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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0697**

Laurie LaCroix, mother and natural guardian
on behalf of minor, Jessica Baer,
Appellant,

vs.

Lindley Stimler,
Defendant,

Glenn Stimler,
Defendant,

Matthew Alery, et al.,
Respondents,

Richard O'Connor, et al.,
Respondents,

Aaron Geffre, et al.,
Respondents,

Kelly Campbell, et al.,
Respondents.

**Filed June 9, 2009
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. CV-06-9958

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant brought suit on behalf of her daughter, who was a passenger injured in a car accident. Appellant challenges summary judgment against her, arguing that the district court: (1) erred by submitting the issue of appellant's daughter's liability to the jury; (2) abused its discretion by denying appellant's motion to amend her complaint; and (3) erred by not instructing the jury that physical contact was not required for a cause of a crash to constitute a "direct cause." We affirm.

FACTS

On October 7, 2005, defendant Lindley Stimler was driving a car that crashed into a telephone pole on Old Rockford Road in Plymouth. Appellant Laurie LaCroix's daughter, Jessica Baer, was a front-seat passenger and was seriously injured in the crash. Respondent Kelly Campbell was a back-seat passenger. In an attempt to recover damages for Baer's injuries, appellant brought suit on behalf of Baer.

The parties do not dispute certain events that preceded the crash. Stimler was driving in the right-hand, westbound lane of Old Rockford Road when she approached an intersection. At the intersection, respondent Matthew Alery was the driver of a truck located directly behind Stimler and respondent Richard O'Connor was the driver of a truck located directly behind Alery. Respondent Aaron Geffre was a front-seat passenger in O'Connor's truck. After Stimler proceeded through the intersection, her lane became a right-turn-only lane. Alery and O'Connor merged their trucks into the left-hand lane, but Stimler remained in the right-turn-only lane until it became a gravel shoulder. Stimler then attempted to merge into the left-hand lane, lost control of the car, and crashed into a telephone pole.

Appellant alleged that Stimler, Alery and O'Connor were racing when the crash occurred. Appellant initially brought suit against Stimler, Alery, O'Connor, and their parents as owners of the involved vehicles. In the complaint, appellant asserted a negligence count against Stimler and a joint tortious-conduct count against Alery and O'Connor, alleging that Alery and O'Connor planned to drive fast and race. The complaint also stated the racing was a joint enterprise. The Alerys and the O'Connors

brought motions for summary judgment. The district court granted summary judgment against appellant on the joint-enterprise theory, but denied summary judgment on appellant's other theories of liability. Appellant amended her complaint to add Campbell, Geffre, and their mothers as defendants. The district court subsequently concluded that Campbell and Geffre could not be liable in negligence as passengers and that there was no genuine issue of material fact regarding their alleged joint tortious conduct. In granting Campbell and Geffre summary judgment, the district court relied on the deposition testimony of Campbell and a witness, Barbara Paulson.

Campbell testified at her deposition that she, Geffre, Alery, and Baer discussed racing the day of the crash and that Baer may have suggested that the girls could beat the boys back to school. Campbell admitted that her recollection of the events was not reliable, that her last memory before the crash was of getting into her car, and that her memories of events before getting into the car were "fuzzy." The district court concluded that this testimony was "likely" inadmissible. Barbara Paulson testified at her deposition that she witnessed the parties' driving conduct and the crash and that all defendants "soared right through the intersection and the stop sign" without stopping, traveling 50-60 miles per hour. Paulson formed the impression that the three vehicles were playing a "game of chase." Paulson observed that the back-seat passenger of Stimler's vehicle (Campbell) was turned around in her seat, looking behind Stimler's vehicle, and laughing.

Stimler admitted her negligence a week before trial. The day before trial, appellant served a motion to amend the complaint to add a negligence count against the

Alerys and the O'Connors. The district court denied appellant's motion to amend but informed appellant that she would be allowed to present evidence of negligence and would receive a jury instruction on negligence if she produced sufficient evidence of negligence during the trial. After the close of appellant's case in chief, the district court declined to give the jury a negligence instruction regarding the Alerys and the O'Connors, concluding that the evidence was insufficient to support a claim of negligence.

The district court gave the jury a special verdict form that required the jury to determine whether Stimler, Alery, O'Connor, and Baer individually participated, planned, encouraged, aided, or abetted in driving conduct that caused the accident, to determine whether the conduct of each was a direct cause of the accident, and to apportion fault.

The jury asked two questions during their deliberations: (1) "What happens if the plaintiff's culpability is equal to any of the individual defendants[?]" and (2) "What is meant by 'direct cause' . . . Does this mean physical contact, etc.[]" The district court answered the jury's first question by referring the jury back to the original instructions and informing the jury that if it concluded that Baer had "a percentage of culpability that is greater than any individual defendant, then plaintiff will not receive any damages from that defendant." The district court answered the jury's second question by informing the jury that "[a] direct cause is a cause that has a substantial part in bringing about the accident." The jury found Stimler, Alery, O'Connor, and Baer liable for joint tortious

conduct and apportioned 70% of fault to Stimler, 9% to Alery, 9% to O'Connor, and 12% to Baer.

The district court dismissed the claims against the Alerys and the O'Connors because the jury apportioned to Baer a greater percentage of fault. Appellant filed a motion for new trial, judgment notwithstanding the verdict (JNOV), or additur. The Stimlers also moved for new trial, JNOV, or additur. The district court denied all motions. This appeal follows.

D E C I S I O N

Appellant challenges the district court's: (1) grant of summary judgment to Campbell and Geffre; (2) dismissal of the Alerys and the O'Connors based on the jury's apportionment of fault; and (3) denial of appellant's motion for new trial, JNOV, or additur. In her reply brief, appellant argues that the district court was incorrect to rule that Baer could not recover from Alery or O'Connor on the basis of Baer's complicity in the conduct that caused her injuries.

Campbell and Geffre

Appellant argues that the district court erred in granting summary judgment to Campbell and Geffre or erred in submitting Baer's liability to the jury because all were passengers and either all passengers could be liable or none of them could be liable. A court reviewing a summary judgment ruling asks if there is a genuine issue of material fact or an error in the application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Submission of factual issues to the jury is reviewed for an abuse of discretion. *See Shastid v. Shue*, 247 Minn. 314, 329-330, 77 N.W.2d 273, 283 (1956)

(ruling that submission of issues of negligence, contributory negligence, and proximate cause to the jury was not a clear abuse of discretion).

The legal basis for the liability of each passenger and the facts regarding each passenger were critical to the district court's ruling. The district court ruled that, as a matter of law, Campbell and Geffre could not be liable for negligence because passengers owe no duty to third persons for the conduct of a driver with whom the passenger is riding. *See Olson v. Ische*, 343 N.W.2d 284, 287 (Minn. 1984) (concluding that passengers in a vehicle have no duty to protect third parties from the driver unless there is a special relationship). But as to joint tortious conduct, the district court did not rule that Campbell and Geffre could not be liable because they were passengers; rather, the district court concluded that appellant had not established a genuine issue of material fact about their alleged participation in a plan to race. *See Witzman v. Lehrman, Lehrman, & Flom*, 601 N.W.2d 179, 185-86 (Minn. 1999) (stating that "all who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done are jointly and severally liable for the resulting injury" (quotation omitted)). In concluding that appellant had not established a genuine issue of material fact about Campbell's and Geffre's alleged participation in a plan to race, the district court rejected Paulson's testimony that it looked to her like there was a "game of chase" going on, and rejected Campbell's testimony that before the crash, she and Geffre had participated in a conversation about racing. Considering all of the evidence in the record when the district court made its

ruling, we conclude that there was no genuine issue of material fact as to the participation of Campbell or Geffre and affirm the district court's ruling on this issue.

But the evidence regarding Baer's participation was more substantial. The district court submitted the issue of Baer's liability to the jury because of testimony regarding her participation in a plan to race. According to trial testimony, approximately a week before the crash, Stimler, with Baer and Campbell as passengers, "lost a race" when she spun out in her car and landed in a ditch. Baer was upset because Stimler lost the race and the boys with whom Stimler was racing, which included Geffre, did not stop to help. Baer wanted to race again. The testimony created a fact issue for the jury regarding whether Baer instigated a plan to race on the day in question. We conclude that the district court properly distinguished between Baer's alleged participation in a plan to race and the participation of Campbell and Geffre. We further conclude that the court did not abuse its discretion in submitting the issue of Baer's liability for joint tortious conduct to the jury.

Amendment of Complaint

Appellant next argues that, on the first day of trial, she should have been permitted to file a second amended complaint adding an explicit count of negligence against the Alerys and the O'Connors.

"A party may amend a pleading once as a matter of course at any time before a responsive pleading is served." Minn. R. Civ. P. 15.01. "Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.* "The trial court has wide discretion to

grant or deny an amendment, and its action will not be reversed absent a clear abuse of discretion.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The district court did not clearly abuse its discretion in refusing to allow appellant to amend her complaint the first day of trial. Furthermore, even if the court abused its discretion, because appellant was allowed to present evidence of negligence, she has not shown that she was prejudiced by the district court’s ruling. *See* Minn. R. Civ. P. 61 (requiring that harmless error be ignored).

Trial Errors

Appellant next argues that the district court erred by denying her motion for a new trial because: (1) Baer should not have appeared on the special verdict form; (2) the special verdict form was confusing; and (3) the district court’s answer to the jury’s question regarding contact between the vehicles was inadequate.

Appellant moved for a new trial under rule 59.01, which allows the district court to grant a new trial for several reasons, including legal error in the district court’s rulings at trial. Minn. R. Civ. P. 59.01(f). “The decision to grant a new trial generally lies within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion.” *Dostal v. Curran*, 679 N.W.2d 192, 194 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). “But when the district court exercises no discretion and decides a motion for new trial because of an error of law, a de novo standard of review applies.” *Id.*

District courts have “considerable latitude in determining jury instructions” and “broad discretion in drafting special-verdict questions.” *Russell v. Johnson*, 608 N.W.2d

895, 898 (Minn. App. 2000), *review denied* (Minn. June 27, 2000). “Where jury instructions fairly and correctly state the applicable law, this court will not reverse the denial of a new trial.” *Id.*

None of appellant’s arguments of error is availing. As already addressed, the district court did not abuse its discretion by submitting Baer’s liability to the jury. And appellant has not demonstrated that the special verdict form was confusing or that the district court’s definition of direct cause was not a fair or correct statement of applicable law. The district court defined “direct cause” by using the substantial-factor test contained in 4 *Minnesota Practice*, CIVJIG 27.10 (2006). “Minnesota applies the substantial factor test for causation” in negligence cases, *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006), and causation for purposes of joint tortious conduct is tested according to the same factors used to test legal causation for negligence, *see* Restatement (Second) of Torts § 876 cmt. c (1979). We conclude that the district court did not abuse its discretion.

Complicity

Appellant argued in her reply brief, for the first time, that the district court erroneously ruled that recovery against the Alerys and the O’Connors was barred due to Baer’s complicity in the driving conduct. Because appellant failed to raise the issue in her principal brief, she waived the issue on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (deeming that issue not briefed was waived); *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that this court would not consider an issue raised in a reply brief that was not raised or argued in the appellant’s principal brief).

Even if not waived, we reject appellant's argument of complicity because the district court based its ruling on the Minnesota Comparative Fault Act, which provides that contributory fault bars recovery if the contributory fault was greater "than the fault of the person against whom recovery is sought," Minn. Stat. § 604.01, subd. 1 (2008), and appellant does not challenge the district court's application of this statute.

Affirmed.