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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001089-MR

CRAIG WEST — APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE ANDREW SELF, JUDGE
ACTION NO. 05-CI-00066

LEVEE LIFT, INC. AND
JANET LEIGH HANCOCK GORDON — APPELLEES

AND
NO. 2008-CA-001095-MR

JAMES BUTLER — APPELLANT

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE ANDREW SELF, JUDGE
ACTION NO. 05-CI-00066

LEVEE LIFT, INC. AND
JANET LEIGH HANCOCK GORDON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

THOMPSON, JUDGE: This action arises from an automobile accident in which James Butler and Craig West were injured. Christopher Gordon, the driver of the automobile that struck West's vehicle, was an uninsured, unlicensed driver who was subsequently convicted of operating a motor vehicle while under the influence of alcohol. Following a three-day trial, the trial court directed a verdict on liability against Christopher Gordon. However, the court concluded that because Christopher Gordon and his wife, Janet Gordon, jointly owned the vehicle involved, as a matter of law, Janet could not be liable for negligent entrustment and directed a verdict in her favor. The case was submitted to the jury as to the liability of Christopher's employer, Levee Lift, Inc. Ultimately, the jury found no liability against Levee Lift but awarded to Butler $748,979.15 and West $1,051,685.08 against Gordon.

Butler and West filed a timely motion for judgment notwithstanding the verdict or, alternatively, for a new trial. With regard to Levee Lift, the trial court denied the motion but, in regard to Janet, granted the motion. In doing so, it stated that pursuant to KRS 186.620, Janet had a statutory duty not to knowingly

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

permit the vehicle which she co-owned with Christopher to be driven by an unlicensed driver. Neither Christopher nor Janet has appealed.

The issues raised by Butler and West concern the liability of Christopher's employer, Levee Lift, Inc., and whether the court should have entered a judgment against Janet without remanding for a new trial. Because we conclude that there was no evidence upon which a reasonable jury could find Levee Lift liable for the appellants' injuries and that the remand for a new trial against Janet was proper, we affirm.

The events leading to the accident began on July 30, 2004. On that date, Christopher reported to his employment as a service manager at Levee Lift, Inc., in Hopkinsville, where he and parts manager, Jim Marshall, were co-managers under the supervision of Gerald Thomas Breuklander.

On July 30, 2004, neither Marshall nor Breuklander was in the Hopkinsville office, leaving Christopher as the sole manager. Christopher and a co-worker, David von Fange, spent the afternoon on the date of the accident rewiring the brake lights of von Fange's trailer. At approximately 4:00 p.m., von Fange left the premises. Fifteen minutes later, Christopher left for home to prepare for a weekend trip with Janet to Cullman County, Alabama. After stopping for gas, Christopher arrived home at approximately 5:00 p.m. and, at 6:00 p.m., departed on the trip. Within minutes after leaving home, Christopher rear-ended the automobile operated by West.

Christopher admitted that he began drinking vodka while at work on the afternoon of July 30, 2004, but denied that he was intoxicated when he left the work premises. During his commute home from work, he consumed between eight and twelve shots of vodka. Von Fange testified that he did not observe any signs that Christopher was intoxicated. Additionally, Breuklander spoke with Christopher several times and at no time detected slurred speech or had reason to believe Christopher was intoxicated. However, Marshall spoke to Christopher on the telephone at noon on July 30, 2004, and noticed that Christopher's speech was slurred. Additionally, another employee smelled alcohol on Christopher's breath.

Evidence was produced that Christopher had a history of drinking and it was known to Levee Lift that he did not possess a valid driver's license. He had been previously admonished not to drive to and from work; Levee Lift, however, paid Christopher $250 per month for travel expenses. Two weeks prior to the accident, Christopher had been placed on probation for consuming alcohol during work hours.

Notably, the facts are undisputed that at the time of the accident, Christopher was not acting on behalf of Levee Lift; two hours prior to the accident had left his employment for the day; and he was operating an automobile owned jointly by him and Janet.

We first address the claim asserted against Levee Lift.

Butler and West allege that the trial court erred when it failed to direct a verdict against Levee Lift and when it failed to instruct the jury on the tort of negligent retention. The court instructed the jury as follows:

> It was the duty of Levee Lift, Inc. to exercise ordinary care and control over its employee, Christopher Gordon, during work hours. Levee Lift, Inc. had the duty to take such action as a reasonable prudent employer, under the same or similar circumstances, would take to prevent an employee from causing unreasonable risk of harm to others.

Butler and West argue that the trial court should have given two separate instructions which they tendered as follows:

> It was the duty of Levee Lift to discharge Christopher Gordon, its employee, if any of the following factors were met:
> 1. That Levee Lift was aware, or should have been aware, that Christopher Gordon posed a threat, AND
> 2. That Levee Lift failed to take remedial measures to insure the safety of others.

Additionally, they contend that the jury should have been instructed:

> It was the duty of Levee Lift to exercise control over its employee, Christopher Gordon. The Employer has the duty to take such action as a reasonably prudent employer, under the same or similar circumstances, would take to prevent the employee from causing unreasonable risk of harm to others.

Butler and West contend that the instruction submitted to the jury was a general negligence instruction while the instructions rejected by the court encompassed the tort of negligent retention. Assuming their distinction between the tendered instructions and that submitted to the jury is accurate, we conclude that there was no evidence presented to warrant a negligent retention instruction to the jury.

Negligent retention was expressly adopted in this Commonwealth in *Oakley v. Flor-Shin, Inc*., 964 S.W.2d 438 (Ky.App. 1998).

Oakley presented the Court with facts that were tragic and novel. A K-Mart employee was sexually assaulted by an employee of Flor-Shin, a floor cleaning service that contracted with K-Mart. In a civil action against Flor-Shin, the assaulted employee asserted a claim for negligent hiring. The Court rejected Flor-Shin's contention that an employer is never liable for its lack of care in hiring or retaining an employee and held that liability can be imposed on an employer who knew or should have known that the employee was unfit for the job which he was employed and that his placement or retention in that job created an unreasonable risk of harm. *Id*. at 442. However, the Court observed that the tort is not without limitations and distinguished *Smith's Adm'r v. Corder*, 286 S.W.2d 512 (Ky. 1956), which denied a third-party claim against an employer for the criminal acts of an employee. In *Flor-Shin*, the Court pointed out that in *Corder,* our Supreme Court did not refuse to adopt the tort, but "declined to hold the employer liable for wrongful acts not committed on its property . . ." *Flor-Shin*, 964 S.W.2d at 441.

Subsequently, in *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840 (Ky. 2005), the Supreme Court explained the genesis of claims for negligent hiring, retention and supervision. Such claims arise because of the special relationship between the tort feasor and the defendant and are of two types: negligent failure to warn and negligent failure to control. *Id*. at

851. The Court emphasized that the negligent failure to control the person who caused the harm must be actual and, if exercised, would have meaningfully reduced the risk of harm that occurred. *Id*. The Court's review of the law is instructive:

> The Second Restatement provides that a special relationship exists between master and servant only if the servant is using an instrumentality of the employment relationship to cause harm, *i.e.,* either the master's chattel or premises entered by virtue of the employment relationship. Restatement (Second) of Torts § 317 (1965). The proposed Third Restatement puts this requirement more succinctly: "Special relationships giving rise to the duty provided in [§ 41(a)] include: ... (3) an employer with employees *when the employment facilitates the employee's causing harm to third parties.*" Restatement (Third) of Torts: Liability for Physical Harm § 41(b)(3) (Proposed Final Draft No. 1, 2005) (emphasis added). *See also Marusa v. Dist. of Columbia,* 484 F.2d 828, 831 (D.C.Cir.1973) (city had duty of reasonable care in training and supervision of police officer who caused off-duty injury with service revolver); *Ponticas v. K.M.S. Investments,* 331 N.W.2d 907, 911 (Minn.1983) (apartment owner had duty to exercise reasonable care in hiring employee who later used passkey issued by apartment owner to rape tenant); *McCrink v. City of New York,* 296 N.Y. 99, 71 N.E.2d 419, 422 (1947) (city had duty of reasonable care in retention of police officer who, while off-duty, shot and killed plaintiff's decedent with service revolver); *Hutchison ex rel. Hutchison v. Luddy,* 560 Pa. 51, 742 A.2d 1052, 1060 (1999) (evidence sufficient to support negligent supervision and retention claim against employer where employee used his status as such to enter minor's motel room where sexual abuse occurred). Again, the common thread through the above-described employment relationships is that the employer has a real means of control over the employee which, if exercised, would meaningfully reduce the risk of harm. *See Weaver v. African Methodist Episcopal Church, Inc.,* 54 S.W.3d 575, 582-83 (Mo.Ct.App.2001) ("Such

> limitations serve to restrict the master's liability for a servant's purely personal conduct which has no relationship to the servant's employment and the master's ability to control the servant's conduct or prevent harm.").

Id. at 852. The parameters set forth by this Court and our Supreme Court on a claim for negligent hiring, retention, or supervision dispel Butler and West's argument to sustain the cause of action; there must be a causal relationship between the employment and the harm.

It is unfathomable that Levee Lift could have prevented Christopher from driving his own vehicle to Alabama two hours after he departed Levee Lift's premises. Under the facts presented, there is absolutely no relationship between Christopher's employment and the accident. The imposition of liability would serve to render Levee Lift responsible for the personal conduct of Christopher, which it had neither the right nor opportunity to control. *Id*. at 851. Accordingly, Levee Lift was entitled to a directed verdict on the issue of liability; therefore, any error alleged by appellants was harmless.

Before addressing the issues in regard to Janet, we point out that Janet has not filed a brief with this Court. CR 76.12(8) provides the court with the following options: (1) accept appellant's statement of the facts and issues as correct; (2) reverse the judgment if appellant's brief appears reasonably to sustain such action; or (3) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case. Because we are affirming

the trial court's decision to grant a new trial in regard to Janet and the issues on appeal may again arise, we decline to invoke the provisions of the rule.

Butler and West contend that the trial court should have entered a judgment against Janet without remand for a new trial. We disagree.

Janet filed a *pro se* "reply" to the complaint and entered her appearance; however, she did not appear at a properly noticed deposition or for trial. Butler and West moved the trial court to strike her answer and, as a penalty for her failure to comply with discovery or appear for trial, to enter a default judgment.

We are not persuaded that the trial court was required to strike the answer and enter a default judgment. Although pursuant to CR 37.02(2) the trial court has such power, its decision must be affirmed if exercised within its discretion. *Greathouse v. Am. Nat'l Bank & Trust, Co.*, 796 S.W.2d 868 (Ky.App. 1990). Because a default judgment against the disobedient party has grave consequences, a default judgment should be resorted to only in the most extreme cases. *Polk v. Wimsatt,* 689 S.W.2d 363 (Ky.App. 1985). In this case, the court chose not to impose the sanction, a decision we will not disturb.

Butler and West assert that Janet is liable pursuant to the common law theory of negligent entrustment. One who negligently entrusts her vehicle to another whom she knows to be inexperienced, careless, or reckless, or given to excessive use of intoxicating liquor while driving, is liable for the natural and probable consequences of the entrustment. *Owensboro Undertaking & Livery*

Ass'n v. Henderson, 273 Ky. 112, 115 S.W.2d 563 (1938). The essence of the tort is that the owner of a vehicle has the authority either to permit or to deny the use of her vehicle.

Christopher and Janet owned the vehicle jointly. Absent some relationship such as parent and child in which authority can be exercised to prevent the use of the vehicle, as joint owners neither had superior rights to the vehicle to the exclusion of the other joint owner. Thus, as a matter of law, Janet could not have either given permission or denied the use of the vehicle that Christopher legally owned. Therefore, we conclude that the trial court properly held that the common law tort of negligent entrustment does not apply. *See Neale v. Wright*, 322 Md. 8, 585 A.2d 196 (1991).

Although the trial court rejected the theory of negligent entrustment, it found that the joint ownership of the vehicle did not preclude an action based on the duty imposed upon Janet pursuant to KRS 186.620, which states:

> (1) No person shall authorize or knowingly permit a motor vehicle owned or controlled by him to be driven by any person who has no legal right to drive it or in violation of any of the provisions of KRS 186.400 to 186.640.

The statute does not create a civil action for harm caused by its violation. However, KRS 446.070 permits recovery of damages caused by the violation of any statute from the offender, a codification of common law negligence *per se*.

We reiterate that Janet did not appeal and, therefore, we do not address whether KRS 186.620 was properly applied to a co-owner of a vehicle.

Assuming its application is correct, we disagree that Butler and West were entitled to a judgment against Janet.

Although it is undisputed that Christopher did not possess a valid drivers' license, the statute requires a factual finding that Janet knew he was unlicensed and that she knowingly permitted him to operate the vehicle. We equate "knowingly," with voluntarily and agree that Janet should have the opportunity to present facts regarding the authority given for Christopher to drive the vehicle. Moreover, negligence *per se* requires that appellants prove that Janet violated the statute and that the violation was the proximate cause of the accident. *Burnett v. Yurt*, 247 S.W.2d 227 (Ky. 1952).

We conclude that the trial court properly remanded the case for trial and did not, as appellants suggest, err when it refused to enter a judgment imposing liability upon Christopher and Janet jointly.

Based on the foregoing, the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

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