[Cite as *Bobb Chevrolet, Inc. v. Dobbins*, 2002-Ohio-4256.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

Bobb Chevrolet, Inc., et al.,	:	
	:	
Plaintiffs-Appellees,	:	
	:	Case No. 01CA2621
vs.	:	
	:	DECISION AND JUDGMENT ENTRY
Randall Dobbins,	:	
	:	Release Date: August 20, 2002
Defendant-Appellant.	:	

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for appellant.

Keith A. Ganther, Cleveland, Ohio, for appellees.

Per Curiam:

{¶1} Randall Dobbins appeals the Chillicothe Municipal Court's entry of summary judgment in favor of Bobb Chevrolet, Inc., and Bobb Chevrolet's insurer, Universal Underwriters Group. Dobbins asserts that the trial court erred in granting summary judgment on a bailment theory, because Bobb Chevrolet and Universal did not assert a claim for bailment in their complaint. Because Bobb Chevrolet and Universal's complaint provided Dobbins with fair notice of the action as required by Civ.R. 8(A), we disagree. Dobbins also asserts that the trial court erred in determining as a matter of law that Dobbins'

affirmative defense of comparative negligence was without merit. We disagree, because the evidence, even when construed in Dobbins' favor, reveals that Dobbins' admitted negligence was the sole cause of the injuries that occurred in this case. Finally, Dobbins asserts that the trial court erred in sanctioning him and his counsel by ordering them to pay attorney's fees in an amount that bears no relationship to the reasonable expenses incurred by Bobb Chevrolet and Universal due to Dobbins' failure to provide discovery. Because the record contains evidence supporting the reasonableness of the amount of attorney's fees the trial court awarded and the trial court did not abuse its discretion, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} Dobbins visited Bobb Chevrolet to look at used pickup trucks. He determined he wanted to purchase a 1995 Chevrolet S10 truck, completed a loan application, provided a copy of his insurance card, and drove the vehicle to his home in Pike County with the understanding that he would return the following day to complete the sales transaction. Dobbins still had possession of the vehicle with the permission of Bobb Chevrolet, but had not yet completed the sales transaction, when he lost control of the vehicle and struck a guardrail off of State Route 12 in Chillicothe. Dobbins was alone in

the truck at the time of the accident, and no other individuals were injured.

{¶3} Bobb Chevrolet filed a claim with its insurance carrier, Universal. Universal determined that the vehicle was a total loss and paid Bobb Chevrolet $4,451, which represents the value of the vehicle minus Bobb Chevrolet's $1,000 deductible. Thereafter, Bobb Chevrolet and Universal (hereafter collectively "Bobb Chevrolet") filed a complaint in the Chillicothe Municipal Court to recover their damages from Dobbins. Dobbins filed an answer in which he admitted that he was driving the vehicle at the time of the accident, but denied any negligence or responsibility for the damage to it.

{¶4} On December 4, 2000, Bobb Chevrolet served, via certified mail, interrogatories and a request for production of documents upon Dobbins at the office of his attorney, James Boulger. After two months passed and several attempts to contact Boulger failed, Bobb Chevrolet filed a motion to compel discovery. On February 9, 2000, the court granted Bobb Chevrolet's motion and ordered Dobbins to serve answers to interrogatories and a response to the document request within ten days.

{¶5} Approximately one month later, on March 5, 2000, Dobbins served answers to Bobb Chevrolet's interrogatories. However, Dobbins left several interrogatories unanswered and failed to completely respond to others. Additionally, Dobbins submitted no response to

Bobb Chevrolet's request for production of documents. Bobb Chevrolet filed a motion for sanctions. Bobb Chevrolet also filed a request for leave to file a motion for summary judgment, and attached its motion for summary judgment.

{¶6} At an April 16, 2001 status conference, the trial court granted Bobb Chevrolet leave to file its motion for summary judgment. Additionally, the court scheduled a hearing on Bobb Chevrolet's motion for sanctions for June 6, 2001. Finally, the court accepted Dobbins' admission that he was negligent in the automobile accident, and thus determined that his negligence was no longer an issue before it.

{¶7} Dobbins filed a motion for leave to amend his answer on May 2, 2001, seeking to include as an affirmative defense an allegation that Bobb Chevrolet was negligent per se in its failure to maintain proof of financial responsibility with regard to Dobbins' operation of the vehicle. Additionally, Dobbins filed a memorandum in opposition to Bobb Chevrolet's motion for summary judgment. Dobbins argued that Bobb Chevrolet impermissibly relied upon a theory of bailment, rather than upon a theory of negligence, in its arguments supporting its motion for summary judgment.

{¶8} The trial court granted Dobbins leave to amend his answer. However, Bobb Chevrolet did not respond by seeking to supplement its motion for summary judgment in order to address

Dobbins' affirmative defense. Instead, Bobb Chevrolet filed a motion to strike, asking the court to reconsider its decision allowing Dobbins to amend his answer. Additionally, Bobb Chevrolet filed a motion to amend its complaint to include allegations that Dobbins and Bobb Chevrolet had a bailment contract.

{¶9} On June 6, 2001, the court held a hearing on Bobb Chevrolet's motion for sanctions. Bobb Chevrolet presented detailed time sheets and records of postage and copying charges to support its request for attorney's fees. Additionally, Bobb Chevrolet's counsel, Keith Ganther, testified with regard to his hourly rates, the amount of time he spent on the matter, and the reasonableness of both. Bobb Chevrolet also asked that the court sanction Dobbins by prohibiting him from introducing any evidence supporting the defenses set forth in his answer. The court granted Bobb Chevrolet's motion for sanctions, but reduced the amount of attorney's fees requested and declined to prevent Dobbins from presenting evidence. Neither Dobbins nor Boulger attended the hearing.[1]

{¶10} The trial court declined to strike Dobbins' amended answer, but granted Bobb Chevrolet's motion for summary judgment. The court stated that it based its decision upon Dobbins' admission of negligence and the arguments advanced in Bobb Chevrolet's motion

[1] Boulger filed a motion to continue ninety minutes prior to the scheduled hearing because he was scheduled for trial in another court. Because Boulger had over a month's notice of the hearing and ample notice of the conflict, and because Ganther had traveled four hours to attend the hearing, the trial court denied the continuance.

for summary judgment. The court found, as a matter of law, no merit in Dobbins' affirmative defense of comparative negligence. Finally, the court declined to grant Bobb Chevrolet's motion to amend its complaint.

{¶11} Dobbins appeals, asserting the following assignments of error:

"I. The trial court erred in granting summary judgment to the plaintiff upon a claim not asserted in the complaint and absent the express or implied consent of the defendant to amendment of the complaint.

"II. The trial court erred as a matter of law in determining that the defendant did not possess an affirmative defense of comparative negligence to the claim of the plaintiff/vehicle owner based upon the owner's breach of the duty described in R.C. 4509.101(A)(1).

"III. The trial court erred in entering judgment against defendant and his counsel in an amount ascribed to attorney's fees as a sanction under Rule 37 of the Ohio Rules of Civil Procedure when the amount of the award bore no relationship to the 'reasonable expenses' incurred in obtaining the order to compel discovery as authorized under Civil Rule 37(A)(4) and bore no relationship to the 'reasonable expenses' caused by a failure to fully comply with a Rule 37 Order to Compel."

II.

{¶11} In his first assignment of error, Dobbins asserts that the trial court erred in granting summary judgment to Bobb Chevrolet on a bailment theory when the trial court did not permit Bobb Chevrolet to amend its complaint, Dobbins did not assent to trial on bailment, and the original complaint did not refer to bailment.

{¶12} Civ.R. 8(A) provides that a complaint must contain "a short and plain statement of the claim showing that the party is entitled to relief * * *." Thus, pursuant to Civ.R. 8(A), "[a] party is not required to plead the legal theory of recovery or the consequences which naturally flow by operation of law from the legal relationship of the parties." *Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, paragraph six of the syllabus. As long as the complaint provides fair notice of the action, it "need not state with precision all elements that give rise to a legal basis for recovery." *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 82; *Illinois Controls* at 526; *Dillon v. Ferris* (June 11, 1996), Lawrence App. No. 95CA25. Even if the complaint neither contains allegations on a legal theory nor suggests or intends to advance that theory, the complaint nonetheless is sufficient so long as it "contain[s] allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Fancher* at 82.

{¶13} A bailment occurs when a person transfers possession, but not ownership, to another. *Thomas v. Nationwide Mut. Ins. Co.* (1992), 79 Ohio App.3d 624, 629. To establish a cause of action under a bailment theory, the bailor must show: (1) that a contract of bailment, express or implied, exists; (2) that the bailee possessed the bailed property; and (3) that the bailee failed to return the property to the bailor undamaged. *VanDeventer v. VanDeventer* (1999), 132 Ohio App.3d 762.

{¶14} In this case, Bobb Chevrolet stated in its complaint that Dobbins operated a motor vehicle belonging to Bobb Chevrolet, that Dobbins did so negligently, and that Dobbins' negligence caused damage to Bobb Chevrolet's vehicle. While we agree that Bobb Chevrolet did not mention a contract of bailment in its complaint, we find that the complaint set forth sufficient operative facts to give Dobbins fair notice of the action. Bobb Chevrolet's allegation that Dobbins operated a motor vehicle belonging to it gives rise to an inference that Bobb Chevrolet would present evidence regarding the circumstances of how Dobbins came to be operating its vehicle, specifically, via an extended test drive that implied a contract of bailment. Likewise, Bobb Chevrolet's allegation that Dobbins caused damage to its vehicle gives rise to an inference that Dobbins did not return the vehicle to Bobb Chevrolet undamaged.

{¶15} Thus, we find that Bobb Chevrolet's complaint alleged sufficient facts to give Dobbins fair notice of the action. To the extent that the trial court considered Bobb Chevrolet's motion for summary judgment based upon a bailment theory, it did not err in doing so. Accordingly, we overrule Dobbins' first assignment of error.

III.

{¶17} In his second assignment of error, Dobbins asserts that the trial court erred in determining as a matter of law that he did not possess an affirmative defense of comparative negligence based upon Bobb Chevrolet's alleged failure to comply with R.C. 4509.101(A)(1).

{¶18} Summary judgment is appropriate only when it has been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535.

{¶19} In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be drawn from it to determine if the opposing party can possibly prevail. *Morehead*, 75 Ohio App.3d at 411-12. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." *Id.* See, also, *Schwartz v. Bank-One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809.

{¶20} Dobbins asserts that the trial court erred in finding as a matter of law that R.C. 4509.101(A)(1) cannot serve as a basis for finding that Bobb Chevrolet was negligent per se with respect to its own injuries, and thus does not afford him a comparative negligence defense.

{¶21} When a statute imposes a specific duty for the protection and safety of others, and an individual's neglect to perform that duty proximately results in injury to another, the individual is negligent per se or as a matter of law. *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, paragraph two of the syllabus; see, also, *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, 496. Thus, Bobb Chevrolet was negligent per se pursuant to R.C. 4509.101 only if: (1) the statute sets forth a specific duty, (2) for the safety and protection of others, and (3) Bobb Chevrolet's failure to perform that duty proximately resulted in harm to those whom the statute was designed to protect.

{¶22} R.C. 4509.101(A)(1) provides:

"No person shall operate, or permit the operation of, a motor vehicle in this state, unless proof of financial responsibility is maintained continuously throughout the registration period with respect to that vehicle, or, in the case of a driver who is not the owner, with respect to that driver's operation of the vehicle."

In this section, R.C. 4509.101 sets forth the specific and definite requirement that vehicle owners maintain proof of responsibility with regard to the operation of their vehicles. In so doing, R.C. 4509.101(A)(1) serves as a legislative declaration of the standard of care to which a reasonably prudent automobile owner must adhere before allowing another to drive his automobile. Thus, R.C. 4509.101(A)(1) meets the first requirement for serving as the basis of a negligence per se claim.

{¶23} R.C. 4509.101(J) provides that "[t]he purpose of this section is * * * to minimize those situations in which persons are not compensated for injuries and damages sustained in motor vehicle accidents." Thus, R.C. 4509.101 explicitly provides that it exists for the protection of others, and therefore it may serve as the basis for negligence per se liability. *Fontaine v. Hairston* (Feb. 10, 2000), Franklin App. No. 99AP-625; contra *Grange Mut. Casualty Co. v. Martin* (Sept. 18, 1990), Tuscarawas App. No. 90AP20011.[2]

[2] The *Grange* court determined that a violation of R.C. 4509.101(A) does not give rise to a cause of action in a civil matter because the General Assembly

{¶24} In this case, however, we find that Bobb Chevrolet did not proximately cause harm to those whom R.C. 4509.101(A)(1) was designed to protect. In other cases in which Ohio courts have found an automobile dealer to be negligent per se based on R.C. 4509.101(A)(1), the uninsured test driver collided with and injured a third-party. See *Fontaine, supra.* In this case, no "others" were injured; Dobbins only caused injury to himself and Bobb Chevrolet's vehicle. Moreover, Dobbins admitted that his negligence caused the accident. Thus, Bobb Chevrolet's alleged failure to comply with R.C. 4509.101(A)(1) did not proximately cause injury to a person whom R.C. 4509.101 is designed to protect. Therefore, in this instance R.C. 4509.101(A)(1) does not give rise to negligence per se liability as a matter of law.

{¶25} Accordingly, we find that the trial court did not err in ruling that Dobbins' comparative negligence defense based upon R.C. 4509.101(A)(1) negligence per se has no merit. Therefore, we overrule Dobbins' second assignment of error.

IV.

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provided for "reasonable civil penalties" such as suspension or impoundment of the violator's license. The *Fontaine* court disagreed, holding that "[s]imply because the legislature has set forth penalties for violation of R.C. 4509.101(A)(2) does not mean a person could not be found negligent *per se* and subsequently liable for any damages arising out of a violation of R.C. 4509.101(A)(1)." We agree with the *Fontaine* court and note that negligence liability does not constitute a penalty, but rather an obligation arising from a breach of duty.

{¶26} In his third assignment of error, Dobbins and his counsel, attorney James Boulger, assert that the trial court erred in determining the amount of attorney's fees Dobbins and Boulger must pay to Bobb Chevrolet as a sanction for their discovery misconduct. Specifically, Dobbins asserts that the amount the trial court awarded bears no relationship to the reasonable expenses that Bobb Chevrolet incurred in order to obtain an order to compel and as a result of Dobbins' and Boulger's continued failure to fully comply with their discovery obligations in the face of that order to compel.

{¶27} The Ohio Supreme Court describes our standard of review for discovery sanction rulings as follows:

"The discovery rules give the trial court great latitude in crafting sanctions to fit discovery abuses. A reviewing court's responsibility is merely to review these rulings for an abuse of discretion. '"The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations."' * * * In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." (Citations omitted.) *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256; *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58

Ohio St.3d 147, 152; *Wright v. Structo, Div. of Eljir Mfg., Inc.* (1993), 88 Ohio App.3d 239, 244.

{¶28} Pursuant to Civ.R. 37(A)(2), when a party fails to answer an interrogatory or produce documents in accordance with the rules of discovery, the discovering party may request an order to compel discovery. If the court grants the motion, "the court *shall* * * * require the party * * * or attorney advising such conduct or both of them to pay the moving party the reasonable expenses in obtaining the order, including attorney's fees, unless the court finds that the * * * circumstances make an award of expenses unjust." (Emphasis added.) Civ.R. 37(A)(4).

{¶29} Likewise, pursuant to Civ.R. 37(D), if a party fails to respond, either with answers, production of documents, or objections, to interrogatories or document requests, "the court *shall* require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award unjust." (Emphasis added.)

{¶30} In this case, Dobbins and Boulger do not contest the trial court's decision to levy sanctions against them; they contest only the amount the court awarded to Bobb Chevrolet. Dobbins and Boulger contend that the record contains no evidence that their

discovery misconduct cost Bobb Chevrolet $3,177.56. However, our review of the record reveals that the trial court heard testimony and viewed exhibits supporting the award amount. In fact, upon reviewing the testimony and the exhibits, the trial court declined to award Bobb Chevrolet the full amount it requested by determining that the attorney billed too many hours for his preparation for the hearing on the motion for sanctions. Thus, it appears from the record that the trial court fully and fairly reviewed the evidence before it with regard to the attorney's fees and costs properly attributable to Dobbins' and Boulger's discovery misconduct. We cannot say that the trial court abused its discretion in ordering Dobbins and Boulger to pay $3,177.56 to Bobb Chevrolet.

{¶31} Accordingly, we overrule Dobbins' third assignment of error.

V.

{¶32} In conculsion, we overrule each of Dobbins' assignments of error. Accordingly, we affirm both the trial court's entry of summary judgment in favor of Bobb Chevrolet and the award of attorney's fees to Bobb Chevrolet.

JUDGMENT AFFIRMED.

Kline, J., dissenting:

{¶33} I concur with the majority in overruling Dobbins' first and third assignments of error, but disagree regarding Dobbins' second

assignment of error. I do not believe any authority exists for limiting the application of the negligence per se doctrine to situations in which a third-party is harmed as a result of the automobile dealer's failure to comply with R.C. 4509.101(A)(1).

{¶34} A person is liable for negligence when he proximately causes harm by failing to exercise the standard of care of a reasonably prudent person. A person is negligent per se when he proximately causes harm by failing to follow a statute that "serves as a legislative declaration of the standard of care of a reasonably prudent person." *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, 496, citing 57A Am.Jur.2d (1989), 672, Negligence.

{¶35} R.C. 2315.19(A)(1) provides that a defendant possesses the statutory right to assert a plaintiff's own negligence as an affirmative defense to a negligence claim. R.C. 2315.19 contains no exception for plaintiffs who are alleged to be negligent under the doctrine of negligence per se. Yet, the majority effectively holds that the doctrine of negligence per se cannot be invoked as an affirmative defense, because it holds that a person can be negligent per se only with respect to a third-party, not with respect to himself.

{¶36} As the majority notes, *Fontaine v. Hairston* (Feb. 10. 2000), Franklin App. No. 99AP-625, involved an automobile dealer's negligence per se with regard to a third-party whom an uninsured test

driver hit. The automobile dealer argued that the driver's negligence, not its failure to insure the driver, proximately caused the third-party's injuries. The *Fontaine* court disagreed, noting that the injury in such a circumstance is not the physical injury itself, but rather the inability to be compensated to the same extent that would be possible if the dealer had ensured that the test-driver had proper insurance.

{¶37} In this case, Bobb Chevrolet's alleged failure to maintain proper insurance with respect to its test-drivers resulted in the same type of injury that a third-party might have suffered. Specifically, Bobb Chevrolet allegedly has found itself unable to be compensated to the same extent that it would have been had it properly insured its test-drivers. If Bobb Chevrolet owns a policy that complies with R.C. 4509.101(A)(1) and still has a $1,000 deductible, then it is entitled (based on Dobbins' admitted negligence) to recover that loss absent a showing that it negligently caused that loss. If, however, Bobb Chevrolet's insurance policy does not comply with R.C. 4509.101(A)(1), and a compliant policy would have resulted in a smaller or no deductible, then its loss arose in part from its own failure to follow the law and its recovery must be limited accordingly.

{¶38} We need not attempt to guess the specifics of Bobb Chevrolet's insurance policy. Bobb Chevrolet did not file a copy of

its policy with Universal or even argue that its policy satisfied the R.C. 4509.101(A)(1) requirements. On summary judgment, the moving party bears the initial burden of proving that no genuine issue of fact exists with regard to any material issue before the court. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429. Thus, although comparative negligence constitutes an affirmative defense for which Dobbins would bear the burden of proof at trial, the initial burden lies with Bobb Chevrolet on its motion for summary judgment. Bobb Chevrolet did not produce any Civ.R. 56(C) evidence to affirmatively demonstrate that Dobbins had no evidence of its noncompliance with R.C. 4509.101(A)(1).

{¶39} In my view, no authority exists for restricting application of R.C. 4509.101(A)(1) negligence per se to third parties. Therefore, summary judgment is not appropriate in this case. Dobbins should be permitted to attempt to prove that Bobb Chevrolet failed to comply with R.C. 4509.101(A)(1), and thereby is responsible or partially responsible for proximately causing its own financial loss. Therefore, I would reverse the judgment of the trial court with respect to Dobbins' second assignment of error.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED** and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Chillicothe Municipal Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J., and Evans, J.: Concur in judgment and opinion.
Kline, J.: Concurs as to assignments of error one and three, and dissents as to assignment of error two.

For the Court

BY: _____
Peter B. Abele, Presiding Judge

BY: _____
David T. Evans, Judge

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.