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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1846**

Joan Ilene Lasley,
Appellant,

vs.

Sam's Auto Body of Bemidji, Inc.,
Respondent,

State Farm Mutual Automobile Insurance Company,
a foreign corporation,
Respondent.

**Filed July 30, 2012
Affirmed
Peterson, Judge**

Beltrami County District Court
File No. 04-CV-10-231

Darrell Gene Carter, Bemidji, Minnesota (for appellant)

Michael I. Kiedrowski, St. Paul, Minnesota (for respondent Sam's Auto Body of Bemidji)

C. Todd Koebele, Scott G. Williams, Murnane Brandt, St. Paul, Minnesota (for respondent State Farm Mutual Automobile Insurance Company)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This appeal is from a summary judgment dismissing appellant's claims against her automobile insurer and an auto-body shop because appellant (1) failed to properly serve the insurer, (2) failed to provide expert-witness testimony that the car the body shop loaned to appellant was defective and that the defect caused the car to crash, and (3) assumed the risk of driving the car. We affirm.

FACTS

After her car was damaged in September 2003, appellant Joan Ilene Lasley filed a claim with her insurer, respondent State Farm Insurance Company. State Farm told appellant that it "ha[d] a program of preferred vendors to provide auto body repair to State Farm insureds." Appellant selected respondent Sam's Auto Body of Bemidji, Inc. from State Farm's list of preferred vendors and brought her car to Sam's for repairs.

Sam's loaned appellant a car to use while Sam's worked on her car. Appellant's friend drove the loaner car from Sam's to appellant's work place and, after driving it, told appellant that the car "pulls to the . . . left." The friend also said, "It's really out of line. I hope you don't get hurt. . . . You've got to hold it to the right to keep it on the road."

Appellant testified in a deposition that she drove the loaner car and had to pull "with all [her] strength" to keep the car on the road. Appellant picked up her children at school, and one of them observed "how hard [appellant] was pulling the wheel to the right to keep [the car] on the road." Appellant considered the car dangerous to drive and

knew that she should not be driving it. Appellant did not tell Sam's or State Farm about the car's steering problem.

On September 9, 2003, at approximately 8:00 p.m., appellant left her house and drove the loaner car to a casino approximately 45 miles away. While driving home early the next morning, appellant applied the brakes to avoid hitting deer crossing the highway. The car crossed the oncoming-traffic lane, went into the ditch on the left side of the road, and rolled over. Appellant was injured in the crash and, in September 2009, alleged negligence and breach-of-contract claims in a complaint against State Farm and Sam's.

Appellant's attorney submitted an affidavit stating that he spoke on the telephone with a woman in State Farm's legal department named Wendy, and Wendy told him that he could serve State Farm by faxing and/or mailing the summons and complaint to the legal department. On September 2, 2009, the attorney faxed the summons and complaint to State Farm's legal department in Illinois. The attorney also mailed the summons and complaint by certified mail, return receipt requested, to State Farm's legal department in Illinois the same day.

The district court granted summary judgment in favor of Sam's on the bases that appellant failed to provide expert testimony that the steering in the car was defective and the defect caused the crash and that appellant assumed the risk of driving the loaner car. The district court granted summary judgment in favor of State Farm on the bases that appellant failed to properly serve State Farm and that appellant assumed the risk of driving the loaner car. This appeal followed.

DECISION

“On appeal, we review a grant of summary judgment ‘to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.’” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quoting *K.R. v. Sanford*, 605 N.W.2d 387, 389 (Minn. 2000)). “A party need not show *substantial evidence* to withstand summary judgment. Instead summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006). “[T]he party resisting summary judgment must do more than rest on mere averments.” *Master Blaster, Inc. v. Dammann*, 781 N.W.2d 19, 24 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. June 29, 2010). “[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

Whether a summons and complaint is properly served is a question of law. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. App. 1992), *review denied* (Minn. July 16, 1992). Whether service of process was effective is reviewed de novo, but this court defers to the factual findings of the district court, unless they are clearly erroneous. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

Viewing the evidence in the light most favorable to appellant, appellant’s attorney mailed the summons and complaint to State Farm’s legal department in Illinois by

certified mail, return receipt requested. Appellant's attorney also faxed the documents to the legal department.

A civil action is commenced against a defendant “(a) when the summons is served upon that defendant, or (b) at the date of acknowledgement of service if service is made by mail.” Minn. R. Civ. P. 3.01.

In any action, service may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgment of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual.

Minn. R. Civ. P. 4.05. Receipt of the mailing with no acknowledgment is ineffective service. *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 773 (Minn. App. 1992), *review denied* (Minn. July 16, 1992). Because the record does not show that appellant received an acknowledgment of service by mail from State Farm, service by mail of the summons and complaint was ineffective.

Appellant's attorney also faxed the summons and complaint to State Farm's legal department in Illinois. Minn. R. Civ. P. 4 states the requirements for effective service of a summons. The supreme court has explained that “[r]ule 4 of the Minnesota Rules of Civil Procedure does not include any provision for service by facsimile. Facsimile service is authorized under Minn. R. Civ. P. 5.02, but Rule 5 applies only to service of documents after an action has been initiated.” *Kmart Corp. v. Cnty. of Clay*, 711 N.W.2d 485, 490 (Minn. 2006). Because rule 4 does not provide for service of a summons and

complaint by facsimile, service by facsimile was ineffective to initiate the action against State Farm. The district court did not err by granting summary judgment in favor of State Farm on the basis that appellant failed to properly serve State Farm.

II.

“[W]hen the acts or omissions complained of are within the general knowledge and experience of lay persons, expert testimony is not necessary.” *Tousignant v. St. Louis Cnty.*, 615 N.W.2d 53, 58 (Minn. 2000) (quotation omitted). “The test of whether expert testimony is required is whether the matter to be dealt with is so esoteric that jurors of common knowledge and experience cannot form a valid judgment as to whether the conduct of the parties was reasonable.” *Radel v. Bloom Lake Farms*, 553 N.W.2d 109, 111 (Minn. App. 1996) (quotations omitted), *review denied* (Minn. Oct. 29, 1996). Whether expert testimony is required to establish a prima facie case is a question of law, which is reviewed de novo. *Tousignant*, 615 N.W.2d at 58.

Both appellant and her friend drove the loaner car and observed that it “pull[ed] to the . . . left.” Appellant stated in her deposition that the steering problem caused her to veer off the road when she applied the brakes upon encountering the deer. Even if the testimony of appellant and her friend, which did not identify a specific defect, is sufficient to prove that the car had a defect, their testimony is not sufficient to prove that an unidentified defect caused the car to leave the road when appellant applied the brakes to avoid the deer. The district court did not err by granting summary judgment in favor of Sam’s on the basis that appellant failed to present expert testimony that a steering

defect in the loaner car caused the car to leave the highway when appellant applied the brakes.

Because appellant's failure to properly serve State Farm was a proper basis for granting State Farm summary judgment and appellant's failure to provide expert opinion testimony that a defect in the loaner car caused the car to leave the highway was a proper basis for granting Sam's summary judgment, we do not address as an additional, separate basis for granting summary judgment that appellant assumed the risk of driving the loaner car.

Affirmed.