[Cite as *Dunne v. Hanson*, 2002-Ohio-2267.]

IN THE COURT OF APPEALS OF LUCAS COUNTY

Mary Dunne, Individually Court of Appeals No. L-01-1414
and as Mother and Next
Friend of Melissa M. Dunne, Trial Court No. CI-00-1426
a Minor

Appellant

v.

Cassandra A. Hanson,
et al. **DECISION AND JUDGMENT ENTRY**

Appellee Decided: May 10, 2002

* * * * *

James D. Caruso and John A. Borell, Jr.,
for appellant.

Edward T. Mohler, for appellee Nicholas Ryan.

* * * * *

PIETRYKOWSKI, P.J.

{¶1} This case is before us on appeal from a decision of the Lucas County Court of Common Pleas, which granted summary judgment to appellee Nicholas Ryan. For the reasons that follow we affirm in part, reverse in part, and remand.

{¶2} This case arises out of injuries suffered by appellant's daughter, Melissa Dunne, when Melissa jumped on the hood of a car driven by Cassandra Hanson. The events took place in the parking lot of Camp Miakonda, a Boy Scout camp in Lucas County.

{¶3} In the summer of 1999, Melissa, Hanson, and appellee were all employed at Camp Miakonda. The three had attended a dinner party at the camp on July 21, 1999, which ended in the early evening. All three walked back toward the parking lot. Melissa and Hanson proceeded to the home of the park ranger, whose house abutted the parking lot, because they were friends with the ranger's daughter. Appellee, who was driving a car owned by his mother, Jeannette Ryan, proceeded to his car, started it, and began to leave. Hanson stopped appellee in the parking lot and asked him if she could drive his car. Ultimately, appellee allowed Hanson to drive the car, knowing that she was an unlicensed driver. He exited the driver's side of the car and sat in the passenger seat. What happened next is the subject of some dispute, but it is undisputed that while the car was running and while Hanson was behind the wheel and appellee was in the passenger seat, Melissa jumped on the hood of the car. Hanson drove some distance in the parking lot with Melissa on the hood, and Melissa was thrown from the hood, sustaining injury.

{¶4} Appellant, individually and as next friend of Melissa Dunne, filed suit against Cassandra Hanson, appellee, Jeannette Ryan, and the Boy Scouts of America, Erie Shores Council, Inc. #460. With regard to appellee and Jeannette Ryan, the complaint alleged that Jeannette Ryan negligently entrusted her vehicle to appellee and that appellee negligently entrusted his mother's vehicle to Cassandra Hanson. Appellee and Jeannette Ryan answered and asserted a cross-claim against Hanson seeking indemnity. Subsequently, appellant dismissed from the lawsuit the Boy Scouts of America and Jeannette Ryan. Appellant later filed an amended complaint adding a general negligence claim against appellee.

{¶5} The trial court granted summary judgment to appellee on the negligent entrustment claim, holding that only an owner of a vehicle may be liable for negligent entrustment. Subsequently, the trial court issued another order also granting summary judgment to appellee on the general negligence claim, finding that appellee neither owed a duty nor breached a duty to appellant. Also, when Hanson failed to answer the cross-claim, appellee sought and was granted default judgment on his cross-claim against her.

{¶6} With appellee dismissed from the lawsuit on summary judgment and being granted default judgment on his cross-claim, and with Jeannette Ryan and the Boy Scouts of America voluntarily dismissed, the only claims pending in the case were appellant's claims against Hanson. However, the trial court issued an order finding that judgment in favor of appellee was final, and, pursuant to Civ.R. 54(B), that "there was no just reason for delay." This appeal followed. Appellant raises the following two assignments of error for our review:

{¶7} "FIRST ASSIGNMENT OF ERROR

{¶8} THE TRIAL COURT ERRED IN HOLDING THAT APPELLEE WAS NOT LIABLE BASED UPON THE DOCTRINE OF NEGLIGENT ENTRUSTMENT

{¶9} "SECOND ASSIGNMENT OF ERROR

{¶10} THE TRIAL COURT ERRED IN HOLDING THAT APPELLEE WAS NOT LIABLE BASED UPON GENERAL NEGLIGENCE"

{¶11} We review the trial court's ruling on the summary judgment motion de novo. *Conley-Slowinski v. Superior Spinning* (1998), 128 Ohio App.3d 360, 363, discretionary appeal not allowed (1998), 83 Ohio St.3d 1464. A movant is entitled to summary judgment pursuant to Civ.R. 56(C) when she demonstrates:

{¶12} "*** that there is no issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party." *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

{¶13} Appellant contends in her first assignment of error that the trial court erred in holding that only an owner of a motor vehicle may be held liable for negligent entrustment. Appellant contends that those in control of a motor vehicle should be liable for negligent entrustment as well. Almost without exception, courts in Ohio have held that owners may be liable for negligent entrustment; the cases do not hold that one who merely has control over a motor vehicle may be liable for negligent entrustment. A seminal case on negligent entrustment held as follows:

{¶14} "3. The owner of a motor vehicle may be held liable for an injury to a third person upon the ground of negligence if the owner knowingly, either through actual knowledge or through knowledge implied from known facts or circumstances, entrusts its operation to an inexperienced or incompetent operator whose negligent operation results in the injury.

{¶15} "***.

{¶16} "5. In an action against the owner of a motor vehicle arising from its entrustment for operation, the burden is upon the plaintiff to establish that the motor vehicle was driven with the permission and authority of the owner; that the entrustee was in fact an incompetent driver; and that the owner knew at the time of the entrustment that the entrustee had no drivers's license, or that he was incompetent or unqualified to operate the vehicle, or had knowledge of such facts and circumstances as would imply knowledge on the part of the owner of such incompetency." *Gulla v. Strauss* (1950), 154 Ohio St. 193, paragraphs three and five of the syllabus." See, also, *The Mt.*

Nebo Baptist Church v. Cleveland Crafts Co. (1950), 154 Ohio St. 185, paragraph two of the syllabus.

{¶17} Since then, other Ohio courts have held that, to be liable for negligent entrustment, one must be an owner of the vehicle, and not merely one in control of the vehicle. See, e.g., *Gray v. Giacomelli* (June 7, 1995), Lorain App. No. 94CA005949; *DiFilippo v. Hamrlik* (Dec. 30, 1994), Lorain App. No. 93CA005698.

{¶18} However, two cases have either held or suggested that one in control of a motor vehicle may be liable for negligent entrustment. In one, the Eighth District Court of Appeals, citing the Restatement of the Law 2d, Torts (1965) 314, Sections 390 and 308, held that an entrustor who is not an owner may still be liable for negligent entrustment. See *Motorists Ins. Co. v. Sokol* (Apr. 7, 1983), Cuyahoga App. No. 45380. Restatement Section 390 provides:

{¶19} "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."

{¶20} Section 308 provides:

{¶21} "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

{¶22} In holding that non-owner entrustors may be liable, the court in *Motorists Ins. v. Sokol* noted,

{¶23} "Most Ohio cases which discuss negligent entrustment claims involve owner-entrustors, but we have found no Ohio case that denies liability because the entrustor had possession and control rather than title. The evidence was undisputed here that defendant had possession and control of the car and the car keys before codefendant acquired them."

{¶24} We find the reasoning in *Motorist Ins. v. Sokol* unpersuasive for two reasons. First, the Supreme Court of Ohio has never adopted Sections 308 or 390 of the Restatement; therefore, these sections do not have the force of law in Ohio.[i] Second, since *Sokol*, several cases have held that non-owner entrustors may not be liable for negligent entrustment. See, e.g., *Gray v. Giacomelli*, supra; *DiFilippo v. Hamrlik*, supra.

{¶25} A second case suggested that a non-owner entrustor could be liable for negligent entrustment. We stated in *Teague v. Castro* (Aug. 21, 1992), Lucas App. No. L-91-276, jurisdictional motion overruled (1993), 65 Ohio St.3d 1493:

{¶26} "One who owns or *has control over* a motor vehicle cannot be held liable for negligent entrustment of that vehicle to one who is intoxicated or is likely to become so, unless it is demonstrated that the owner gave permission to the other person to drive the vehicle, that the driver was, in fact, intoxicated and that the owner, at the time of the entrustment, either knew or had knowledge of such facts and circumstances as would imply knowledge on her part of the other person's intoxication." (Emphasis ours.)

{¶27} However, "ownership" versus "control" was not an issue in *Teague*. In fact, the alleged entrustor of the motor vehicle did, indeed, own the car. Thus, we consider this language in *Teague* to be dicta. In short, we find that the overwhelming weight of the authority in Ohio holds

that one must be an owner of a motor vehicle in order to be liable for the negligent entrustment of that motor vehicle.

{¶28} Nevertheless, appellant contends that the law of negligent entrustment, as stated in *Mt. Nebo*, supra, was based on a statute making it illegal for one who owns or controls a motor vehicle to entrust that vehicle to one who has no legal right to drive it. Therefore, according to appellant, at its roots the tort of negligent entrustment included both owners and those in control of motor vehicles. Appellant also contends that to hold that only an owner may be liable leads to absurd results. We shall address each of these arguments in turn.

{¶29} First, appellant contends that the holding in *Mt. Nebo*, supra, which was decided the same day as *Gulla*, supra, was meant to encompass both those who owned and those who controlled motor vehicles. The two-paragraph syllabus of *Mt. Nebo* reads as follows:

{¶30} "1. The entrustment of an automobile by its owner to a person who does not have a driver's license, in violation of the provision of Section 6296-28, General Code, that 'no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so,' does not of itself constitute negligence as a matter of law.

{¶31} "2. To establish negligence of the owner of a motor vehicle in such a case, it is essential that it be shown by competent evidence that the owner of the automobile had knowledge of the driver's incompetence, inexperience or reckless tendency as an operator, or that the owner, in the exercise of ordinary care, should have known thereof from facts and circumstances with which he was acquainted. (*Williamson v. Eclipse Motor Lines, Inc.*, 145 Ohio St. 467, approved and followed.)"

{¶32} We disagree with appellant's argument that the tort of negligent entrustment was based on a statute governing those who either owned or controlled motor vehicles. As we read *Mt.*

Nebo, the holding was two-fold. First, the court determined that the solitary act of entrusting one's vehicle to an unlicensed driver in violation of the statute was not, by itself, enough to establish negligence. Second, the court set out the elements of the tort of negligent entrustment: that the *owner* knew or should have known of the driver's incompetence or inexperience. Thus, we disagree with appellant's reading of *Mt. Nebo*.

{¶33} Second, appellant contends that a holding requiring that one be an owner of a motor vehicle in order to be liable for negligent entrustment would lead to absurd results. Appellant provides, as one example, a situation where a husband loans his wife's vehicle to an underage, unlicensed driver. According to appellant, allowing the husband to escape liability simply because he is not the owner is absurd. Without expressing an opinion on the absurdity of such a situation, we can only answer that the Supreme Court of Ohio has only held that owners can be liable for negligent entrustment; it has not recognized a cause of action for non-owner entrustment. We cannot change the law, or create new law, or hold that the Supreme Court of Ohio could not have meant what it has very clearly said. For all of the foregoing reasons, we find that the trial court did not err in granting summary judgment to appellee on the negligent entrustment claim. Accordingly, appellant's first assignment of error is found not well-taken.

{¶34} In her second assignment of error, appellant contends that if appellee cannot be liable for negligent entrustment, he is liable under a theory of general negligence. This could only be true if appellee, himself, did some act which could be found to have proximately caused Melissa Dunne's injuries.

{¶35} The evidence is disputed as to who did which acts that led to Melissa Dunne's injuries. Hanson testified in her deposition that, after taking over control of the car, she put the car in "reverse," backed up a bit, and then put the car in "park." While the car was in "park," Melissa

Dunne jumped on the hood.[ii] According to Hanson, she (Hanson) then put the car in "drive" and began driving with Melissa on the hood. Appellee initially testified at his deposition that Hanson put the car in "drive," which was consistent with the version of the facts he provided in the police report. Later in his deposition, however, he testified that he, sitting in the passenger seat, put the car in "drive." He did not give any details about when, in the sequence, Melissa Dunne got on the hood, saying only that, "at some point in time Melissa jumped on the car." If, indeed, appellee put the car in "drive" knowing that Melissa Dunne was on the hood, a jury could find that appellee was at least partially at fault. However, there is a material question of fact as to who put the car in "drive" and whether Melissa Dunne was on the hood at that point.

{¶36} In addition, even assuming that appellee put the car in "drive" knowing that Melissa Dunne was on the hood, it is possible that a jury could find that Hanson's operation of the car after appellee put the car in "drive" was a superseding intervening cause that broke the chain of causation, thereby relieving appellee of any liability for his acts. See *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155, 159-161 (an intervening act becomes a superseding cause, thereby breaking the chain of causation and absolving the original tortfeasor of liability where the intervening act was foreseeable). However, questions relating to intervening and superseding causes must be resolved by the finder of fact. *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269; *Austermiller v. Dosick*, Lucas App. No. L-01-1223, 2001-Ohio-2910, at ¶18. Because questions of fact exist as to appellee's negligence, we find that the trial court erred in granting summary judgment to appellee on the general negligence claim. Appellant's second assignment of error is found well-taken.

{¶37} On consideration whereof, we find that substantial justice was not done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. That portion of the trial court's judgment granting summary judgment to appellee on the general negligence claim is reversed, and this case is remanded to the trial court for further proceedings. Appellee is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED IN PART

AND REVERSED IN PART.

Richard W. Knepper, J. _____

JUDGE

Mark L. Pietrykowski, P.J.

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George M. Glasser, J. JUDGE

CONCUR.

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JUDGE

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

[i] {¶a} One case from the Supreme Court of Ohio, *Wery v. Seff* (1940), 136 Ohio St. 307, 310, cited Section 308 as the last in a string cite of five authorities, but it did not formally adopt that section as the law of Ohio.

[ii] {¶b} Earlier in her deposition, Hanson testified that Melissa jumped on the hood of the car while she (Hanson) was getting into the driver's seat.