Court of Appeals of South Carolina

Starr GADSON, by her Guardian ad Litem Kathy GADSON, Respondent,

v.

ECO SERVICES OF SOUTH CAROLINA, INC. and Joseph Jenkins, Appellants.

No. 2005–UP–130. | Heard Jan. 12, 2005. | Decided Feb. 18, 2005.

Appeal from Jasper County; Paul M. Burch, Circuit Court Judge.

Attorneys and Law Firms

Deborah H. Sheffield, of Charleston, for Primary Appellant.
Joseph R. Weston, of Mt. Pleasant, for Secondary Appellant.
Daniel E. Henderson, of Ridgeland, for Respondent.

Opinion

PER CURIAM.

ECO Services of South Carolina, Inc. (ECO) and Joseph Jenkins[] appeal from jury verdicts against them on Starr Gadson's claims for negligent entrustment. We affirm as to Jenkins and reverse as to ECO.

FACTS

Jenkins worked for ECO, [a] solid waste contractor that services Beaufort, Jasper, and Hampton counties. As a "helper," Jenkins used ECO's trucks to go back for missed pickups. On August 6, 1997, Jenkins failed to return ECO's truck at the end of the day to the Hilton Head office. Instead, he drove the truck to Hardeeville. Gadson testified that she saw Jenkins drive the truck to a friend's house. Jenkins's cousin John Jenkins was riding in the front of the truck and Gadson's brother and another passenger were riding in the back.

Gadson's brother climbed out of the truck and went home. Gadson and several other people climbed into the back of the truck and Jenkins drove them to McDonald's. After they ate, Jenkins drove them to a store where John bought a cigar and one or two wine coolers, which he shared with another passenger. Jenkins then drove them to the Purrysburg Landing, where they talked for about an hour.

When the group started back to Hardeeville, John was driving the truck.[1] He suddenly sped up to around 80 miles per hour and then lost control of the vehicle, resulting in the accident. Gadson and the other passengers in the back were thrown from the truck.

Gadson, along with others injured in the accident, brought suit alleging negligence and negligent entrustment against ECO, Jenkins, and John.[2] The case was tried to a jury. ECO and Jenkins were represented at trial, but Jenkins did not appear. John was not represented and did not appear at trial. The jury returned a general verdict against all three defendants. The jury found, in special interrogatories, as follows: (1) ECO entrusted its vehicle to Jenkins; (2) ECO was negligent in entrusting its vehicle to Jenkins; (3) ECO's negligence proximately caused the plaintiffs' injuries; (4) John was the driver of the vehicle; (5) John's negligence proximately caused the plaintiffs' injuries; (6) Jenkins was not the driver of the vehicle; and (7) Jenkins was negligent in entrusting the vehicle to John. It awarded Gadson $50,000 in actual damages.

ECO and Jenkins both requested and were granted ten days to file post-trial motions. In their motions, ECO and Jenkins asked for JNOV and new trial based on alleged juror misconduct.[3] The trial court initially dismissed both motions finding they were untimely. On remand from this court, the trial court considered both motions on the merits, but denied them. ECO and Jenkins appealed.

STANDARD OF REVIEW

When reviewing the denial of a motion for a directed verdict or JNOV, this court uses the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The motion must be denied when the evidence is susceptible of more than one inference. Id. at 300, 536 S.E.2d at 418. Neither this court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Id.

[1] The official accident investigation report listed Jenkins as the driver of the truck, but the jury by special interrogatory found the driver at the time of the accident to be John.

[2] The other cases have been settled and are no longer a part of this appeal. In addition, John did not appeal the judgment against him.

[3] After the trial, Jenkins' attorney spoke to one of the jurors and discovered that several of the jurors either knew of Jenkins and John or knew of their reputations. Additionally, one of the jurors had a cousin who worked for ECO. The attorney prepared an affidavit testifying to what he heard.

LAW/ANALYSIS

ECO and Jenkins both argue the trial court erred in denying their motions for directed verdict and JNOV on Gadson's claims for negligent entrustment.

"The theory of negligent entrustment provides: 'the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment.'" Am. Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 622, 274 S.E.2d 416, 418 (1981) (quoting 19 A.L.R.3d 1175, 1192).

The Restatement (Second) of Torts § 308 (1965)[4], provides as follows:

> 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.

We will consider Gadson's claims against ECO first.

It is undisputed that ECO owned the truck involved in the accident. ECO does dispute that Jenkins had authority to be driving the truck on the night of the accident. Lou Joseph Diaz, general manager for ECO, testified that Jenkins had never taken the truck to Hardeeville after work hours prior to the date of the accident. However, one of the other passengers injured in the truck contradicted this testimony when he said that he had seen Ricky driving the truck around Hardeeville in the evenings for a week before the accident.

Jenkins was suspended twice early in 1997 for unexcused absences from work. Additionally, a note in Jenkins's personnel file indicated that Jenkins was terminated for unauthorized use of a company vehicle on July 11, 1997—three weeks before the accident occurred. When confronted, Diaz testified that the date on the note was probably a typographical error by the personnel office in Charleston. He further testified that the note was probably intended to reflect that Jenkins was fired on August 7, 1997 as a result of the accident, and that Jenkins had not been disciplined in July of 1997. Diaz noted that this could be confirmed by the personnel office; however, the ECO employee who inserted the note into the file was never called to testify. Hector Calderon, human resource director at

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[4] In Lydia v. Horton, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000), this court adopted the Restatement (Second) of Torts §§ 308 and 390 as the standard for negligent entrustment in South Carolina. Lydia involved a first party cause of action for negligent entrustment. The South Carolina Supreme Court reversed this court's opinion, holding that the plaintiff could not recover on a first party negligent entrustment cause of action because "(1) South Carolina's modified comparative negligence scheme would bar recovery for this type of claim, and (2) the public policy considerations addressed ... in Tobias v. Sports Club, Inc., 332 S.C. 90, 504 S.E.2d 318 (1998)." Lydia v. Horton, 355 S.C. 36, 39, 583 S.E.2d 750, 752 (2003). The supreme court also "decline[d] to adopt sections 308 and 390 of the Restatement" based on the facts of that case. Id. at 43, 583 S.E.2d 750, 583 S.E.2d at 754. We do not find the supreme court's ruling in Lydia would prevent application of section 308 of the Restatement under the facts of the present case as the question addressed in Lydia was whether South Carolina recognizes a first party negligent entrustment claim.

ECO, testified that ECO never fired Jenkins in July of 1997. He stated ECO's payroll records showed Jenkins was working for the company during that time. We agree with ECO that the only reasonable conclusion is that the notation that Jenkins was terminated on July 11, 1997 is a typographical error. See Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (stating that although we are bound to review the record in a light most favorable to respondents, we "cannot ignore facts unfavorable to that party.") However, even if we accept the notation as evidence ECO had previously terminated Jenkins for unauthorized use of a vehicle, we find the record does not support the jury's finding of negligent entrustment against ECO.

Gadson asserts that the evidence proves ECO knew that Jenkins was an irresponsible employee, and therefore was likely to cause harm to third parties with the truck. We disagree. The crux of the issue is whether ECO knew or should have known that Jenkins intended or was likely to use the truck in such a manner as to create an unreasonable risk of harm to others. The only inference from the evidence in the record is that Jenkins had attendance problems at work about six months before the accident, and that he was known to take ECO's trucks home without authorization. Jenkins's driving record contained no violations, accidents, or suspensions over the three-year period prior to the accident. There is simply no evidence that ECO knew that Jenkins was likely to drive the truck recklessly, or that ECO knew that Jenkins was likely to entrust the truck to someone else who would drive it recklessly.

Gadson attempts to close this gap by using negative inferences from the fact that Jenkins did not testify at the trial. See Duckworth v. First Nat'l Bank, 254 S.C. 563, 576, 176 S.E.2d 297, 304 (1970) ("If a party knows of an available witness on a material issue and such witness is within his control and if without satisfactory explanation he fails to call him, the jury may draw the inference that the testimony of the witness would not have been favorable to such party.") However, this rule is not applicable here because Jenkins was no longer an employee of ECO at the time of trial and thus was no longer under ECO's control. Id. at 576–77, 176 S.E.2d at 304.

The test for legal sufficiency of the evidence in South Carolina is "whether the evidence serves to prove a fact or permits an inference of fact that would enable an ordinarily intelligent mind to draw a rational conclusion therefrom in support of the right of the plaintiff to recover." Mahaffey v. Ahl, 264 S.C. 241, 248, 214 S.E.2d 119, 122 (1975). We find insufficient evidence to support the knowledge prong of Gadson's negligent entrustment claim against ECO. The evidence presented is simply not enough to permit an ordinarily intelligent mind to rationally infer that ECO knew that Jenkins was likely to entrust the vehicle to another who would drive recklessly. Accordingly, we find the trial court erred in denying ECO's motions for directed verdict and JNOV.

Jenkins' liability for negligently entrusting the truck to John is a separate issue. Jenkins did not dispute that he had control of the vehicle, or that he entrusted the vehicle to John. Additionally, Jenkins has not disputed that this entrustment was unauthorized. We find the record supports the inference that Jenkins knew or should have known that John's use of the vehicle was likely to cause harm. Jenkins knew that John had been drinking alcoholic

beverages. Jenkins was apparently familiar with John's character, because he was John's cousin. Moreover, because Jenkins did not testify on his own behalf, the jury was permitted to infer that any testimony would have been unfavorable. See McCowan v. Southerland, 253 S.C. 9, 12, 168 S.E. 573, 574 (1969) (stating that as to facts that were peculiarly within defendant's knowledge, the defendant's unexplained failure to testify raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position). Accordingly, we find the trial court did not err in denying Jenkins's motions for directed verdict and JNOV.

CONCLUSION

Based on the foregoing, the order of the trial court is

AFFIRMED in part, and REVERSED in part.

HUFF, KITTREDGE, and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Starr Gadson, by her Guardian ad Litem, Kathy Gadson, Respondent,

v.

ECO Services of South Carolina, Inc., and Joseph Jenkins,
of whom Joseph Jenkins, is, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Jasper County
Paul M. Burch, Circuit Court Judge

Opinion No. 26357
Heard May 2, 2007 - Filed July 16, 2007

REVERSED AND REMANDED

Joseph R. Weston, of Weston Law Firm, of Mt. Pleasant, for Petitioner.

Daniel E. Henderson, of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Ridgeland, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision in Gadson v. ECO Services of South Carolina, Op. No. 2005-UP-130 (S.C. Ct. App. filed February 18, 2005). Joseph Jenkins (Petitioner) contends the Court of Appeals erred in affirming the trial court's denial of his motions for directed verdict and judgment notwithstanding the verdict (JNOV). We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was employed by ECO Services of South Carolina, Inc. (ECO), a solid waste contractor. On August 6, 1997, instead of returning ECO's vehicle to the Hilton Head office, Petitioner drove the vehicle to Hardeeville where he picked up several passengers, including Starr Gadson (Respondent) and his cousin, John Jenkins, and drove them to McDonald's. Petitioner then drove them to a store where John purchased one or two wine coolers. John shared the wine coolers with another passenger.

Petitioner drove them to Purrysburg Landing, where they talked for about an hour. On the way back to Hardeeville, John drove the vehicle. John reached a speed of 80 miles per hour before losing control of the vehicle. Several passengers, including Respondent, were thrown from the vehicle and sustained injuries.

Respondent filed an action against ECO and Petitioner, alleging negligence and negligent entrustment. Neither Petitioner nor John appeared at trial. However, Petitioner did move for a directed verdict. The jury returned a verdict against all three defendants, finding: (1) ECO entrusted the vehicle to Petitioner; (2) ECO was negligent in entrusting the vehicle to Petitioner; (3) ECO's negligence proximately caused Respondent's injuries; (4) John was driving the vehicle at the time of the accident and was doing so negligently; (5) John's negligence proximately caused Respondent's injuries; (6) Petitioner was not driving the vehicle at the time of the accident; and (7) Petitioner was negligent in entrusting the vehicle to John. The jury awarded Respondent $50,000 in actual damages.

Both ECO and Petitioner moved for JNOV and a new trial based on juror misconduct. The trial court dismissed both motions finding they were not timely filed. The Court of Appeals remanded and the trial court considered and denied the motions. ECO and Petitioner appealed. Based on the definition of negligent entrustment as provided by the Restatement (Second) of Torts § 308 (1965), the Court of Appeals affirmed as to Petitioner and reversed as to ECO. Gadson v. ECO Services of S.C., Op. No. 2005-UP-130 (S.C. Ct. App. filed February 18, 2005). Specifically, the Court of Appeals considered Petitioner's driving record and work history and found ECO neither knew nor should have known Petitioner intended or was likely to use the truck in such a manner as to create an unreasonable risk of harm to others. As for Petitioner, the Court of Appeals found he knew or should have known John's use of the vehicle was likely to cause harm considering their familial relationship and the fact John consumed alcohol before driving.

ISSUE

Did the Court of Appeals err in affirming the trial court's denial of Petitioner's motions for directed verdict and JNOV and in finding Petitioner negligently entrusted the vehicle to John Jenkins?

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). The motions should be denied when either the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006). An appellate court will only reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

LAW/ANALYSIS

Petitioner argues the Court of Appeals erred in affirming the trial court's denial of his motions for directed verdict and JNOV and in finding he negligently entrusted the vehicle to John Jenkins. Specifically, Petitioner argues there is no evidence from which a jury could have reasonably concluded he knew or had reason to know John was likely to use the vehicle in a manner involving unreasonable risk of physical harm to himself or others.

According to our case law, the elements of negligent entrustment are: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. Jackson v. Price, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986). However, in determining whether Respondent met her burden of proving the elements of negligent entrustment, the Court of Appeals applied Restatement (Second) of Torts §§ 308 and 390,[5] which extend liability when the owner knows or had reason to know that such person is likely because of his youth, inexperience, or otherwise, to create an unreasonable risk of physical harm to himself and others. We decline to adopt sections 308 and 390 of the Restatement based on this set of facts, and we analyze this case under the elements of negligent entrustment set forth in Jackson.

The Court of Appeals erred in finding Petitioner knew John would cause harm because Petitioner knew John had been drinking alcohol prior to driving the vehicle. Over an hour

[5] Section 308 provides:

> 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.

Section 390 provides:

> 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.

before driving the vehicle, Petitioner witnessed John purchase and consume wine coolers. It is disputed whether John purchased one or two wine coolers and whether he shared the drinks with another passenger. Petitioner stated in his brief and Respondent testified at trial that John did not appear intoxicated. Furthermore, there was no evidence as to John's drinking habits or his driving record. The sole evidence supporting the claim for negligent entrustment against Petitioner is the fact John had one or two wine coolers prior to driving. Knowledge that a driver has had a drink or two is a far cry from meeting the first element of negligent entrustment that there be knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking.

Viewing the evidence in the light most favorable to Respondents, there was no support for the contention Petitioner, or even Respondent, for that matter, knew John was intoxicated; nor was there evidence Petitioner knew John had a habit of being intoxicated and driving. Evidence John consumed as little as half of a wine cooler[6] an hour before driving the vehicle does not support a finding of negligent entrustment against Petitioner. See, *e.g.*, Greene v. Jenkins, 481 S.E.2d 617 (Ga. Ct. App. 1997) (parents were not liable for entrusting vehicle to son when parents knew son had a couple of drinks, but did not know he was incompetent due to intoxication and when passenger in wrecked vehicle testified she would not have ridden with the son had she believed he was intoxicated); Gibson v. Bruner, 178 A.2d 145 (Pa. 1961) (JNOV granted to father who entrusted truck to son after son had consumed four bottles of beer when there was no evidence son was intoxicated or unable to drive the truck competently).

The Court of Appeals also erred in finding Petitioner knew John would cause harm simply because John was Petitioner's cousin. The Court of Appeals held, "[Petitioner] was apparently familiar with John's character, because he was John's cousin." Gadson v. ECO Services of S.C., Op. No. 2005-UP-130 (S.C. Ct. App. filed February 18, 2005). Respondent presented no evidence Petitioner had any knowledge of John's drinking habits, driving record, or general behavior. Assuming Petitioner was aware of John's character simply because Petitioner and John are cousins was error.

Finally, the Court of Appeals erred in finding the jury could have inferred the elements of negligent entrustment had been met when Petitioner failed to testify on his own behalf. The failure of a defendant to testify raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position. See, *e.g.*, Crocker v. Weathers, 240 S.C. 412, 126 S.E. 335 (1962). However, Respondent presented no evidence Petitioner knew John would create an unreasonable risk of harm other than evidence Petitioner and John were cousins and John consumed a minimal amount of alcohol before driving. Respondent carried the burden of proof and failed to present any evidence Petitioner negligently entrusted the vehicle to John. See Ross v. Paddy, 340 S.C. 428, 433, 532 S.E.2d 612, 614 (Ct. App. 2000) ("The burden of proof is on the plaintiff to establish the negligence of the defendant."). Respondent failed to meet her burden of proof and cannot rely on the absence of Petitioner at trial to fill the void of evidence.

[6] Respondent testified John split the wine cooler with another passenger.

CONCLUSION

The Court of Appeals erred in affirming the trial court's denial of Petitioner's motion for a directed verdict because Respondent failed to submit any evidence establishing the necessary elements of negligent entrustment.

REVERSED AND REMANDED.

TOAL, C.J., MOORE, J., and Acting Justice J. Cordell Maddox, concur.

PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that petitioner's JNOV motion should have been granted, but write separately because I believe we should adopt Restatement (Second) of Torts[] §§ 308 and 390 as alternative methods of proving negligent entrustment. I fear that our current formulation would not admit of liability where a person permitted an individual to drive an automobile knowing that the driver was intoxicated, but where there was no evidence the supplier knew the driver was a habitual drinker or addicted to alcohol. In my view, adoption of sections 308 and 390 would eliminate this loophole. That said, I agree that even under these formulations, there is no evidence that petitioner knew or should have known that John Jenkins was likely to operate the vehicle in a manner which created an unreasonable risk of harm. I therefore concur in the decision to reverse and remand the Court of Appeals' decision affirming the trial court's denial of petitioner's JNOV motion.