for discrimination against an improperly discharged Division I college hockey coach. *Id.* at 575–76. That court remitted the damages award to $750,000—25% of the jury's award—reasoning that Miller had experienced only "garden variety" emotional distress without claiming any physical or psychological injury or providing evidence of medical treatment for her emotional harm. *Id.* at 583–84. It recognized that even "garden variety" emotional harm can lead to justifiably significant damages. *Id.* at 586. But it nevertheless remitted the award, crediting its own insight in having presided over the trial and observing that the plaintiff was "not mak[ing] any claim or offer[ing] any evidence of medical treatment or anything else that implicates her physical or psychological health." *Id.* at 582–83. It emphasized that the plaintiff's emotional harm did not result from any extraordinarily traumatic event but primarily from the basic fact that she had been "a college hockey coach who did not get a new contract." *Id.* at 584. We believe that the *Miller* district court's extensive discussion and application of the federal remittitur standard comports with Minnesota's remittitur standard as applied here. *See id.* at 582–86. And we believe its rationale is sound.

Like the *Miller* court, we believe the law requires a district court to strike a balance. It may sustain a substantial damages award based on merely garden-variety emotional harm. The district court did so here. But it must also employ its trial-observing discretion to reduce an emotional-harm award when it believes that the award exceeds the degree of emotional harm supported by the evidence. *Zaikaner v. Small*, 98 N.W.2d 247, 252 (Minn. 1959). The district court also did that here. It reduced Bernard's award to 30% of the verdict amount on its assessment that Bernard's evidence did not portray the kind of extensive emotional harm that required treatment. It observed that neither Bernard's allegations nor his evidence showed complex distress resulting from any psychological disorder. Our deference to the district court's exercise of its informed insight leads us to affirm its decision to remit.

We of course observe that Miller's remitted award, which the *Miller* court described as "extremely large," was ten times greater than Bernard's remitted award. But the facts differ markedly from ours. Miller's noneconomic damages did not cover only emotional distress and mental anguish, they also compensated loss of reputation in a unique circumstance in which the district court saw that Miller was "nothing like a typical employment plaintiff" and where the emotional distress she experienced was "worse than what is typically experienced by employees who lose their jobs." *Miller*, 402 F. Supp. at 582. Miller had built a successful hockey program over many years from the ground up, establishing her significant emotional investment. *Id.* at 587. Her termination was also immensely public, increasing her reputational damage, and it left her without the possibility of finding a new, similar position without moving hundreds of miles away and potentially out of the country, likely adding to her stress and sorrow. *Id.* By sharp contrast, Bernard's employment with Superset had been comparatively brief, did not separate him from an institution he personally built, and did not involve "widespread public" humiliation. The district court found that Bernard's testimony included only "very basic" reactions to losing a job, and the record supports this finding. That Miller's emotional-harm damages greatly exceeded Bernard's emotional-harm damages is consistent with the careful and similar reasoning exhibited by the district court judges in each case.

We are not persuaded otherwise by Bernard's concern that the district court's approach to "garden variety" emotional harm conflicts with the MHRA, whose relevant private-action provision allows for uncapped emotional-distress damages that need not be severe or accompanied by physical injury and can be based on subjective testimony. Minn. Stat. § 363A.33, subd. 8 (2024); *Kohn v. City of Minneapolis Fire Dep't*, 583 N.W.2d 7, 14–15 (Minn. App. 1998), *rev. denied* (Minn. Oct. 20, 1998). We agree that the MHRA does not support a strict two-tiered approach to emotional-distress damages. And Bernard is correct that the district court erred in asserting that the law surrounding emotional distress does not contemplate Bernard's reactions to losing his job as a "genuine injury." But the district court's actual decision did not effectuate that erroneous assertion. It instead recognized that emotional-distress damages are indeed recoverable without physical injury or severe emotional distress, as demonstrated by its awarding Bernard $75,000 for his emotional harm. *See Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 401 (Minn. 1977)

("Although in some instances [the district court] may . . . have given reasons we do not believe to be proper bases for ordering remittiturs, where reasons do exist independently of those cited by the [district] court to reduce the awards, the decision so made should stand."); *see also Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987). To reiterate, the district court determined that without evidence of more severe emotional harm such as complex distress resulting in a specific psychological disorder—which is undisputedly lacking in the record—only a lesser award was justified. Again, this was within the district court's discretion.

Because we affirm the district court's determination that the severity of Bernard's harm evidenced at trial could not sustain a $250,000 emotional-distress award, we need not address its alternate basis for remitting. We therefore do not discuss the district court's belief that the jury's $0 lost-income award was incompatible with its emotional-distress award.

The *amici* and Bernard imply generalized arguments against our reasoning. The *amici* generally contend that we should not approve of the district court's rejecting a jury verdict, premised on the esteem with which we hold juries in our judicial system. The argument seems to overlook the fact that the district court has a duty to "keep the jury within the bounds of reason" for excessive damages awards and also has a practical advantage over appellate courts in doing so by being enmeshed in the atmosphere of the trial, "much of which the record never discloses." *Zaikaner*, 98 N.W.2d at 252. *Amicus* MAJ argues that we should not recognize "garden variety" as a unique class of emotional-distress damages that requires reduced compensation because there are many valid reasons why a person may not seek formal treatment or diagnosis for an injury unrelated to the severity of their suffering. We do not intend our decision to suggest that we are treating "garden variety" as a class of emotional distress. We base our decision on the basic premise that district courts may reduce an emotional-distress damages award when the award would be justified only on evidence of more severe emotional harm. Bernard finally argues that remitting undermines the MHRA's civil-rights goals. Minn. Stat. § 363A.02, subd. 2 (2024). But the district court's maintaining $75,000 in emotional-distress damages recognizes Bernard's MHRA rights. The generalized arguments do not require reversal.

The parties and *amicus* NELA argue that the district court erred by remitting the jury's award unconditionally. The argument is convincing. Supporting the right to disposition by jury, the supreme court has recounted, "In no case reported has this court upheld the unconditional imposition of additur or remittitur. . . . Consent of the non-moving party continues to be required." *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 50 (Minn. 1989). We therefore reverse and remand for the district court to amend its decision regarding the damages, allowing Bernard the option of accepting either the $75,000 award or a new trial on damages. It is true, as Superset points out, that Bernard's opening brief did not base his argument for reversal on this premise, but he convincingly seeks reversal and we fashion our remedy on the supreme court's direction in *Runia*, ordering the only reversal the law supports.

Superset's Appeal for Further Remittitur

Superset by notice of related appeal argues that the district court should have reduced the verdict further, to $10,000. But litigants are generally bound by the theories they argue to the district court, and we disfavor a party's switching theories on appeal. *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Superset in fact never argued for a $10,000 remittitur. It instead argued for the remittitur amount the district court determined:

> Judges have remitted damages in many circumstances, and we think it's appropriate in this case, you know, in a case like this with no damages, no medical records, none of that, you know, *it's more in line with $50,000 of emotional distress, $100,000 tops*, not [$]250[,000].

(Emphasis added.) The district court's $75,000 sits precisely at the center of the range Superset presented as appropriate. We deem Superset's chameleonic argument forfeited.

II

Superset also maintains that the district court should have granted its new-trial motion because its decision to remit the damages award shows that a new trial on liability is necessary. This argument also differs from the one it made to the district court. Superset moved the district court for a new trial on the bases that the verdict was not justified by the evidence or was contrary to law under Minnesota Rules of Civil Procedure 59.01(e) and 59.01(g). That is, its argument both in the district court and on appeal is that the district court or this court should *either* grant a new trial *or* remit the damages award. Superset's argument for a new trial is essentially that, because the district court determined it necessary to remit the emotional-distress damages award (an outcome Superset argued for) it needed to have also ordered a new trial on liability as "[t]he jury's motivation for inventing damages is inseparable from its invention of liability in general." Superset has changed its argument for a new trial on appeal, and it is forfeited. *See Thiele*, 425 N.W.2d at 582. We also observe in the interest of thoroughness that the argument similarly fails on its merits because accepting it would contravene age-old law that establishes that remittitur exists as a remedy alternative to a new trial. *Stickney v. Bronson*, 5 Minn. 215, 222, 5 Gil. 172, 178 (1861) ("[W]e will give to the Plaintiff the opportunity to correct the error without driving him to another trial of the issues found in his favor."); *see* Minn. R. Civ. P. 59.01 (recognizing a new trial may be granted on less than all issues). And a district court has "large discretion" in determining "whether the cure [for an excessive damages award] is a remittitur or a new trial." *Hanson v. Chicago, Rock Island & Pac. R.R. Co.*, 345 N.W.2d 736, 739 (Minn. 1984) (quotation omitted). Except for the unconditional nature of its award, the district court did not abuse its discretion by fashioning remittitur as the remedy—again, as requested by Superset.

Superset hints that the district court erroneously rejected other new trial arguments it had made, but the argument requires little analysis because Superset fails to carry its burden of demonstrating error resulting in prejudice. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (holding that an appellate assignment of error made by mere assertion is forfeited unless error is obvious on mere inspection). We do not see a conspicuous error requiring reversal beyond the narrow basis we have discussed.

Affirmed in part, reversed in part, and remanded.