IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gary D. Klimple,	)	
	)	Supreme Court No. 20060195
Appellant,	)	District Court No. 51-05-C-00001
v.	)	
	)	
Mark Bahl,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT

THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT

COUNTY OF WARD, STATE OF NORTH DAKOTA

THE HONORABLE DOUGLAS MATTSON, PRESIDING

ORDER DATED MAY 4, 2006, AND

AMENDED JUDGMENT DATED JUNE 29, 2006

BRIEF OF PLAINTIFF/APPELLANT

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STATEMENT OF THE ISSUE

I. The District Court erred in granting summary judgment against Plaintiff Gary Klimple, in finding Plaintiff was unable to prove Defendant Mark Bahl's actions were the proximate cause of his injuries, or any aggravation of a preexisting condition, because this issue is a question of fact that should be posed to a jury.

STATEMENT OF THE CASE

On April 6, 2004, Plaintiff Gary Klimple (Klimple) served a Complaint on Defendant Mark Bahl (Bahl) alleging he was injured in an automobile accident due to the negligence of Bahl. Klimple suffered injuries to his left wrist when the vehicle he was driving was struck by a vehicle driven by Bahl on October 1, 2001, in Minot, North Dakota.

On January 19, 2003, Bahl filed a Motion for Summary Judgment, arguing Klimple could not produce admissible evidence proving the cause of his injuries. Bahl further argued Klimple could not demonstrate any aggravation or exacerbation of his preexisting physical condition.

The district court for Ward County held Oral Argument on Bahl's motion on March 8, 2006. On May 4, 2006, the court granted Bahl's Motion for Summary Judgment, stating Klimple had failed to prove the October 1, 2001, automobile accident either caused his injuries or aggravated a preexisting condition.

The Ward County Clerk of Court assessed costs against Klimple on June 6, 2006. Amended Order for Judgment was entered by the district court on June 29, 2006. Notice of Entry of Judgment was served on July 11, 2006. Notice of Appeal was served and filed on June 30, 2006, and

Amended Notice of Appeal was served on July 17, 2006, and filed on July 18, 2006.

FACTS

On October 1, 2001, Plaintiff Gary Klimple (Klimple) and Defendant Mark Bahl (Bahl) were involved in a motor vehicle accident in Minot, North Dakota. Appellant's Appendix (App.) p. 19, l. 20:6-9. Bahl was cited for, and subsequently convicted of, "Failure to Yield" in municipal court. Transcript of Deposition of Mark Bahl, p. 35, l. 6-25; p. 36, l. 1-2.

Klimple had been driving with his left hand on the vehicle's steering wheel immediately before the accident. App. p. 27, l. 50:2-4. Upon impact, Klimple's left wrist "kind of bounced up against the door and the steering wheel." App. p. 27, l. 49:24-25. Klimple did not perceive any injuries at the scene of the accident and, therefore, did not report any to the Minot police officer attending to the accident. App. p. 26, l. 47:10-14; App. p. 30, l. 61:11-13.

However, Klimple's left wrist was stiff and he "couldn't even move [his] hand" the next day. App. p. 30, l. 61:14-21. He made an appointment for October 8, 2001, the next available date, with Dr. Uthus, an orthopedic surgeon. App. p. 29, l. 60:8-13; App. p. 55, l. 19:5-6.

Approximately one month earlier, Klimple went to a clinic for his left wrist and was diagnosed with tendonitis. App. p. 34, l. 77:12-17. Klimple was given medication, Celebrex, and "that took care of [the tendonitis]."

App. p. 34, l. 77:20-21. This is the only time before the accident Klimple sought medical attention for his left wrist; he had never suffered any other left wrist injuries. App. p. 37, l. 91:17-22.

On October 8, 2001, Klimple told Dr. Uthus' nurse his wrist injury was caused by a car accident on October 1, 2001. App. p. 30, l. 64:20-25; App. 31, l. 65:1-3; App. p. 48. Dr. Uthus diagnosed a fracture in Klimple's left wrist and the presence of "Kienbock's disease," (Kienbock's) after reviewing an X-ray. App. p. 30, l. 62:5-12. Dr. Uthus did not perform an MRI. See App. p. 55, l. 18:22-24; App. p. 17, l. 9:1-2; App. p. 30, l. 62:1-25; App. p. 30, l. 63:1.

The initial cause of Kienbock's is "trauma and fractures in the lunate [bone in the wrist]." App. p. 54, l. 16:9-12. Then, a bone in the wrist begins dying from lack of blood supply, or "avascular necrosis." App. p. 53, l. 9:21-25; App. p. 53, l. 10:1; App. p. 54, l. 16:5-8. An MRI confirms a diagnosis of Kienbock's. App. p. 55, l. 18:19-21. It is not believed to be more common in persons engaged in manual labor with their hands. App. p. 55, l. 17:3-7.

After placing Klimple's wrist in a cast until December 2001 and ordering physical therapy, Dr. Uthus determined Klimple needed surgery to repair his injury. App. p. 30, l. 62:10-11; App. p. 30, l. 62:19-20. Dr. Uthus

referred Klimple to Dr. Jeffery Keim, a plastic surgeon and hand specialist. App. p. 30, l. 62:21-25; App. p. 30, l. 63:1.

Dr. Keim reviewed Dr. Uthus's notes before Klimple's initial visit on December 11, 2001. App. p. 52, l. 7:12-19; App. p. 52, l. 6:22-24. One note indicated Dr. Uthus had diagnosed Klimple with preexisting Kienbock's. App. p. 52, l. 7:12-25; App. p. 52, l. 8:1-6. Dr. Keim never spoke directly with Dr. Uthus about this note. App. p. 52, l. 7:7-19. Dr. Keim performed an MRI on Klimple's wrist and subsequently agreed with Dr. Uthus' diagnosis of Kienbock's. App. p. 52, l. 8:20-24.

Klimple underwent surgery on January 16, 2002. App. p. 53, l. 10:25; App. p. 53, l. 11:1. Dr. Keim performed a "scaphocapitate arthrodesis," which he described as "taking two of the bones and fusing them, both with a bone graft and screw." App. p. 53, l. 10:25; App. p. 53, l. 11:1-5.

Klimple owned a tree service in Minot with his wife at the time of the accident. App. p. 17, l. 9:12-16; App. p. 17, l. 10:1-3; App. p. 18, l. 16:3-5. Together they performed all of the labor, including "tree trimming, stump removal, take down of big trees." App. p. 18, l. 16:6-15. Klimple returned to work in July 2002 or August 2002, performing only light duties but was not cleared by Dr. Keim to resume all normal work duties until October 2002. App. p. 34, l. 77:1-11; App. p. 53, l. 11:23-25.

Dr. Keim later testified it was possible the automobile accident was the cause of Klimple's Kienbock's, but could not say with any reasonable degree of certainty whether the condition was, or was not, caused by the car accident. App. p. 54, l. 16:9-12; App. p. 56, l. 24:20-24.

Dr. Keim's diagnosis that the Kienbock's was preexisting was solely based on Dr. Uthus's initial diagnosis that this condition was preexisting. App. p. 56, l. 24:12-15. Further, if Klimple did have preexisting Kienbock's, Dr. Keim believed it could have been "aggravated" or "exacerbated" by the car accident. App. p. 57, l. 25:7-10; App. p. 62, l. 46:13-18.

Klimple continued to suffer from his wrist injury after his final office visit with Dr. Keim on October 29, 2001. App. p. 32, l. 71:24-25; App. p. 32, l. 72:1-5; App. p. 53, l. 12:22-23. According to Klimple, his pain includes, "[s]tiffness," "writer's cramps," and his hand "knots up." App. p. 32, l. 72:2-8. Klimple is also unable to carry or hold heavy objects, due to decreased grip strength. App. p. 33, l. 73:24-25; App. p. 33, l. 74:1-19; App. p. 33, l. 75:1-2. These symptoms are consistent with Dr. Keim's initial description of Klimple's symptoms as "[p]ain, loss of motion, decreased grip strength." App. p. 52, l. 8:15-18.

Klimple can no longer climb trees while performing his job. App. p. 37, l. 89:12-13. The tree service is no longer able to perform removal of large trees. App. p. 38, l. 94:4-12. Klimple is unable to "run a [chain] saw for a full day" which he was able to do before the accident as frequently as "[e]very day." App. p. 36, l. 88:10-19.

Klimple did not experience any of these difficulties before the automobile accident with Bahl on October 1, 2001. App. p. 37, l. 89:25; App. p. 37, l. 90:1-10.

LAW AND ARGUMENT

I. The District Court erred in granting summary judgment against Plaintiff Gary Klimple, in finding Plaintiff was unable to prove Defendant Mark Bahl's actions were the proximate cause of his injuries, or any aggravation of a preexisting condition, because this issue is a question of fact that should be posed to a jury.

A. Introduction

The District Court erred in granting summary judgment against Klimple because Klimple is able to demonstrate a genuine issue of material fact as to the issue of proximate cause based on his testimony regarding his physical health before and after the accident. Further, Klimple's ability to demonstrate a genuine issue of material fact is bolstered by Dr. Keim's equivocal testimony regarding the proximate cause of Klimple's injuries.

B. Standard of Review

The Court reviews an appeal from a grant of summary judgment de novo on the entire record because it is a question of law. e.g., Perez v. Nichols, 2006 ND 20, ¶ 5, 708 N.W.2d 884; Zuger v. State, 2004 ND 16, ¶ 7, 673 N.W.2d 615.

C. Summary Judgment Principles

A motion for summary judgment is governed by Rule 56 of the North Dakota Rules of Civil Procedure. "[S]ummary judgment . . . is a procedural device for the prompt resolution of a controversy on the merits without a

trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from the undisputed facts, or if the only issues to be resolved are questions of law." Ballensky v. Flattum-Riemers, 2006 ND 127, ¶ 7, 716 N.W.2d 110.

The party moving for summary judgment bears the burden of establishing no disputed issues of material fact exist and show entitlement to judgment as a matter of law under applicable substantive legal principles. Skjervem v. Minot State University, 2003 ND 52, ¶ 4, 658 N.W.2d 750. This Court has also stated, if reasonable persons could reach only one conclusion from the facts, issues of fact may become issues of law. Perez, 2006 ND 20, ¶ 7, 708 N.W.2d 884 (stating, "[w]hen the evidence permits a reasonable fact-finder to reach only one reasonable conclusion, negligence becomes a question of law and is appropriate for summary judgment").

The party resisting the motion is required to present "competent admissible evidence" that raises an issue of material fact and may not "merely rely on the pleadings, briefs, or unsupported and conclusory allegations" Beckler v. Bismarck Public School Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172. Such evidence is admissible by affidavit, deposition testimony, or other comparable means. Id.; Rule 56(c), N.D.R.Civ.P. The resisting party is further required to "draw the court's attention to relevant

evidence in the record raising an issue of material fact." Knutson v. County of Barnes, 2002 ND 68, ¶ 11, 642 N.W.2d 910.

This Court must review all evidence in a light most favorable to the non-moving party and that party is given the benefit of all favorable inferences. Ballensky, 2006 ND 127, ¶ 7, 716 N.W.2d 110.

D. Negligence Principles

In a negligence action, a plaintiff must prove by a preponderance of the evidence that, 1) the defendant owed the plaintiff a duty of care, 2) that duty of care was breached, and 3) breach of that duty was the proximate cause of plaintiff's injuries. e.g., Perez, 2006 ND 20, ¶ 6, 708 N.W.2d 884.

The evidentiary standard of preponderance of the evidence requires that plaintiff demonstrate it is more likely than not the negligence of the defendant caused the injury. e.g., Foerster v. Fischbach-Moore, Inc., 178 N.W.2d 258, 262 (N.D. 1970) (stating, "the burden is on the plaintiffs to present evidence of the defendants' negligence from which a reasonable man may conclude that, on the whole, it is more likely that the negligence of the defendants did cause the injury than that they did not. . . ."); Mertz v. Weibe, 180 N.W.2d 664, 667 (N.D. 1970) (holding, "[t]he plaintiffs are only required to satisfy the trier of the facts by a fair preponderance of the

evidence that the injuries occurred in the manner contended for in their respective claims.”).

Proximate cause is defined as, “a cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred.” Beckler, 2006 ND 58, ¶ 13, 711 N.W.2d 172 (quoting Kimball v. Landeis, 2002 ND 162, ¶ 7, 652 N.W.2d 330) (internal quotations omitted).

If a plaintiff is unable to prove an essential element of a claim, summary judgment is appropriate. “Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on an essential element of her claim and on which she will bear the burden of proof at trial.” Koehler v. County of Grand Forks, 2003 ND 44, ¶ 9, 658 N.W.2d 741. However, summary judgment is generally inappropriate in actions for negligence. e.g., Perez, 2006 ND 20, ¶ 7, 708 N.W.2d 884; Miller v. Diamond Resources, Inc., 2005 ND 150, ¶ 8, 703 N.W.2d 316.

In this case, the only element of negligence at issue is proximate cause. Proximate cause and negligence are generally questions of fact to be left for the jury to decide. Miller, 2005 ND 150, ¶ 8, 703 N.W.2d 316. “A question of fact becomes a question of law only when a reasonable person

can draw a single conclusion from the evidence." McDowell v. Gillie, 2001 ND 91, ¶ 5, 626 N.W.2d 666.

E. Expert Testimony Regarding Proximate Cause

Bahl moved for summary judgment on grounds that Klimple is unable to show the October 1, 2001, accident caused Klimple's wrist injuries. Brief in Support of Defendant's Motion for Summary Judgment, page 6. In support of his motion for summary judgment, Bahl argued that "it is undisputed that Plaintiff's injuries were not caused by the October 1, 2001 accident." Id. Bahl bases this assertion solely on the testimony of Dr. Keim.

However, this is a mischaracterization of the evidence in this case. Dr. Keim testified at his deposition that he could not say with any reasonable degree of certainty whether Klimple's Kienbock's was caused by the car accident. When pressed on the issue, Dr. Keim testified, "I don't know if I can say [Klimple's Kienbock's was] preexisting. . . . The only time I think that I've seen preexisting was in Dr. Uthus' note. I mean I can only say preexisting because Dr. Uthus said preexisting." App. p. 56, l. 24:12-16.

Additionally, it has been established that Dr. Uthus, an orthopedic surgeon, did not perform an MRI in his course of treatment of Klimple yet still diagnosed Klimple with preexisting Kienbock's. According to Dr. Keim, an MRI is necessary to confirm a diagnosis of Kienbock's. In fact,

when asked whether Kienbock's was difficult to diagnose, Dr. Keim's response was, "[n]ot with the advent of MRI." App. p. 55, l. 18:18.

Further, even if Klimple's Kienbock's arose before the accident, Dr. Keim testified Klimple's Kienbock's "[c]ould have been aggravated by the car accident." App. p. 57, l. 25:7-10.

It has been established that aggravation of a preexisting condition through negligence is a compensable action, even though the defendant may not be liable for the preexisting condition itself. Olmstead v. First Interstate Bank of Fargo, 449 N.W.2d 804, 808 (N.D. 1989). "The degree of aggravation of pre-existing conditions is a factual question for the jury." Tuhy v. Schlabsz, 1998 ND 31, ¶ 13, 574 N.W.2d 823.

F. Plaintiff Testimony Regarding Proximate Cause

In addition to Dr. Keim's inability to state for certain the proximate cause of Klimple's injuries, or any aggravation of a preexisting condition, Klimple's own testimony establishes a causal connection between the car accident and his subsequent injuries.

Klimple's testimony regarding his injuries and any causes thereof are properly admissible in determining whether summary judgment is appropriate. Only "competent admissible evidence" is used to determine the appropriateness of summary judgment. Beckler, 2006 ND 58, ¶ 7, 711

N.W.2d 172. However, a plaintiff's testimony regarding his own physical condition is considered competent and admissible evidence in an injury case:

> It is proper and indeed necessary to inquire into the nature and extent of the injury complained of; and accordingly it is proper to receive evidence as to the physical condition, in respect to health, of the injured person prior and subsequent to the injury; that before the injury the plaintiff was healthy and vigorous, and that in consequence of the injury he suffered pain and disease. The injured person is a competent witness to testify to his feelings, pains, and symptoms, as well as to all the characteristics of the injury, internal or external, so far as the same were perceptible to the senses, and do not require the exercise of scientific skill and knowledge; and indeed it has been held that he is better qualified to testify to such matters than anyone else.

Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 765 (N.D. 1922) (internal citations and quotations omitted) (emphasis added). See also, Cain v. Stevenson, 706 P.2d 128, 131 (Mont. 1985) ("[a] claimant is competent to testify as to his past and present condition."); Piel v. Dillard, 414 So. 2d 87, 91 (Ala. Civ. App. 1982) (holding the injured party's own testimony supported a finding of injury because, "[a] lay witness may testify as to his own inability to work."); Guyer v. Mayor and Aldermen of the City of Savannah et al., 292 S.E.2d 445, 448 (Ga. Ct. App. 1982) (stating, "a person knows more about his injuries and suffering than a whole college of physicians and may testify as to same."); Daniels v. Bloomquist, 138 N.W.2d 868, 874-75 (Iowa 1965) (holding, "[a] nonexpert or lay witness

may testify as to his own health or physical condition. . . . He may state his prior condition.")

In a similar case, summary judgment was granted for the defendant on grounds the deposition of the plaintiff's treating physician was equivocal as to the cause of injury. Guyer, 292 S.E.2d at 446-47 ("a possibility," "anything is possible," and "may be causally related") (internal quotations omitted). The Georgia Court of Appeals reversed the district court's award of summary judgment, holding the plaintiff's testimony concerning her injury was sufficient to create an issue of material fact in the face of equivocal expert testimony. In its reversal, the Georgia Court of Appeals specifically noted the plaintiff had testified to the incursion of her injury, the cause of her injury, and whether her injury had yet healed. The appellate court further stated, "[the plaintiff's] testimony has not been overcome by the medical expert." Id. at 448.

Based on the above-cited legal principles in Asch and Guyer, a plaintiff's own testimony concerning the cause of his injury is both admissible and sufficient to create a genuine issue of material fact, thereby making summary judgment inappropriate. Rule 56, N.D.R.Civ.P. Klimple gave testimony his wrist was thrust against the door panel upon impact of

the accident. He testified he was healthy before the accident and unable to work after the accident.

Klimple further testified that he sought medical treatment after the accident where it was not necessary before the accident. When he arrived at Dr. Uthus's office for his initial visit, it was documented that Klimple was seeking medical attention due to an injury to his left wrist that resulted from an automobile accident and the date of on-set was October 1, 2001, the same day as Klimple's automobile accident with Bahl.

G. Plaintiff Testimony in conjunction with Expert Testimony

Moreover, Klimple's testimony, taken in conjunction with Dr. Keim's testimony, leaves no doubt as to the existence of a genuine issue of material fact. Dr. Keim's testimony can, at best, be characterized as equivocal as to whether the automobile accident caused the injury in this case.

"'[A]n expert's opinion that something is "possible" or "could have been" may be sufficient to sustain a verdict or award' when rendered in conjunction with other, probative evidence establishing the material factual question to be proved." Roberson v. Hicks, 694 N.E.2d 1161, 1163 (Ind. Ct. App. 1998) (emphasis added). Dr. Keim's testimony that Klimple's Kienbock's, "[c]ould have been aggravated by the car accident" is sufficient

to create a genuine issue of material fact. App. p. 57, l. 25:7-10 (emphasis added).

Dr. Keim's testimony certainly does not establish or lead to only one conclusion as to the cause of Klimple's injuries or any aggravation of a preexisting condition. Dr. Keim's testimony does not refute Klimple's claim that the automobile accident was the proximate cause of the injuries for which he was treated after the accident.

H. Genuine Issue of Material Fact – Proximate Cause

Reasonable persons, after reviewing the evidence in this case, could reach more than "a single conclusion from the evidence" with regard to the proximate cause of Klimple's injuries. See McDowell, 2001 ND 91, ¶ 5, 626 N.W.2d 666. As such, proximate cause remains a question of fact in this case and should not become a question of law. See id. Based on the testimony of both Dr. Keim and Klimple, it is possible to infer either Klimple did not have a preexisting condition or, if he did, that this condition was aggravated by the automobile accident. This is especially possible after viewing all evidence in a light most favorable to Klimple.

CONCLUSION

The District Court erred in granting summary judgment against Klimple in finding him unable to prove Bahl's actions were the proximate cause of his injuries, or any aggravation of a preexisting condition, because this issue is a question of fact that must be answered by a jury.

Dated this __9th__ day of August, 2006.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that above Appellant's Brief is in compliance with 32(5)(A) and 32(7)(A) of the North Dakota Rules of Appellate Procedure.

ss:// Carey A. Goetz_____

Carey A. Goetz

CERTIFICATE OF ELECTRONIC SERVICE

I certify that on the 9th day of August, 2006, I electronically served a copy of the attached Appellant's Brief to the recipient, Bradley Beehler, at his e-mail address published on the North Dakota Supreme Court online directory, which is listed as:

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