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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-992**

Dennis A. Thom,
Appellant,

vs.

Apple Valley Ford, Inc.,
Respondent.

**Filed January 12, 2010
Affirmed
Stoneburner, Judge**

Dakota County District Court
File Nos. 19AVCV09675; 19AVCO082315

Dennis A. Thom, Prior Lake, Minnesota (pro se appellant)

Bradley D. Fisher, Lucas C. Laakso, Foley & Mansfield, P.L.L.P., Minneapolis,
Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's ruling that he failed to sustain his burden of proof that respondent is liable for damages for breach of contract or negligence. We affirm.

FACTS

For months prior to March 27, 2007, appellant Dennis Thom had noticed a noise in his 1999 GMC Yukon truck, and he had seen an oil-like substance on the garage floor that had apparently leaked from the truck. On March 27, 2007, he took the truck to respondent Apple Valley Ford (Ford). Thom had a coupon for a \$31 oil change. According to Thom, he told a service mechanic at Ford that there was an oil-type leak on his garage floor and he asked that Ford check all fluid levels when they changed the oil and oil filter. He was told that a fluid-level check is part of the normal inspection. The service mechanic noted on the check-list used during service that the automatic transmission fluids were “ok—little high.”

After approximately three months and an additional 3,000 miles of driving, Thom experienced problems with the truck. He looked underneath the truck and discovered for the first time that this truck had a separate four-wheel-drive transfer fluid case (transfer case). Until then, Thom thought that the four-wheel drive transfer fluid came from the same place as the automatic transmission fluid. Thom also noted that the bolt on the transfer case did not appear to have been recently loosened, leading him to conclude that Ford had not checked the level of fluid in the transfer case in March 2007. Thom took his truck to another mechanic who told him that his transmission failed due to lack of fluid in the transfer case. Thom sued Ford in conciliation court for breach of contract and negligence, seeking damages for repair of the transmission, storage costs, and “inconvenience.” His claim was denied, and Thom removed the case to district court for a de novo court trial.

At trial, Thom asserted that Ford breached a contract to check all fluid levels by not checking the fluids in the transfer case and was negligent in servicing his truck by using a form for the fluid checks that depicts a car rather than a form that depicts a truck with a transfer case. Ford presented evidence that Thom requested an oil change for which he had a coupon, and that Thom specifically asked for a check of transmission fluids. Ford's standard oil change includes a "multi-point inspection" that includes inspection of all "top-side" fluid levels, including the automatic transmission fluids. Accordingly, Ford told Thom the transmission fluid would be checked. The form depicting the car is used for the multi-point inspection done in the Ford "Quick Lane." Ford's witness testified that checking the transfer-case fluid is not part of the "Quick Lane" oil change or multi-point inspection and was not specifically requested by Thom. A transfer-case inspection is done in the main shop (due to difficulty in accessing the transfer case) and is done by a certified technician. Ford's witness also testified that there would be no way of knowing when Thom's transfer case lost fluid.

The district court sustained Ford's hearsay objection to a letter Thom attempted to introduce stating that a leak of transfer-case fluid caused the transmission failure. The district court held that Thom failed to establish that Ford contracted to check the fluid in the transfer case and failed to establish negligence by Ford that caused the claimed damages. This appeal followed.

DECISION

"[T]he existence and terms of a contract are questions for the fact finder."

Morrisette v. Harrison Int'l Corp., 486 N.W.2d 424, 427 (Minn. 1992). Likewise, issues

of negligence and causation are generally factual determinations to be decided by the fact finder. *See Poplinski v. Gislason*, 397 N.W.2d 412, 416 (Minn. App. 1986) (reversing summary judgment because the issues of negligence and proximate cause were factual determinations to be decided by a jury), *review denied* (Minn. Feb. 18, 1987).

“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. “It is not the province of this court to reconcile conflicting evidence. On appeal, a [district] court’s findings of fact are given great deference, and shall not be set aside unless clearly erroneous....If there is reasonable evidence to support the [district] court’s findings of fact, a reviewing court should not disturb those findings.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Here, the district court found that Thom failed to prove that checking the transfer case-fluid level was part of the inspection that Thom requested and Ford agreed to perform. The district court also found that Thom failed to prove that Ford was negligent or that any act or omission of Ford actually caused his damages. The district court’s findings are supported by the record. The district court apparently credited Ford’s witness that Thom specifically asked Ford to check the “transmission fluid” and Thom concedes that the transmission fluid was checked. Thom testified that after the inspection he saw that “ATF” (automatic transmission fluid) was checked off on the form. The district court’s finding that Ford did not contract with Thom to check fluid in the transfer

case is not clearly erroneous and the court did not err by ruling in favor of Ford on Thom's breach of contract claim.

The district court did not discuss Thom's claim that Ford negligently used the wrong form for the multi-point inspection of his truck. But the district court held that Thom's negligence claim failed because Thom did not prove causation.

Thom challenges the district court's denial of his offer of a mechanic's letter as evidence of causation. Thom did not challenge the district court's evidentiary ruling at trial or in a posttrial motion, and generally this court will not consider matters not raised in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued to and considered by the district court). But even if Thom did not waive this issue on appeal, the district court did not err in ruling that the letter proffered by Thom was inadmissible hearsay. Additionally, the letter offered describes a repair made to Thom's transmission a full year-and-a-half after Ford serviced the truck and does not establish that Ford's failure to inspect the transfer case fluid ultimately caused the failure of the transmission. The district court did not abuse its discretion by denying admission of the letter, and the finding that Thom did not prove causation is supported by the record.

Thom's assertion on appeal that it was inappropriate for the conciliation court to allow Ford to be represented by counsel is not relevant to his appeal from the decision in the de novo court trial, but we note that representation by counsel in conciliation court is permitted by Minn. R. Gen. Pract. 512(c), which provides that parties "may be represented by a lawyer . . . [who] may participate in the trial to the extent and in the

manner that the judge, in the judge's discretion, deems helpful." Thom's assertion that Ford failed to answer in a timely manner is unclear and insufficiently briefed to permit review. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).

Affirmed.