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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000177-MR

LASHONDA FENTRESS; LASHONDA FENTRESS, AS ADMINISTRATRIX OF THE ESTATE OF JAMES FENTRESS; LASHONDA FENTRESS, NEXT FRIEND AND LEGAL GUARDIAN OF ELIJAH JAMES FENTRESS, A MINOR; LASHONDA FENTRESS, NEXT FRIEND AND LEGAL GUARDIAN OF AALIYAH ELIZABETH FENTRESS; AND LASHONDA FENTRESS, NEXT FRIEND AND LEGAL GUARDIAN OF ANDREIS IVAN FENTRESS — APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CI-02747

MARTIN CADILLAC, INC. AND TIMOTHY S. COPPLE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lashonda Fentress, Lashonda Fentress as Administratrix of the Estate of James Fentress, and Lashonda Fentress as next friend and legal guardian of Elijah James Fentress, Aaliyah Elizabeth Fentress and Andreis Ivan Fentress, minors (collectively Fentress) appeal from an order of the Hardin Circuit Court granting summary judgment in favor of Martin Cadillac, Inc. (Martin) and Timothy S. Copple. Fentress contends the circuit court prematurely granted summary judgment. Fentress further contends that even if not premature, summary judgment was improper because Copple owed a duty to prevent the theft of a vehicle in his possession and there is a question of fact regarding whether the reckless operation of the stolen vehicle by the thief was a superseding cause. We disagree.

This case arises from an automobile accident that occurred on June 6, 2010, in which James Fentress was killed and several others injured when Brandon Lee Jessie ran into their vehicles while attempting to evade police. The 2010 Mitsubishi Outlander operated by Jessie was owned by Martin, a car dealership, and stolen the previous evening from a Barren County apartment parking lot. Copple, an apartment resident and car salesman for Martin, was provided the Outlander for his personal use by Martin. On the evening the Outlander was stolen, Copple parked it in front of his apartment with the doors unlocked and the ignition key inside the vehicle.

On December 30, 2010, Fentress filed an action against Jessie, the police officers involved in the pursuit, and representatives of the cities of Radcliff

and Vine Grove. Additionally, Fentress named Copple alleging negligence and negligent entrustment of the vehicle to Jessie, and Martin alleging negligent entrustment of the vehicle to Copple and that Martin negligently hired, trained and retained Copple.

On April 5, 2011, Martin and Copple filed a motion for summary judgment. They argued Jessie's reckless driving was an intervening and superseding cause of James Fentress's death and Copple could not have entrusted the car to Jessie because he was a stranger to Copple. Additionally, they argued Kentucky Revised Statute (KRS) 189.430(3), commonly referred to as the "key-in-ignition" statute, was not applicable to the parking lot in front of Copple's apartment. Finally, Martin argued it could not be liable for entrusting the Outlander to Copple or for negligently hiring, training or retaining Copple as an employee. The motion was supported by a copy of the police report which stated that at the time of the accident, the officer's radar indicated Jessie was traveling at a speed of 125 miles per hour. The motion also included affidavits from Copple and a general manager at Martin stating that Jessie was a stranger prior to his theft of the Outlander and Jessie did not have permission to operate the Outlander.

Fentress responded, arguing summary judgment was not proper absent additional discovery. On May 31, 2011, the trial court granted summary judgment. The order was not made final and appealable and the case remained pending against other named defendants.

On June 27, 2011, Jessie pled guilty to the criminal charge of unlawful taking of the Outlander. Jessie was deposed on July 24, 2012. He admitted he stole the Outlander from Copple's apartment complex and that he did not know Copple prior to taking the Outlander. In light of Jessie's deposition testimony, on April 2, 2013, Copple and Martin filed a motion to make the May 31, 2011, summary judgment final and appealable. Fentress responded, arguing that KRS 189.430 applied. While the motion remained pending, on January 24, 2014, Fentress, Copple and Martin filed an agreed order to make the trial court's summary judgment final and appealable. The order was entered on January 24, 2014, and this appeal followed.

Our standard of review when summary judgment is granted is well known and often recited. In *Bruck v. Thompson*, 131 S.W.3d 764, 766 (Ky.App. 2004), the standard was concisely stated as follows:

> A party moving for summary judgment in a negligence case is entitled to judgment as a matter of law if the moving party shows that (1) it is impossible for the non-moving party to produce any evidence in the non-moving party's favor on one or more of the issues of fact, (2) under undisputed facts, the moving party owed no duty to the non-moving party, or (3) as a matter of law, any breach of a duty owed to the non-moving party was not the proximate cause of the non-moving party's injuries. (internal footnote omitted).

With this standard in mind, we address the issues.

KRS 189.430(3) provides in part: "No person operating or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key[.]" Fentress contends the statute

imposed a duty upon Copple to remove the ignition key from the unattended Outlander parked in his apartment parking lot and, by failing to do so, he breached that duty.

Although the relatively unknown statute has been afforded little attention in Kentucky tort law, in cases addressing the statute in the context of negligence actions, two common issues have emerged. The first is whether a defendant breached a duty of care by leaving an ignition key in an unlocked and unattended vehicle that was later stolen and, through the thief's negligence or recklessness, injured the plaintiff. The second issue is whether the defendant's act of leaving the ignition key in the vehicle was superseded by the negligence or recklessness of the thief when operating the vehicle. Both issues were addressed extensively in *Bruck*. *Bruck*, 131 S.W.3d at 769.

In *Bruck*, the plaintiff argued KRS 189.430(3) created a duty upon the defendant to remove the ignition key from an unlocked vehicle parked in a private driveway. The Court held the statute did not apply to a private driveway noting the statute "is a part of the regulations of traffic on public ways and may not be regarded as applicable to a private driveway." *Bruck*, 131 S.W.3d at 767 (quoting *Estridge v. Estridge*, 333 S.W.3d 758, 760 (Ky. 1960)).

Fentress contends an apartment parking lot differs from a private driveway in that it is a public place. While there may be some differences, we disagree that the reasoning in *Bruck* is inapplicable.

A private driveway generally serves as a place where the residence's occupants and invited guests park. Likewise, an apartment complex parking lot is owned by the property owner and, depending on the lease agreement, permitted to be used by the residents and guests. In that regard, it is analogous to a private driveway. Moreover, assuming Fentress is correct in her characterization of an apartment parking lot as a public place, it is not a public *way* used by motorists to travel from one point to another. *Id*.

The Court's reasoning in *Bruck* and the lack of duty is not the only obstacle to Fentress's recovery of tort damages. Even if Fentress could establish some statutory or common law duty to remove an ignition key from a vehicle parked in an apartment parking lot, the question remains whether any breach of that duty was the proximate cause of James Fentress's death.

"Proximate cause is an indispensable element of negligence." *Island Creek Coal Co. v. Bays*, 549 S.W.2d 523, 524 (Ky.App. 1977). "In Kentucky, a 'superseding cause is an independent force' which breaks the chain of causation and relieves the original actor from liability." *Bruck*, 131 S.W.3d at 767 (quoting *NKC Hospitals, Inc. v. Anthony,* 849 S.W.2d 564, 568 (Ky.App. 1993)). Citing *NKC Hospitals*, the *Bruck* Court summarized attributes of a superseding cause as follows:

> 1) an act or event that intervenes between the original act and the injury;
>
> 2) the intervening act or event must be of independent origin, unassociated with the original act;

> 3) the intervening act or event must, itself, be capable of bringing about the injury;
>
> 4) the intervening act or event must not have been reasonably foreseeable by the original actor;
>
> 5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or the second party plaintiff] or the intervention of a natural force;
>
> 6) the original act must, in itself, be a substantial factor in causing the injury, not a remote cause.

Id. at 768. The Court concluded:

> [T]he original action was the leaving of the key in the car, and the intervening act was the negligent driving of the thief. All the factors indicate that the thief's intervening action, *i.e.,* his negligent driving, was a superseding cause, which was not reasonably foreseeable. Thus, the leaving of the key in the truck was a negligent act which merely created a condition.

Id.

Here, the original action was Copple leaving the ignition key in the Outlander, and the intervening act was Jessie's reckless driving. As in *Bruck*, leaving the key in the vehicle was merely an act which created a condition and Jessie's reckless driving was a superseding cause that was not reasonably foreseeable. *Id*.

As Fentress points out, it is possible that special circumstances existed at the time an ignition key is left in an unattended vehicle so that it was foreseeable that a thief will negligently or recklessly operate the stolen vehicle. Such was the case in *Pile v. City of Brandenburg*, 215 S.W.3d 36 (Ky. 2006).

In *Pile*, a police officer placed an intoxicated man into custody after he attempted to flee police, handcuffed him, placed him in the back seat of the police cruiser, and subsequently stopped the police cruiser in the highway. The officer then left the cruiser with the keys in the ignition with the engine and the emergency lights activated. The intoxicated man maneuvered into the front seat and proceeded to drive the cruiser at a high rate of speed and crash head on into a car causing the driver's death. *Id*. at 39.

Under these facts, the Court distinguished *Bruck*. It pointed out that in *Bruck*, the key was left in the ignition of a vehicle parked in a private driveway and not in a highway. *Id*. at 42. Further, it was foreseeable that the intoxicated arrestee in *Pile* would drive the cruiser negligently or recklessly. The Court emphasized the officer left the police cruiser with the engine running and with an intoxicated man inside who had been placed in custody after he attempted to avoid arrest. Under the circumstances, the Court concluded it was foreseeable that the intoxicated man would not only steal the police cruiser but also drive the cruiser negligently or recklessly. *Id*.

The facts in this case are markedly different. Nevertheless, Fentress contends given the opportunity to conduct discovery, she can produce evidence that there were special circumstances indicating that Jessie's reckless driving was not a superseding cause.

It is true that a party opposing a motion for summary judgment must be granted an adequate opportunity to discover the relevant facts. *Suter v. Mazyck,* 226 S.W.3d 837, 842 (Ky.App. 2007). The Court further held:

> Whether a summary judgment was prematurely granted must be determined within the context of the individual case. In the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties.

Id.

Despite that this is not a complex case, Fentress has not alleged what evidence could be discovered to establish the special circumstances required to render it foreseeable that Jessie would recklessly operate the Outlander. Copple's affidavit submitted with the motion for summary judgment stated he did not know Jessie and knew nothing of his ability and willingness to operate a vehicle in accordance with the laws of the Commonwealth of Kentucky. He further stated that he had no knowledge or forewarning that Jessie would steal the Outlander and he did not give permission for Jessie to operate the Outlander. As the party opposing summary judgment, Fentress was required to "show [her] hand, or enough of it to defeat the motion, before trial on the merits[.]" *Barton v. Gas Service Co.,* 423 S.W.2d 902, 905 (Ky. 1968). Fentress's conclusory allegation of what might be discovered if additional discovery was permitted is insufficient to warrant further prolonging this action where the undisputed facts demonstrate Copple cannot be liable.

Martin cannot be liable for negligent hiring, training or retention unless Copple committed a negligent or intentional act resulting in injury to Fentress. Liability on the employer is derivative of the employee's commission of a compensable act. As stated in *Scelta v. Delicatessen Support Services, Inc.,* 57 F.Supp.2d 1327, 1348 (M.D.Fla. 1999): "[T]he underlying wrong allegedly committed by an employee in a negligent supervision or negligent retention claim must be based on an injury resulting from a tort which is recognized under common law." Because Copple cannot be liable for James Fentress's death, Martin cannot be liable for negligent hiring, training, or retention.

Based on the forgoing, the summary judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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