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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0020**

Carnea Roberson,
Appellant,

vs.

STI International,
Respondent,

Bill's Gun Shop,
Defendant.

**Filed August 31, 2020
Affirmed
Hooten, Judge**

Ramsey County District Court
File No. 62-CV-19-79

Nixon O. Ayeni, Law Office of Nixon Ayeni, Burnsville, MN (for appellant)

William L. Davidson, Brian A. Wood, João C.J.G. de Medeiros, Lind, Jensen, Sullivan & Peterson, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Jesson, Judge; and Florey, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant challenges the summary judgment dismissal of his product-liability claim against respondent, a firearm manufacturer, claiming that the district court erred when it

determined that: (1) appellant had not timely submitted evidence to support his claims, (2) the evidence submitted by appellant was not sufficient to prove the existence of a defect that caused his injuries, and (3) the evidence submitted by appellant was not sufficient to prove the manufacture of the pistol was an abnormally dangerous activity. We affirm.

FACTS

Appellant Carneia Roberson¹ challenges the summary judgment dismissal of his product-liability claims against respondent STI International (STI), a firearm manufacturer, related to injuries sustained while firing an STI-manufactured pistol (the pistol). Roberson argues that the district court erred when it determined that: (1) Roberson had not timely submitted evidence to support his claims, (2) the evidence submitted by Roberson was not sufficient to prove the existence of a defect that caused his injuries, and (3) the manufacture of the pistol was an unreasonably dangerous activity triggering strict liability under the Restatement (Second) of Torts §§ 519, 520.

It is undisputed that the pistol, a 2011 HEX Tac, was manufactured at STI's Texas warehouse on May 24, 2016, and was shipped the next day to a sporting goods store in Robbinsdale, Minnesota. Almost two years later, Roberson purchased the pistol at Bill's Gun Shop, a different store located in Circle Pines, Minnesota. Neither party claims to know the location of the pistol from the time when it was initially shipped to Robbinsdale

¹ The case caption in the district court identifies the appellant as "Carnea Roberson" and that name is used in the caption on appeal. However, appellant's brief identifies the appellant as "Carneia Roberson." The caption on appeal must match the caption used in the district court's decision, Minn. R. Civ. App. P. 143.01, but we use "Carneia Roberson" in the body of this opinion.

to the time when it was sold at Bill's Gun Shop. After purchasing the pistol, Roberson fired it at a gun range located at Bill's Gun Shop. Roberson alleges that he was seriously injured when the pistol discharged and a hot shell casing imbedded in his right forearm.

Roberson asserts that after he suffered the injury, the pistol was sent to STI to be repaired. According to Roberson, he paid to have the gun repaired and it was later returned to him with a receipt. Roberson sued STI and Bill's Gun Shop for strict products liability and negligence. Over the course of discovery, Roberson's counsel failed to comply with discovery requests and STI filed motions to compel production.

On October 10, 2019, STI moved for summary judgment. In response, on October 30, 2019, Roberson filed a memorandum opposing summary judgment, in which he referenced exhibits not yet submitted to the district court. On November 6, 2019, one day *after* STI filed its reply and two days before the scheduled summary judgment hearing on November 8, 2019, Roberson filed the exhibits referenced in his October 30th memorandum.

The district court did not accept Roberson's untimely exhibits and granted summary judgment in favor of STI. Roberson appeals.

D E C I S I O N

I. The district court did not abuse its discretion when it refused to accept late-submitted exhibits into the summary judgment record.

Roberson argues that the district court abused its discretion when it decided not to accept late-submitted exhibits when assessing whether or not to grant summary judgment.

A party opposing a motion for summary judgment cannot rely on the pleadings' bare allegations, but must specifically show there are genuine issues of fact. *See McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 230 (Minn. 2019) (stating that a genuine issue of material fact may not be established by “unverified and conclusory allegations” (quotation omitted)). Instead, a party responding to a dispositive motion, including for summary judgment, must serve and file with the district court administrator a memorandum of law and supplementary affidavits and exhibits “at least 9 days prior to the hearing.” Minn. R. Gen. Prac. 115.03(b) (2018).² “For a dispositive motion, the court, in its discretion, may refuse to permit oral argument by the party not filing the required documents, may allow reasonable attorney’s fees, or may take other appropriate action.” Minn. R. Gen. Prac. 115.06. Appropriate action includes refusing to consider the late-filed documents. *See Am. Warehousing & Distrib., Inc. v. Michael Ede Mgmt., Inc.*, 414 N.W.2d 554, 557 (Minn. App. 1987) (upholding a district court’s refusal to consider an affidavit submitted four days after a summary-judgment hearing), *review dismissed* (Minn. Jan. 20, 1988).

The enforcement of Minn. R. Gen. Prac. 115 is left to the discretion of the district court. *See Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 923 (Minn. App. 2010) (recognizing district court’s discretion to impose sanctions for discovery violations), *review denied* (Minn. Dec. 14, 2010); *see also* Minn. R. Gen. Prac. 115.06 advisory comm. cmt. (stating that “permissive language is included to make it clear the court retains the discretion to hear matters even if the rules have been ignored”).

² Minnesota Rule of General Practice 115.03(b) was amended, effective January 1, 2020, to require responsive memoranda to be filed at least 14 days before the hearing.

Roberson submitted his memorandum opposing summary judgment on October 30, 2019, nine days prior to the November 8, 2019 hearing. However, Roberson did not file the exhibits referenced in his memorandum until two days before the hearing. Thus, as Minn. R. Gen. Prac. 115.03(b) requires a responding party to submit all supplemental exhibits and affidavits nine days before the hearing, the district court did not abuse its discretion when it refused to consider Roberson's exhibits and affidavits two days before the hearing.

The district court's choice not to accept the exhibits might appear to be a harsh outcome resulting from a relatively minor infraction. However, it appears less harsh when viewed in the context of Roberson's repeated failure to comply with discovery and his counsel's unapologetic tardiness to the summary judgment hearing. Additionally, the district court reasonably believed that the "consideration of [Roberson's exhibits] would be prejudicial to STI, who had, by that time, already filed its reply to [Roberson's] opposition." Roberson contends that the decision "boils down to whether the defendant had time to review the exhibits and if the defendant has been supplied the evidence by other means." However, Roberson cites no law or rule mandating that a district court accept late documents based on these factors.

Because of the prejudicial nature of the late filing and the discretion given to the district court to enforce Minn. R. Gen. Prac. 115.03(b), we conclude that the district court did not abuse its discretion when it excluded Roberson's late-filed exhibits.

II. The district court did not err when it granted summary judgment to STI on Roberson's claim of defective design.

As we have concluded that the district court did not abuse its discretion when it refused to consider Roberson's exhibits, we now assess whether the record contained sufficient evidence to show the existence of a defect without the exhibits and thus whether or not the district court erred when it granted summary judgment to STI.

On appeal from summary judgment, we review de novo "whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.* However, evidence offered to support or defeat a summary judgment motion must be admissible at trial. *Hopkins v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991). And arguments of counsel are not evidence. *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004).

In order to prevail on a claim for negligent and defective design, a plaintiff must prove by a preponderance of the evidence that: (1) the product "was in a defective condition unreasonably dangerous to the user," (2) "the defect existed when it left the manufacturer's control," and (3) "the defect was the proximate cause of the injury sustained." *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 731 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Apr. 14, 1998).

The record contains no admissible evidence to support Roberson's claims on any of the elements necessary to present a prima facie case for defective design. Roberson did

not submit any admissible evidence of the existence of a defect, any expert testimony regarding any alleged defect that existed when the gun left the manufacturer's control, or any admissible evidence relating to a connection between the alleged defect in the pistol and the injury.

Roberson's argument linking his injury to an alleged defect perhaps can be understood as a *res ipsa loquitur* argument because he contends that no additional evidence beyond the injury is needed to prove STI's negligence. See *Spannaus v. Otolaryngology Clinic*, 242 N.W.2d 594, 596 (Minn. 1976) (describing *res ipsa loquitur* and stating that an injury "must be caused by an agency or instrumentality within the exclusive control of the defendant"). But not only did Roberson fail to provide evidence that the pistol was within the exclusive control of STI, *see id.*, he also failed to raise *res ipsa loquitur* as a theory of recovery in his complaint or argue such theory to the district court. Thus, we need not consider the legal theory. See *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988) ("[A]n undecided question is not usually amenable to appellate review.").

As the record contains no admissible evidence supporting the elements of a design defect claim but for the arguments of Roberson, which are not evidence, and no *res ipsa loquitur* argument was made to the district court, we conclude that the summary judgment record does not demonstrate a *prima facie* case for a design defect even when viewed in the light most favorable to Roberson. See *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995) (stating that summary judgment is appropriate when the

record reflects a complete lack of proof on one essential element of the plaintiff's claim). Therefore, the district court did not err when it granted summary judgment to STI.

III. The district court did not err when it granted summary judgment to STI on Roberson's claim of abnormally dangerous activity.

Finally, Roberson argues that because STI engaged in an abnormally dangerous activity when it manufactured and distributed the pistol, the district court erred when it granted summary judgment to STI.

"We review the grant of summary judgment de novo to determine 'whether there are genuine issues of material fact and whether the district court erred in its application of the law.'" *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). When a party fails to submit any evidence of a genuine issue of material fact in a responsive motion to a motion for summary judgment, summary judgment is appropriate. *DHL, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The Minnesota Supreme Court has not adopted the Restatement (Second) of Torts § 520's definition of an ultra-hazardous activity. And yet, the Minnesota Supreme Court has identified a list of factors taken from § 520 that a district court may consider to determine whether or not an activity is abnormally dangerous so as to warrant the application of strict liability. *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 860–61 & n.2 (Minn. 1984). These identified factors are follows:

- (a) [the] existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) [the] likelihood that the harm that results from it will be great;

- (c) [the] inability to eliminate the risk by the exercise of reasonable care;
- (d) [the] extent to which the activity is not a matter of common usage;
- (e) [the] inappropriateness of the activity to the place where it is carried on; and
- (f) [the] extent to which its value to the community is outweighed by its dangerous attributes.

Id. at 860–61 n.2.

The district court concluded that Roberson failed to submit any evidence that would allow it to assess whether or not STI engaged in an abnormally dangerous activity. Thus, summary judgment for STI was warranted. We agree. Because there is no evidence in the record that raises a genuine issue of material fact, we hold that the district court did not err when it concluded that Roberson’s lack of evidence prevented it from determining whether or not STI’s manufacture and distribution of the pistol was an abnormally dangerous activity so as to warrant the application of strict liability.

Affirmed.