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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-922

Filed: 15 May 2018

Forsyth County, No. 16 CVS 342

VIRGINIA COLLINS WHITMAN, Plaintiff,

v.

JASON PATRICK STIMPSON and JEAN MILLER KILBY, Defendants.

Appeal by plaintiff from order entered 30 September 2016 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 7 February 2018.

Morrow Porter Vermitsky & Taylor, PLLC, by John N. Taylor, Jr., Benjamin D. Porter, and John C. Vermitsky, for plaintiff-appellant.

Haywood, Denny & Miller, LLP, by John R. Kincaid, for defendant-appellee Kilby.

No brief filed for defendant-appellee Stimpson.

ELMORE, Judge.

Daniel Whitman ("plaintiff"), son and administrator of the estate of Virginia Collins Whitman ("Whitman"), appeals from an order granting Jean Miller Kilby's

("defendant") motion for summary judgment and dismissing plaintiff's negligent entrustment claim with prejudice.

Because there are no genuine issues of material fact with respect to plaintiff's claim against defendant for negligent entrustment, we affirm the order of the trial court.

I.

This appeal arises out of a collision between a farm tractor owned by defendant and a motor vehicle being driven by Whitman.

As of March 2015, Jason Patrick Stimpson ("Stimpson") had been employed by defendant for approximately twelve to fourteen years and was working as the manager of defendant's farm, located in Yadkin County. Stimpson's job duties were limited to management of farm operations, which included maintaining and operating defendant's tractors and other farm equipment. Prior to the collision, Stimpson's driver's license had been permanently revoked for multiple driving while impaired (DWI) convictions.

On the night of 21 March 2015, Stimpson went to defendant's farm with his girlfriend to check on the cows. As the two prepared to leave the farm, they discovered that their vehicle was low on transmission fluid and would not move. Stimpson, who had been drinking alcohol throughout the day, decided to drive one of defendant's

tractors home from the farm. Stimpson did not seek defendant's permission to remove the tractor from her farm.

At approximately 9:00 p.m., Stimpson was driving defendant's tractor on a rural highway in Forsyth County. The highway was dark and the tractor had no operable rear lights. Additionally, Stimpson was intoxicated and traveling at approximately five miles per hour in a fifty-five mile per hour speed zone. As Whitman's vehicle came upon the tractor from behind, Whitman was unable to see Stimpson in time to avoid a collision. Whitman was severely injured in the accident, while Stimpson pled guilty to a felony charge of habitual impaired driving.

On 15 January 2016, Whitman filed a complaint in Forsyth County Superior Court in which she asserted claims for negligence in the operation of a tractor against Stimpson as well as negligent entrustment of an automobile against defendant. As to the latter claim, Whitman asserted that defendant "knew or reasonably should have known that Stimpson was an incompetent or reckless driver, likely to cause injury, as Stimpson has at least three prior convictions for [DWI] in the prior ten years, was driving while impaired when the collision occurred and was driving while his license was revoked."

On 16 August 2016, defendant filed a motion for summary judgment in which she asserted that Stimpson did not have defendant's permission to use her tractor at the time of the collision, and that defendant did not entrust her tractor to Stimpson.

The trial court granted the motion and dismissed Whitman's negligent entrustment claim with prejudice on 30 September 2016.

Approximately fourteen months after the accident, Whitman died as a result of her injuries. The complaint was amended on 31 January 2017 to substitute Whitman's son and the administrator of her estate, Daniel Whitman, as plaintiff, and to assert an additional claim against Stimpson for wrongful death.

On 24 May 2017, the trial court entered default judgment against Stimpson as to plaintiff's claims for negligence in the operation of a tractor as well as wrongful death. Plaintiff entered timely notice of appeal from the summary judgment order entered as to his negligent entrustment claim against defendant.

II.

On appeal, plaintiff contends the trial court erred in granting defendant's motion for summary judgment based on the fact that defendant did not know Stimpson was operating her tractor at the precise time and location of the collision. According to plaintiff, the proper inquiry is whether defendant voluntarily gave Stimpson control over the use and care of the tractor when Stimpson first acquired access and authority to operate it. Plaintiff argues that when the proper inquiry is applied, there are genuine issues of material fact as to whether defendant negligently entrusted her tractor to Stimpson.

Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Summary judgment is appropriate when the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). The party moving for summary judgment bears the initial burden of proof, which may be met "(1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004).

Upon a forecast of evidence tending to support the motion for summary judgment, the burden shifts to the non-moving party to likewise "produce a forecast of evidence demonstrating that he will be able to make out at least a prima facie case at trial." *Collingwood v. Gen. Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 276 S.E.2d 425, 427 (1989) (citation omitted). In evaluating a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party, and all inferences of fact must be drawn in his favor. *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 329, 612 S.E.2d 664, 668 (2005).

Negligent Entrustment

In her motion for summary judgment, defendant argued that plaintiff's negligent entrustment claim should be dismissed because defendant did not know that Stimpson was operating her tractor on the night of 21 March 2015 and never gave Stimpson permission to operate her tractor on a public highway; thus, she did not entrust her tractor to Stimpson. In support of the motion, defendant submitted (1) her own affidavit; (2) Stimpson's answer to the complaint, in which he stated that he was entrusted with the tractor "for farm related purposes" only; and (3) Stimpson's deposition transcript. In opposing the motion, plaintiff likewise relied on Stimpson's answer and deposition transcript in arguing that Stimpson had authorization to use the tractor at the time it was initially entrusted to him.

> Negligent entrustment is established when the owner of an automobile entrusts its operation to a person whom he [or she] knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, who is likely to cause injury to others in its use. Based on his [or her] own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence.

Tart v. Martin, 353 N.C. 252, 254, 540 S.E.2d 332, 334 (2000) (citations, quotation marks, and brackets omitted). The pattern jury instructions for negligent entrustment provide the five essential elements of that claim: (1) that defendant owned the motor vehicle operated by Stimpson; (2) that defendant voluntarily gave possession of her motor vehicle to Stimpson; (3) that Stimpson was an incompetent,

habitually careless, or reckless driver and likely to cause injury to others in operating a motor vehicle; (4) that defendant was negligent in giving possession of her motor vehicle to Stimpson; and (5) Stimpson's incompetent, habitually careless, or reckless driving was a proximate cause of plaintiff's injury. "Proximate cause is a cause which in a natural and continuous sequence produces a person's injury, and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result." N.C.P.I.—Civil 102.68.

In his brief, plaintiff asserts that "[i]n determining whether [defendant] entrusted the tractor to Stimpson for purposes of the negligent entrustment claim, it is necessary to establish the construction and scope of the term 'entrustment' required to invoke the claim." According to plaintiff, "North Carolina cases do not appear to have expressly defined what is required for 'entrustment' for purposes of a negligent entrustment claim[.]" He goes on to cite case law from other jurisdictions, including the supreme courts of Michigan, Wyoming, and Colorado, in support of his proposition that "it is not a defense that the owner did not give specific permission for the use of the vehicle at the precise time and place where the collision occurs." We find plaintiff's argument to be unpersuasive.

In her affidavit, defendant did not merely assert, as plaintiff suggests, that she did not know Stimpson was operating her tractor at the precise time and location of the collision; rather, she asserted that Stimpson "was not engaged in any business

related to the farm or any of [defendant's] other business[,] and he was in no way, shape or form acting as [her] agent." On appeal, defendant again emphasizes that "there is no evidence that Stimpson had permission to use [defendant's] farm tractor for any purpose other than farming, much less driving at night on the highway for over an hour for a personal, non-farm related reason." We agree with defendant.

Our review of the common law tort of negligent entrustment as well as the cases cited by plaintiff in his brief lead us to conclude that the gravamen of such a claim is that "[s]everal thousand pounds of steel are being moved upon the public highway because the owner [negligently] consented thereto." *Cowan v. Strecker*, 394 Mich. 110, 115, 229 N.W.2d 302, 305 (1975). However, "[i]n this jurisdiction, to warrant a finding that negligence, not amounting to a wilful or wanton wrong, was a proximate cause of an injury, it must appear that the tortfeasor should have reasonably foreseen that injurious consequences were likely to follow from his negligent conduct." *Sutton v. Duke*, 277 N.C. 94, 107, 176 S.E.2d 161, 168–69 (1970). The facts of the instant case—specifically, that Stimpson had permission to use defendant's tractor on her private farm—are readily distinguishable.

As of the collision date, Stimpson had worked on defendant's farm for twelve to fourteen years. In his deposition, Stimpson stated he had never taken a tractor or any other equipment off of the farm property for his own personal use before this incident; that he knew he did not have permission to use the tractor for the purpose

of driving on a public highway; and that he did not ask for defendant's permission to use the tractor for that purpose or attempt to inform her about his plan in any way. Further, while plaintiff notes that Stimpson had three previous DWI convictions and that his license was revoked at the time of the incident—suggesting that defendant knew or should have known him to be a reckless driver—a driver's license is not required to operate a farm tractor. N.C. Gen. Stat. § 20-8 (2015). This set of facts simply does not support a conclusion that Stimpson was so likely to cause injury to others that consenting to his use of a tractor for farm-related purposes rose to the level of negligent entrustment.

III.

Based on the foregoing analysis, we conclude that Stimpson's actions were entirely unforeseeable and outside the scope of defendant's consent to Stimpson's use of her tractor. Accordingly, we affirm the order of the trial court granting defendant's motion for summary judgment and dismissing plaintiff's negligent entrustment claim with prejudice.

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).