[Cite as *Bugaj v. Nationwide Ins.*, 2009-Ohio-4413.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Timothy L. Bugaj

Appellant

v.

Nationwide Insurance, et al.

Appellee

Court of Appeals No. L-09-1021

Trial Court No. CI07-7819

DECISION AND JUDGMENT

Decided: August 28, 2009

* * * * *

Marc J. Meister and Teckla H. Meister, for appellant.

David W. Doerner, for appellee Amanda Leffler.

* * * * *

SHERCK, J.

{¶ 1} Appellant, Timothy L. Bugaj, appeals a summary judgment issued by the Lucas County Court of Common Pleas to appellee, Amanda Leffler. This is an accelerated appeal, involving personal injury claims arising from an automobile accident. For the following reasons, we affirm.

{¶ 2} The parties do not dispute that Leffler's vehicle struck Timothy Bugaj's vehicle in an intersection. Bugaj asserted that he was lawfully traveling straight through the intersection with a green light. Because he lost consciousness at impact, Bugaj was unable to determine who was driving Leffler's vehicle. Leffler's vehicle was abandoned at the scene of the accident and was later towed to a police impound lot. While Bugaj testified that several people witnessed the accident, he could not identify them and presented no testimony or evidence of witnesses. The accident occurred at approximately 5:50 a.m.

{¶ 3} Amanda Leffler testified that she began driving her vehicle en route to her employment at approximately 5:30 a.m. that same morning. Realizing that she left an item necessary for her employment at the residence where she spent the previous evening, she returned to the residence shortly after 5:30 a.m.; she left her car running and unlocked on the street while she went inside. She testified that her vehicle was thus unattended for "a few minutes" while she was inside. When she returned, she found her vehicle gone. Leffler testified that the car had to have been stolen between 5:30 and 5:40 a.m.

{¶ 4} Leffler went back inside the residence to alert her friend to the theft and then, with her friend transporting her, went to the Toledo Police station where she filled out a stolen vehicle report. She testified that she arrived at the police station at approximately 8:00 a.m. The stolen vehicle report notes that the report was made at 8:40 a.m., and that the vehicle was stolen at 5:00 a.m. The police officer who took Leffler's

stolen vehicle report testified in deposition that shortly after Leffler made the report, the records department informed him that Leffler's vehicle had been involved in a hit and run accident.

{¶ 5} Leffler moved for summary judgment, arguing that the theft of her vehicle was an intervening cause which relieved her of liability, citing *Ross v. Nutt* (1964), 177 Ohio St. 113, and *Pendrey v. Barnes* (1985), 18 Ohio St.3d 27. In *Pendrey*, the Ohio Supreme Court affirmed its holding in *Ross*: Any negligence on the part of a car owner who left keys in the ignition and the car running was, as a matter of law, superseded by the acts of a person who stole the car and subsequently injured another in an accident. The trial court agreed with Leffler, granting her summary judgment.

{¶ 6} Bugaj appealed and now raises two assignments of error for review:

{¶ 7} "I. The trial court erred when it did not rule that plaintiff was entitled to invoke a rebuttable presumption in his favor that defendant was in possession and control of her motor vehicle at the time of the vehicular collision giving rise to plaintiff's injury and damages.

{¶ 8} "II. The trial court erred when it granted the motion for summary judgment because there were genuine issues of material fact."

{¶ 9} Because both assigned errors involve the summary judgment standard and nearly identical issues, we will consider them jointly. An appellate court reviews a grant of summary judgment with the same standard as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio

St.3d 102, 105. Summary judgment is proper when (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C).

{¶ 10} Bugaj implicitly acknowledges that *Ross v. Nutt*, supra, and *Pendrey v. Barnes*, supra, determine the outcome of these facts as a matter of law. Bugaj, nevertheless, attempts to persuade us to create a new "common-law rebuttable presumption" that the owner of a car is in possession and control of the car when an accident occurs.

{¶ 11} While Bugaj cites many other instances of rebuttable presumptions existing in the common law, and gives many policy reasons for creating such a presumption, we are bound by Ohio Supreme Court precedent. *Gray v. Estate of Barry* (1995), 101 Ohio App.3d 764, 767. Given the undisputed facts of this matter, the application of *Pendrey* and *Ross* are sufficient to find that Leffler was not negligent as a matter of law. The Ohio Supreme Court, in *Pendrey*, explained that policy reasons similar to those argued by Bugaj are "better directed towards the legislature than the courts. The implications of, by judicial fiat, making every owner of an automobile an insurer for injuries to third parties which may be occasioned by the negligent or reckless acts of a car thief are unacceptable." *Pendrey*, 18 Ohio St.3d at 29.

{¶ 12} Finally, while Bugaj acknowledges that the substantive law determines whether a genuine issue of material fact exists, he asserts that *if* this court agrees that he

is entitled to the rebuttable presumption urged upon us, supra, *then* material questions of fact arise. He cannot, however, establish this hypothetical proposition. The antecedent, a precondition for the consequent, does not exist and we decline to create it. Thus, Bugaj implicitly acknowledges that, given the lack of his requested rebuttable presumption, and given the current state of the common law, no genuine issue of material fact exists. Therefore, the trial court properly granted summary judgment to Leffler.

{¶ 13} Based on the foregoing, we find the two assigned errors not well-taken. The judgment of the Lucas County Court of Common Pleas is therefore affirmed. Appellant is to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James R. Sherck, J. _____
CONCUR.
JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.