

IN THE COURT OF APPEALS OF THE STATE OF NEVADA


SHAUN FLANNERY,  
Appellant,  
vs.  
EVOLVE SKATEBOARDS USA,  
Respondent.

No. 84375-COA

FILED

JUN 05 2023

ORDER OF AFFIRMANCE

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

Shaun Flannery appeals a district court order granting summary judgment in favor of Evolve Skateboards USA (Evolve). Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Flannery purchased an electronic skateboard from Evolve in November 2016 and several months later was injured when the skateboard's wheels locked up and the board completely stopped, throwing him off of the board without warning.<sup>1</sup> Flannery pitched forward onto the street and sustained injuries including a torn rotator cuff. He incurred medical expenses totaling about \$79,000 and claims he will eventually need surgery. Flannery had never experienced any issues or crashes with the skateboard prior to this accident.

Flannery informed Evolve about the skateboard accident, and Evolve requested that Flannery mail the skateboard to the company so that it could inspect the board for defects or evidence of user error. After it repaired and upgraded his skateboard, and purportedly without finding user error, Evolve sent the skateboard back to Flannery at no cost to him.

Flannery filed a complaint against Evolve, alleging claims under theories of strict product liability, negligence, product liability under

<sup>1</sup>We recount the facts only as necessary for our disposition.

23-17617

a failure-to-warn theory, breach of express or implied warranties, and misrepresentation. In his complaint, Flannery generally alleged that while he was operating the skateboard, “suddenly and without warning, the skateboard’s wheels locked and/or the braking mechanism malfunctioned and [he] was violently ejected from the skateboard.” Flannery also alleged upon information and belief that there was a defect regarding the skateboard’s “[B]luetooth functionality that causes wheel and braking malfunctions” and “that the defect existed” when the skateboard left Evolve’s possession. Evolve filed its answer to Flannery’s complaint and denied that the electronic skateboard was defective or caused Flannery’s damages.

According to the court’s March 2021 scheduling order, which extended the discovery cutoff and all other deadlines by approximately two months, the deadline for initial expert disclosures was May 14, 2021, and the deadline for rebuttal disclosures was June 11, 2021. Discovery was set to close on August 13, 2021.

Flannery disclosed his medical causation expert on May 13, but he did not disclose a product liability expert or other initial expert. Evolve disclosed its medical causation expert and product liability expert, mechanical engineer Eric Johnson, on May 14. Johnson prepared a report after inspecting the skateboard at issue and concluded that the cause of Flannery’s accident was “sudden deceleration of the skateboard.”<sup>2</sup> Johnson’s report also concluded that “[b]ased on the available evidence, the sudden deceleration was caused by an impediment in the roadway (such as a rock or crack in the roadway surface).” The report stated that “[t]here was

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<sup>2</sup>The skateboard that Johnson inspected and tested was not Flannery’s skateboard but a similar one.

no evidence that a loss of connectivity from the remote would cause a sudden and complete stop of the skateboard” and Flannery’s description of the skateboard’s performance during the incident “was not consistent with a loss of connectivity between the remote and the skateboard.” Lastly, Johnson opined that there was no evidence of a manufacturing or design defect in the skateboard that caused or contributed to the incident.

After the deadline for initial expert disclosures had passed, Flannery contacted Evolve’s counsel to ask for a 30-day extension of the rebuttal witness deadline. Evolve agreed to extend the deadline for rebuttal expert opinions to July 11, but the district court refused to approve the extension request.<sup>3</sup> Nevertheless, on July 9, almost two months after the initial expert disclosure deadline, but within the thirty-day extension to

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<sup>3</sup>In an email from the district court law clerk to the parties’ counsel, the law clerk stated that the proposed stipulation and order extending the rebuttal disclosure deadline could not be processed because, among other clerical errors, “the Rebuttal Disclosure Date cannot move unless the Initial Expert Disclosure Date also moves, as the proposed 7/11/2021 date will exceed 30 days or less after the Initial Expert Disclosure Date.” Evolve’s counsel would not agree to any stipulation that would extend the initial expert disclosure deadline, so the stipulation and proposed order to extend the rebuttal disclosure deadline became unworkable. We note that NRCP 16.1(a)(1)(A) allows for an exception to the mandatory pretrial discovery disclosure requirements “as otherwise stipulated or ordered by the court.” Although Flannery and Evolve’s stipulated agreement submitted to the district court would seemingly qualify as sufficient to exempt the extension from NRCP 16.1’s timing requirements, Flannery fails to raise this argument on appeal and has thereby waived it. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

which the parties had informally agreed, Flannery served a rebuttal expert disclosure for Dr. Patrick Mercier and a rebuttal report.

In the rebuttal report, Dr. Mercier offered several opinions and concluded that the evidence “does not clearly and unambiguously suggest an impediment in the roadway (such as a rock or crack in the roadway surface) was the cause of the sudden deceleration of the skateboard.” Dr. Mercier noted that Dr. Johnson’s report “[did] not consider any other possibilities for the sudden deceleration of the skateboard” except that if the skateboard’s firmware was operating correctly with no bugs, that a loss of connectivity would not have caused the skateboard to suddenly stop. And he concluded that it is “not possible to rule out that an electromagnetic interferer, a firmware bug, or a combination of the two could have resulted in the sudden deceleration experience by Mr. Flannery.”

Evolve moved to strike any and all opinions and reports by Dr. Mercier and to exclude him as a witness, arguing that he was acting as an untimely disclosed initial expert. Evolve alleged that Flannery purposefully made the decision not to retain a product liability expert until after Evolve submitted its expert’s report and opinions in order to be able to respond to Evolve’s defense, and therefore, Dr. Mercier’s opinions were not made in good faith. Flannery opposed Evolve’s motion to strike, claiming that Evolve failed to meet and confer and thus failed to comply with EDCR 2.47 before filing its motion to strike. Flannery also argued that he was not attempting to untimely disclose an initial expert report after the May 14 deadline passed, and that Dr. Mercier’s opinions were true rebuttal opinions that were timely disclosed. Lastly, Flannery stated that this case was not one that required an initial expert witness to be disclosed.

The district court granted Evolve's motion to strike Dr. Mercier and held that the report was inadmissible as evidence on the basis that Dr. Mercier was disclosed untimely and "authored a report that included original opinions despite [Flannery] having been foreclosed from producing and relying upon an initial expert report."

Evolve then moved for summary judgment, arguing that Flannery could not establish a defect in the skateboard's design or manufacture and could not establish that any alleged defective condition caused his damages following the court's granting of its motion to strike. Flannery filed an opposition to Evolve's motion for summary judgment and a countermotion to alter or amend the court's order striking his rebuttal witness.

The district court heard oral argument, granted Evolve's motion for summary judgment and denied Flannery's countermotion to alter or amend. In its findings of fact, conclusions of law, and judgment, the court found that Flannery's claims "hinge on his ability to prove the existence of a defect in the subject skateboard." Accordingly, the district court concluded that "[w]ithout competent expert testimony, Plaintiff cannot establish that the skateboard was defective in either its design or manufacture or that any alleged defective condition caused his damages – essential elements for Plaintiff's product liability-based claims."

Flannery now appeals the district court's findings of fact, conclusions of law, and judgment and argues that: (1) summary judgment in favor of Evolve was improper; (2) the district court should not have heard Evolve's motion to strike because Evolve's motion was actually a motion in limine that did not comply with EDCR 2.47; and (3) the district court abused

its discretion in striking Flannery's rebuttal expert report and excluding Dr. Mercier from testifying as a rebuttal witness. We disagree.<sup>4</sup>

*The district court properly granted summary judgment in favor of Evolve due to Flannery's failure to disclose a liability expert*

Flannery argues that the district court erred in granting summary judgment in favor of Evolve because there was ample circumstantial evidence to bring the case before a jury. Flannery argues and has maintained throughout the litigation that no expert testimony was required in this case, and the mere evidence of the skateboard's malfunction was sufficient to prove that it was defective. Evolve counters that Flannery cannot establish that the skateboard was defective, either in its design or as manufactured, without expert testimony, and thus Flannery's claims fail as a matter of law. Evolve also responds that the "malfunction theory," which allows a party claiming a manufacturing defect to prove the existence of a defect without expert testimony, does not apply to Flannery's claims because this theory is a narrow exception and only applies where other identifiable causes do not exist.

This court reviews a district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no genuine [dispute] as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotations marks omitted). When

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<sup>4</sup>We need not address Flannery's argument related to the meet and confer requirements under EDCR 2.47 as there is no mandatory language in the local rule that prohibits the district court from hearing a motion in limine where no meet and confer has occurred, even though the parties are required to conduct a meet and confer in accordance with EDCR 2.47(b).

reviewing a motion for summary judgment, “the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” *Id.*

We first address whether expert testimony was required. Normally, the plaintiff in a products liability case holds the burden of production to show that the product was defective, that the defect existed at the time the product left the manufacturer, and that the product caused the plaintiff’s injury. *See Ford Motor Co. v. Trejo*, 133 Nev. 520, 525, 402 P.3d 649, 653 (2017); *see also Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192, 209 P.3d 271, 275 (2009) (noting that it is the plaintiff’s responsibility to carry the initial burden to prove causation). The parties here focus on an exception to the general rule and cite *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984), when discussing whether expert testimony is required to prove a defect existed in this case.

*Stackiewicz* involved a steering wheel lock up in a two-month-old car. *Id.* at 446, 686 P.2d at 296. The Nevada Supreme Court held that the evidence of a steering malfunction was sufficient circumstantial proof of a defect, without direct proof of the mechanical cause of the malfunction, and this was enough to sustain the jury’s verdict. *Id.* at 449-51, 686 P.2d at 928-29 (recognizing that Nevada courts “have held that proof of an unexpected, dangerous malfunction may suffice to establish a prima facie case for the plaintiff of the existence of a product defect”). The supreme court reached that conclusion based, in part, on testimony from three percipient witnesses who were riding in the car and described the circumstances leading up to the accident. *Id.* at 451, 686 P.2d at 930. All three witnesses testified that the steering wheel froze and that, when they lost control of the vehicle, all four tires were still on the pavement. *Id.* In

addition, the court relied on testimony from the plaintiff's expert witness who opined that the locking of the steering wheel caused the vehicle to go off the road, even though he could not identify the specific defect that caused the malfunction. *Id.* As such, the supreme court found "sufficient circumstantial evidence that a defect caused the accident in question" to permit the jury's verdict for the plaintiff. *Id.* at 452, 686 P.2d at 930.

The supreme court's holding in *Stackiewicz* was reiterated in *Krause Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566, 572 (2001). In *Krause*, a ladder collapsed as the injured party stood on it, and the court concluded that because the ladder clearly did not perform in a reasonable manner as it was intended to function, the ladder was defective. *Id.* The supreme court noted that "[t]he average juror is quite familiar with a ladder's functions, and does not require expert testimony to know that a ladder should not collapse when a person stands on it." *Id.* The supreme court explained that expert testimony is not necessary to establish the existence of a manufacturing defect when there is evidence of an "unexpected, dangerous malfunction" that gives rise to an inference of a manufacturing defect. *Id.* at 937-38, 34 P.3d at 571-72. In these instances, "circumstantial evidence of the malfunction can prove a manufacturing defect." *Id.* at 938, 34 P.3d at 572.

Flannery's theory of the skateboard's malfunction does not fit within the holdings enunciated in *Stackiewicz* and *Krause*. Unlike the ladder in *Krause*, the unexpected and dangerous malfunction of the skateboard's wheels locking requires expert testimony because an average juror would not know or understand how an electronic skateboard's components work nor how the skateboard's Bluetooth functions could interfere with other Bluetooth devices to cause a malfunction such as a



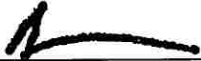
wheel lock up. Further, in sharp contrast to the ample circumstantial evidence available in *Stackiewicz*, Flannery's limited circumstantial evidence—that the wheels suddenly locked—though possibly persuasive in showing that the board may have been defective, does not alone establish that Bluetooth interference was the cause of the wheel lock up. Flannery's circumstantial evidence also does not negate Evolve's alternative cause of the accident—that the sudden deceleration of the skateboard's wheels was caused by an impediment in the roadway. In opposing Evolve's motion for summary judgment, Flannery offered no factual evidence regarding the condition of the roadway at the time of the accident—such as the lack of an impediment or crack in the surface of the road—to support that an external condition was not the cause of the malfunction. Thus, this case involves more complex theories of malfunction that require expert testimony rather than an obvious defect such as the steering wheel of a new car locking or a ladder suddenly collapsing. We also note that initially Flannery acknowledged during his deposition that an expert would be needed to establish how the skateboard's operation would be affected by Bluetooth interference as he believed that this was the defect at issue.


The district court correctly concluded that “[w]ithout competent expert testimony, Plaintiff cannot establish that the skateboard was defective in either its design or manufacture or that any alleged defective condition caused his damages.” *See generally Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1423 (9th Cir. 1998) (holding that when the subject matter of inquiry is one involving special skills and training beyond the knowledge of the ordinary layperson, expert testimony is required). Therefore, the district court properly granted summary judgment in favor of Evolve.


Flannery also argues that the district court abused its discretion when it struck the entirety of Dr. Mercier's rebuttal report and prohibited him from testifying as a rebuttal witness. However, we conclude that even if the district court did abuse its discretion in granting the motion to strike, any alleged error was harmless. *Cf.* NRC 61. Flannery's case could not survive summary judgment because he failed to disclose an initial expert in a case where a liability expert was needed to prove his theory of malfunction, nor did he provide the requisite circumstantial proof to support a products liability claim without such testimony.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Susan Johnson, District Judge  
John Walter Boyer, Settlement Judge  
Hatfield & Associates, Ltd.  
Hutchison & Steffen, LLC/Las Vegas  
Quintairos Prieto Wood & Boyer/Scottsdale  
Eighth District Court Clerk

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<sup>5</sup>Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.