2016 IL App (3d) 150337-U

Order filed April 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

LEONARD BASAK,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-15-0337
	)	Circuit No. 12-L-454
	)	
JAMES HURLEY III, JAMES HURLEY, JR.,	)	
and VIVIAN HURLEY,	)	Honorable
	)	Theodore J. Jarz,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted summary judgment upon negligent entrustment and agency claims brought against the parents of a 17-year-old driver involved in a rear end collision.

¶ 2 A 17-year-old driver, James Hurley III, was operating a vehicle owned by his father when the young driver caused a rear end collision with plaintiff's minivan. Plaintiff filed suit against the driver for his negligent driving and against James Hurley III's parents for the negligent entrustment of the vehicle to their son. The trial court granted summary judgment in favor of the

driver's parents with respect to the counts alleging negligent entrustment and agency. Plaintiff appeals. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 15, 2011, Leonard Basak (plaintiff) was driving his blue Kia minivan northbound on LaGrange Road, near the intersection of La Porte Road, in Frankfort, Illinois. At the time, 17-year-old James Hurley III (James), was driving his father's Pontiac Grand Prix, toward the same intersection and struck the rear end of plaintiff's minivan. When the police arrived at the scene of the accident, they directed both drivers to move the cars to a nearby parking lot. James' parents, James Hurley, Jr. (Mr. Hurley) and Vivian Hurley (Mrs. Hurley), arrived at the scene shortly after the collision.

¶ 5 According to deposition testimony, Mr. Hurley spoke with the investigating officer at the scene and asked if his automobile was safe to drive home. The officer told James and Mr. Hurley that it would be safe as long as the driver drove carefully.

¶ 6 Following the conclusion of the traffic investigation by police, James began driving home as his parents followed behind in another vehicle. However, as James was slowly driving the Grand Prix in the right lane on La Porte Road, the hood flew open. According to James, he reacted by braking slowly and turning the Grand Prix onto a residential street, which was located on the right side of La Porte Road. James did not see plaintiff on the roadway and does not believe contact occurred with plaintiff's automobile. Mr. and Mrs. Hurley gave similar accounts during their respective depositions.

¶ 7 According to plaintiff, after the first collision, plaintiff was also traveling on La Porte Road when he noticed James driving the damaged Grand Prix in the left lane just ahead of plaintiff's vehicle. Plaintiff witnessed the hood of the Grand Prix open and was forced to

quickly slam on his brakes. Plaintiff explained his abrupt braking was necessary to avoid colliding with the Grand Prix when James made a sudden right turn after the hood popped open. This abrupt maneuver by plaintiff allegedly aggravated his previous injuries sustained during the earlier collision.

¶ 8 Plaintiff initiated a civil lawsuit on his own behalf on June 15, 2012, naming James and both parents as defendants. The second amended complaint in this case included counts I and II which were directed solely against James for his negligent operation of the Grand Prix on May 15, 2011. However, counts III and VI of the second amended complaint alleged Mr. and Mrs. Hurley negligently entrusted their son with the automobile because both parents were aware that their son had demonstrated poor judgment in the past. Specifically, plaintiff alleged both parents had prior knowledge their son pled guilty to an alcohol possession and consumption citation from the Village of Orland Park; their son pled guilty to a moving violation; and knew, or should have known, their son had been disciplined at high school, which demonstrated a lack of maturity.

¶ 9 In counts IV and VII of the second amended complaint, plaintiff alleged negligent entrustment by James' parents later on May 15, 2011, by breaching their duty to use reasonable care when entrusting the damaged Grand Prix to James for the purpose of driving the vehicle home from the scene of the first accident. The second amended complaint alleged the parents were negligent for entrusting the vehicle to James without calling a tow truck or first securing the damaged engine hood. Finally, in count V of the second amended complaint, plaintiff alleges James was acting as an agent for his father, by removing "the dangerously defective vehicle which suffered mechanical failure," that later forced plaintiff to stop "suddenly and violently" to

avoid a second collision with James. Plaintiff claims, as a direct and proximate result of the Hurley's negligent entrustment, he sustained permanent and temporary injuries.

¶ 10 On March 1, 2013, defendants filed a partial motion for summary judgment on counts alleging agency and negligent entrustment of the Grand Prix to their minor son, James. In support of the motion for partial summary judgment, the defense focused on plaintiff's deposition testimony that admitted when plaintiff slammed on his brakes to avoid a second impact after the hood of James' vehicle opened, the harm plaintiff suffered was "not shocking from a physical shocking standpoint, but shocking from a mental standpoint[.]" According to his deposition, plaintiff admitted he was shaken but did not recall any immediate pain after the second incident.

¶ 11 Defendants also relied on their undisputed deposition testimony that the police officer told the parents a tow truck would not be necessary. The officer advised the parents that the car was drivable so long as the driver drove under the speed limit in the right lane with his hazard lights blinking, and with another driver following him.

¶ 12 According to James' deposition, when the hood of his car flew up, he was in the right lane, and he reacted by slowly tapping the brakes and pulling onto a residential street. James did not see plaintiff's vehicle on the roadway near the location where the hood became disengaged.

¶ 13 Plaintiff's revised response to defendants' motion for partial summary judgment focused on the undisputed facts that James received a municipal citation for underage drinking and alcohol possession on March 20, 2009, and a moving violation traffic ticket on November 14, 2009, resulting in a requirement for James to attend a traffic safety school as a condition of supervision. It was also undisputed that James had a previous car accident on February 21, 2010.

¶ 14 Plaintiff also relied on portions of an affidavit of Dr. Blair Rhode, a board certified orthopedic surgeon, who performed the surgical repair on plaintiff's left shoulder. Dr. Rhode opined that plaintiff received serious neck and shoulder injuries from the first accident, which were aggravated by the second incident. In addition, plaintiff presented the affidavit of Dr. Paul Bertrand[1], a neurologist, which states, with reasonable medical certainty, that Dr. Bertrand believed the second incident likely aggravated the injuries plaintiff sustained in the first rear end collision on May 15, 2011.

¶ 15 On December 30, 2014, the trial court conducted a hearing on defendants' partial motion for summary judgment. The court found Mrs. Hurley did not have an ownership interest in the Grand Prix and granted partial summary judgment in favor of Mrs. Hurley on this basis.

¶ 16 In addition, based on James' undisputed prior record, the trial court stated "I don't think that this child's past transgressions are sufficient to put a duty on the parents to prevent his operating a motor vehicle[.]" The trial court also found that the evidence presented was not sufficient to establish causation of plaintiff's purported injuries resulting from the second alleged incident. On December 30, 2014, the court found in favor of the defendants and entered summary judgment on counts III-VII of plaintiff's seconded amended complaint.

¶ 17 Plaintiff filed a motion for reconsideration on January 20, 2015, which the trial court denied on April 17, 2015. Plaintiff filed a timely notice of appeal on May 15, 2015.

¶ 18 ANALYSIS

¶ 19 On appeal, plaintiff contends that there is a genuine issue of material fact concerning whether Mr. and Mrs. Hurley negligently entrusted a car to James based on James' prior driving

[1]The referenced affidavit of Dr. Paul Bertrand was discussed in plaintiff's revised response to defendants' motion for partial summary judgment and was included as an exhibit to the original filing. However, on appeal, that exhibit is not included in the record. Thus, we rely only on the representations made by plaintiff in his revised response.

record and lack of maturity. In addition, plaintiff asserts there is a question of fact as to whether James was an agent of Mr. Hurley at the time of the second incident.

¶ 20 In contrast, defendants assert that James' undisputed traffic record includes only one moving violation for disobeying a stop sign on November 14, 2009. Defendants also argue the counts based on negligent entrustment related to the second incident fail because plaintiff admits James did not collide with plaintiff's vehicle during the alleged second incident. Finally, defendants argue the facts alleged in the pleadings do not support the claim that James was acting as an agent for his father at the time of the second incident.

¶ 21 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill. 2d 366, 376 (2005) (citing 735 ILCS 5/2-1005(c) (West 2000); *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002)); *Smith v. Allstate Insurance Co.*, 312 Ill. App. 3d 246, 251 (1999). This court reviews *de novo* the trial court's order granting summary judgment. *Lake v. Related Management Co., L.P.*, 403 Ill. App. 3d 409, 411 (2010) (citing *Weather – Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009)). When reviewing a grant of summary judgment, this court should construe the pleadings, depositions, admissions, and affidavits in the light most favorable to the plaintiff and against the defendants. *Turner v. Northern Illinois Gas Co.*, 401 Ill. App. 3d 698, 705 (2010) (citing *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)). In response to a motion for summary judgment, a plaintiff is not required to establish his case as he would at trial, rather the plaintiff need only present some factual basis that would arguably entitle him to judgment.

Wortel v. Somerset Industries, Inc., 331 Ill. App. 3d 895, 899 (2002) (citing *West v. Deere & Co.*, 145 Ill. 2d 177, 182 (1991)).

¶ 22 To state a cause of action for negligent entrustment of an automobile, the plaintiff must plead that the person who negligently entrusted a vehicle to another had a superior right of control of the entrusted vehicle. *Evans v. Shannon*, 201 Ill. 2d 424, 434 (2002) (citing *Taitt v. Robinson*, 266 Ill. App. 3d 130, 132 (1994)). The case law requires that the person with the superior right of control must entrust the vehicle to another who is incompetent or an unfit driver and the incompetence of that other person proximately caused plaintiff's injury. *Id.* Proximate cause consists of "two distinct elements: cause in fact and legal cause." *Id.* (citing *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999)).

¶ 23 Guided by these two considerations, we agree with the trial court's finding that Mrs. Hurley did not have any ownership rights, or superior right of control, in the Grand Prix. Thus, any claim of negligent entrustment against Mrs. Hurley fails. We conclude the trial court properly granted partial summary judgment with respect to counts VI and VII, which pertained to Mrs. Hurley alone.

¶ 24 Next, we must consider counts III and IV alleging negligent entrustment by Mr. Hurley, the registered owner of the vehicle. The case law provides, when considering a negligent entrustment claim, the driver's driving record is highly relevant. See *Lockett v. Bi-State Transit Authority*, 94 Ill. 2d 66, 74 (1983). For this reason, plaintiff must provide proof that the entrusting defendant knew or should have known that the entrusted driver was "incompetent, inexperienced or reckless." *Lulay v. Parvin*, 359 Ill. App. 3d 653, 658 (2005). In *Eyrich*, this court reasoned that a motorcycle seller's possible knowledge of a buyer's speeding and tinted window violations did not impact the negligent entrustment analysis because neither of those

violations involved vehicular accidents and would have been insufficient to show that the seller knew or should have known that the buyer would operate the motorcycle in a negligent manner. *Eyrich v. Estate of Waldemar*, 327 Ill. App. 3d 1095, 1099 (2002).

¶ 25 In the case at bar, it is undisputed that Mr. Hurley was aware or should have been aware that his son had received one moving violation ticket for disobeying a stop sign on November 14, 2009, and was aware his son received another ticket for underage possession and consumption of alcohol. The alcohol infraction, and James' other alleged transgressions, are unrelated to the *operation* of a motor vehicle and we find they are not relevant. However, we agree it was undisputed that James received one traffic ticket, issued approximately eighteen months before May 15, 2011, and completed a traffic safety course as a result of his traffic infraction. Guided by the rationale in *Lulay* and *Eyrich*, we conclude the undisputed facts do not support the allegation that James was an incompetent driver. Therefore, the trial court properly granted summary judgment in favor of Mr. Hurley on counts III and IV.

¶ 26 The final count we must consider on appeal is the allegation of agency as set out in count V of the second amended complaint. Parents can be held liable under agency theory for their child's negligent driving if, at the time of the accident, the child was on a family errand. *Stellmach v. Olson*, 242 Ill. App. 3d 61, 64 (1993). As noted by the trial court, it is undisputed, even by plaintiff, that there was no physical contact between the two vehicles in the second alleged incident. In other words, after the hood on the Grand Prix popped open, James successfully removed his car from the roadway without incident. This is not negligent driving and, therefore, it is irrelevant whether James was engaged in a family errand. Consequently, we conclude the trial court properly granted partial summary judgment on count V directed against Mr. Hurley.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.