RENDERED: JANUARY 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002345-MR

JOHN M. ISON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 06-CI-008978

BROWN BROTHERS CADILLAC CHEVROLET, INC.; AND PROGRESSIVE NORTHERN INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,[1] SENIOR JUDGES.

ACREE, JUDGE: The appellant, John Ison, appeals an order of the Jefferson Circuit Court granting summary judgment in favor of the appellee, Brown Brothers Cadillac Chevrolet, Incorporated (Brown Brothers). Ison asserts that the circuit

[1] Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580. Senior Judge Henry concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

court improperly granted summary judgment because Brown Brothers owed him a duty to prevent the intervening criminal acts of third persons and there was no superseding cause. Further, Ison argues that even if Brown Brothers did not owe him a duty to prevent intervening criminal acts, it voluntarily undertook a duty to provide security on its premises and could be liable for the negligent performance of this assumed duty. We disagree. Because Brown Brothers did not owe a duty to Ison, summary judgment was appropriate and we affirm.

Ison was severely injured on October 11, 2005, when he was struck by a 2006 Cadillac STS operated by Christopher Montgomery. The police found the factory Cadillac key in Montgomery's possession. Later, it was determined that the Cadillac had been stolen from Brown Brothers. However, Montgomery denied stealing the car.

Brown Brothers was unaware that the theft occurred until notified by the police that the car was found. Gary Brown, the owner of Brown Brothers, stated in his deposition that he was never able to determine how the car was stolen. Indeed, it appears that this fact remains a mystery to Brown, as well as to his new car sales manager and his office manager.

During the hours when the dealership is closed, at least one security guard remains on the lot. Further, the lot is surrounded by a large fence and concrete

wall and each of the exits are blocked when the dealership is closed. The extensive security measures used to protect the vehicles at night led Mr. Brown to believe that the theft occurred during the day.

At the time of the accident, Montgomery was fourteen years old and was driving for the first time. In his deposition, Montgomery stated he received a call from a friend, who was also in middle school, who asked him to pick up the car which was parked on the street with the key hidden under the wheel well. Despite never having driven, he claims he picked up the car and started driving around. Shortly thereafter, the accident occurred.

The stolen vehicle was a fully accessorized Cadillac STS. This particular model was equipped with a keyless starter. This starter was not easy to operate and required knowledge of specific operating instructions. It is unknown how Montgomery learned to use the keyless starting system.

Ison asserts that Brown Brothers had a duty to prevent the theft of the vehicle because it was foreseeable that if a theft occurred, the thief might drive negligently. The circuit court disagreed and granted summary judgment in favor of Brown Brothers without making any written findings. We review the circuit court's decision *de novo*. *Steelvest, Inc. v. Scansteel Serv.Ctr.*, 807 S.W.2d 476, 483 (Ky. 1991).

> 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 disputed 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.

Bruck v. Thompson, 131 S.W.3d 764, 766 (Ky. App. 2004). This case requires us to consider whether Brown Brothers owed Ison a duty of care, and if so, whether Brown Brothers' alleged negligence was the proximate cause of Ison's injuries.

Ison cites *Grayson Fraternal Order of Eagles v. Claywell*, to support his assertion that a "universal duty of care" exists. *See* 736 S.W.2d 328 (Ky. 1987). Ison argues that this universal duty required Brown Brothers to protect him from the criminal acts of third parties. It is clear, however, that if Brown Brothers does not owe a duty of care to Ison, there can be no breach, and therefore no actionable negligence. *See Ashcroft v. Peoples Liberty Bank & Trust Co., Inc.*, 724 S.W.2d 228, 229 (Ky. App. 1986).

On several occasions, this court has pointed out that "*Grayson* is often cited by parties advocating a theory of liability or a cause of action where none previously existed and legal authority is otherwise lacking." *Jenkins v. Best*, 250 S.W.3d 680, 689 (Ky. App. 2007) (quoting *James v. Wilson*, 95 S.W.3d 875, 891 (Ky. App. 2002). "In other words, parties turn to *Grayson's* sweeping statement of 'universal duty' where the facts of their case do not support a duty based on recognized legal relationships." *Jenkins*, 95 S.W.3d at 689. Therefore, at the outset, we note that "our courts have never found liability in tort unless we first

found circumstances giving rise to a relationship of some kind in which one particular party owed a duty to another particular party." *Id.* at 691.

In support of its motion for summary judgment, Brown Brothers relied on this court's decision in *Bruck v. Thompson*, 131 S.W.3d 764 (Ky. App. 2004), and argued that Brown Brothers did not owe a duty of care to Ison. In *Bruck*, we determined that although the defendant left his car unlocked with the keys inside, he did not owe a duty of care to the plaintiff, who was injured when the car was stolen and negligently driven by the thief. *Id*. at 767. This was so even though another of the defendant's cars was previously stolen from the same location, and the defendant's home was burglarized twice before the second vehicle theft occurred. *Id.* at 775-76. In *Bruck*, we noted that KRS 189.430(3) – sometimes referred to as the key-in-the-ignition statute – did not create a duty owed by the defendant to the plaintiff when the car was left in a private driveway. *Id.* at 767. Any duty created by KRS 189.430(3) only exists when a car is stolen on a public street. *Id.* Even if Ison could establish a duty on the part of Brown Brothers, the thief's negligence constituted a superseding cause; therefore, any breach of such a duty by the defendant would not constitute the proximate cause of Ison's injury. *Id.* 767-68.

In *Frank v. Ralston*, the United States Court of Appeals for the Sixth Circuit applied Kentucky law and determined that a defendant who left his car in an unattended parking lot, unlocked, with the key in the ignition, was not liable for injuries incurred by the plaintiff when the car was stolen and negligently driven.

248 F.2d 541 (6th Cir. 1957). The Sixth Circuit "held that the defendants could not as a matter of law be charged with the duty of anticipating that their unlocked and unattended vehicle would be stolen and negligently operated so as to injure the plaintiffs." *Id.* at 542 (quoting *Frank v. Ralston*, 145 F. Supp. 294 (W.D. Ky. 1956)). The district court also noted "that the negligent driving of the thieves was the proximate cause of the decedent's death and that the negligence of the defendant, if any, was too remote in the eyes of the law to be regarded as connected as cause therewith." *Frank*, 145 F. Supp. at 294-95. We agree with this analysis.

In the case *sub judice*, it is undisputed that the vehicle was stolen from Brown Bothers' premises and not from a public street. Under such circumstances, KRS 189.430(3) does not impose a legal duty on the car dealership that would render it liable to a third party even if someone at the dealership had left the keys in the ignition. *Bruck*, 131 S.W.3d at 767 (quoting *Estridge v. Estridge*, 333 S.W.2d 758, 760 (Ky. 1960)("this statute is a 'part of the regulations of traffic on public ways and may not be regarded as applicable to a private driveway.'")).

We find unpersuasive Ison's argument that the car lot here should be treated differently than a driveway because it is open to the public. A typical private driveway is even less secure than the lot at Brown Brothers and, therefore, by Ison's argument, more open to the public; a typical private driveway is often more open to the public than a public parking lot which is designed to control the comings and goings of automobiles. In *Frank*, the car was parked in a public

parking lot and yet the owner's negligence was determined not to be the proximate cause of the decedent's death. The same is true here. Even if we could find a duty here, the undisputed security measures on the premises would make untenable the finding of a breach that could be cognizable as the legal and proximate cause of Ison's injuries.

For the reasons stated above, *Bruck* is controlling. Because the vehicle was stolen from private property, any duty that may have been imposed by KRS 189.430(3) does not apply. Further, even if Brown Brothers acted negligently, its negligence was not the proximate cause of Ison's harm. Therefore the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Patrick S. McElhone
Louisville, Kentucky

BRIEF FOR APPELLEE, BROWN BROTHERS CADILLAC CHEVROLET, INC.:

Carol Schureck Petitt
Louisville, Kentucky