MALITH v. SOLLER

Isaac Malith, Appellant,

v.

Brian Thomas Soller, et al., Respondents.

No. A09-2028.

Court of Appeals of Minnesota.

Filed June 15, 2010.

Duane A. Kennedy, Kennedy Law Office, Rochester, Minnesota; and Daniel J. Heuel, Rochester, Minnesota, for appellant.

Colby B. Lund, Paul E. D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota, for respondents.

Considered and decided by Toussaint, Chief Judge; Bjorkman, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

Appealing the grant of summary judgment and dismissal of his negligence claim arising out of a motor-vehicle accident, appellant contends the district court erred by determining that he was required to produce expert testimony to establish the cause of his injuries. By notice of review/related appeal, respondents assert error on the part of the district court in dismissing appellant's claim without prejudice. Holding that the district court properly granted summary judgment on the merits of appellant's claim but erred by ordering dismissal "without prejudice," we affirm in part, reverse in part, and remand.

FACTS

Appellant Isaac Malith lost control of his vehicle while driving westbound on four-lane Interstate 90 in Houston County. The vehicle rolled over several times through the divided-highway median before coming to rest straddling the eastbound lanes. It was after dark and appellant's vehicle lights were not illuminated. Several eastbound drivers had pulled over to the right shoulder when respondent Brian Soller approached the scene driving a semitrailer truck in the right eastbound lane. Seeing lights on the vehicles stopped on the right shoulder, Soller moved into the left lane where he collided with appellant's vehicle.

Appellant suffered serious injuries, including a traumatic brain injury. He commenced this action against Soller and the truck's owner, respondent Ashley Distribution Services, Ltd., stating a negligence cause of action against Soller and a claim of vicarious liability

against Ashley. Appellant engaged David Daubert, a professional engineer, to evaluate the accidents and serve as an expert witness. After analyzing information derived from an event-data recorder in appellant's vehicle, Daubert concluded that the rollover accident was "a low energy event spread over a long period of time" and that the Soller collision was "a high energy event occurring over a very short period of time." Thus, according to Daubert's report, "[t]he forces on [appellant in the rollover] would have been small and spread over a long time."

Respondents presented the affidavit testimony of Dr. Gerald Harris, a biomechanical engineer, who testified that Daubert's use of the event data was not generally accepted in the field of biomechanical engineering for determining injury causation. According to Dr. Harris, Daubert's analysis was no more than a preliminary step in determining causation. Respondents submitted the report of a clinical neuropsychologist who stated that appellant had suffered a traumatic brain injury as a result of the crashes, but that it was "unclear the degree to which that traumatic brain injury is due to blows to the head he may have sustained when he rolled his car over several times versus the blows to his head he sustained when subsequently struck by the semi-trailer truck." They also submitted the report of an orthopedic surgeon stating that he could not "discern what injuries to [appellant's] body may have been sustained as a result of the rollover and what particular injuries may have been sustained as a result of the collision with the semitrailer truck."

Respondents moved for summary judgment arguing, among other things, that appellant's expert testimony should be excluded and that appellant could not establish that the injuries for which he sought damages were caused by the Soller collision. In granting summary judgment, the district court ruled inadmissible Daubert's testimony on the ground that it lacked foundational reliability and that Daubert's approach to the crash analysis "is not generally accepted in the [biomechanical] community." Concluding that appellant was unable to establish injury causation without expert opinion testimony, the district court determined that there remained no material fact issue on this essential element for trial. The district court's order concludes by stating that respondents' "motion for summary judgment is granted and the case is hereby dismissed without prejudice. This case may be brought again if [appellant] is able to provide admissible evidence establishing a jury question regarding causation."

This appeal followed and, thereafter, respondents filed a notice of review/related appeal seeking the entry of final judgment.

DECISION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On an appeal from summary judgment, [a reviewing court] ask[s] two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn. 1990). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 71 (Minn. 1997).

I.

Appellant challenges the district court's grant of summary judgment, arguing that expert testimony was not required to prove causation of his injuries. Whether expert testimony is required to establish a prima facie case is a question of law reviewed de novo. *Tousignant v. St. Louis County,* 615 N.W.2d 53, 58 (Minn. 2000). Whether expert testimony is required to prove causation depends on whether the issue of causation is outside the realm of the common knowledge of an ordinary layperson. *Gross v. Victoria Station Farms, Inc.,* 578 N.W.2d 757, 762 (Minn. 1998).

For the first time on appeal, appellant argues that causation can be proved under a concurrent-cause theory and he is therefore not required to demonstrate that the Soller collision caused his injuries. Applying such theory, appellant asserts he is only required to show that the Soller collision was a substantial factor in creating his injuries and that it is common knowledge that a truck impacting a passenger vehicle at highway speed would cause injury. Respondent contends that this court's consideration of such concurrent-cause theory is precluded because it was not raised or argued in the district court.

Generally, this court will not address issues raised for the first time on appeal. *Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn. 1988). Appellant did not plead a theory of concurrent causation, did not raise the issue for consideration and decision by the district court, and, at oral argument to this court, appellant's counsel acknowledged that this theory of the case was born only after reading the district court's summary-judgment order. Because the issue of concurrent causation was not argued to and considered by the district court, we decline to consider it for the first time on appeal.

We now turn to whether the district court erred by requiring expert testimony on injury causation under the proximate-cause standard. The district court concluded that appellant was unable to establish injury causation without expert testimony in this case because, without an expert, appellant was unable to demonstrate that the injuries suffered were a result of the Soller collision, as distinguished from the initial rollover accident. Because the cause of appellant's traumatic brain injury and his other physical injuries require comprehension of complex medical and biomechanical factors, and because the ordinary lay person does not have the requisite medical and biomechanical knowledge to determine, without resort to speculation, what injuries would be caused by multiple rollovers and what would be caused by a direct collision, the district court did not err by concluding that expert testimony was required to establish injury causation. *See Bernloehr v. Cent. Livestock Order Buying Co.,* 296 Minn. 222, 225, 208 N.W.2d 753, 755 (1973) (stating that when a claim involves medical factors beyond the knowledge of laypersons "there must be expert testimony, based upon an adequate factual foundation that the thing alleged to have caused the result not only might have caused it but in fact did cause it"). We therefore affirm the district court's grant of summary judgment based on appellant's failure to make a sufficient showing for trial on an essential element of his claim.

II.

By notice of review/notice of related appeal, respondents challenge the district court's decision to dismiss appellant's claim "without prejudice" after granting summary

judgment on the merits. More recent than the district court's order here, this court clarified that "[a]fter granting summary judgment against a claimant on the merits of a claim, a district court may not dismiss the claim without prejudice but, rather, must enter judgment in favor of the moving party." *Pond Hollow Homeowners Ass'n v. The Ryland Group, Inc.,* 779 N.W.2d 920, 921 (Minn. App. 2010). The exception to this rule is when summary judgment is granted solely for procedural inadequacies. *See id.* at 924 (citing *Asmus v. Ourada,* 410 N.W.2d 432 (Minn. App. 1987) (considering a grant of summary judgment "without prejudice" a dismissal without prejudice because the summary judgment was not based on the merits but was instead based on the failure of the plaintiff to file a complaint and to pay the required filing fee)). Just as in *Pond Hollow,* summary judgment was granted here on the merits of appellant's pleaded cause of action, entitling respondents to unqualified judgment without delay. We therefore reverse and remand for entry of final judgment in favor of respondents.

Affirmed in part, reversed in part, and remanded.