

[Cite as *Mitchell v. Woodbridge*, 2001-Ohio-3253.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

LEOLA MITCHELL)
)
) PLAINTIFF-APPELLANT)
)
) VS.) O P I N I O N
)
) ADAM WOODBRIDGE, ET AL.)
)
) DEFENDANTS-APPELLEES)

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of
Common Pleas Mahoning County,
Ohio
Case Nos. 96-CV-3154
97-CV-628

JUDGMENT: Affirmed.

APPEARANCES:

For Appellant:

Atty. Mary Ann Fabrizi
Atty. Matthew C. Giannini
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Boardman, Ohio 44512

For Appellees State Farm
Mutual Auto. Insurance and
Clarence White, Sr.:

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Atty. Margo R. Stoffel
Comstock, Springer & Wilson
100 Federal Plaza East
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Youngstown, Ohio 44503

For Plaintiff Latoya McCrae:

Atty. William C. Ramage
Harshman, Bernard & Ramage
105 East Boardman Street
Youngstown, Ohio 44503

For Defendant Adam Woodbridge:

Atty. Adam Sperling
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& Small
21 North Wickliffe Circle

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: May 2, 2001

WAITE, J.

{¶1} This timely appeal arises from the trial court's grant of summary judgment to Appellees, Clarence White, Sr. and State Farm Insurance. For the following reasons, we affirm the judgment of the trial court.

{¶2} On August 27, 1996, Appellee Clarence White, Sr. (father), permitted his son Clarence White, Jr. (son), to use his car. Father was insured by Appellee State Farm Insurance (State Farm). Son permitted Adam Woodbridge to use the car without the consent of father. Woodbridge was driving the car when he crashed the vehicle into Appellant, Leola Mitchell's house.

{¶3} On January 24, 1997, Appellant filed a complaint against Woodbridge and father, alleging that father negligently entrusted his car to Woodbridge. On father's motion, Appellant's suit was consolidated with a suit filed by Woodbridge's passenger. On September 21, 1998, Appellant filed an amended complaint adding son and State Farm as defendants.

{¶4} On September 21, 1998, Appellees filed separate

motions for summary judgment relying on deposition testimony from the Whites. State Farm argued that Woodbridge was not insured under their policy, as he was driving the car without the permission or knowledge of father. In turn, father argued that there was no evidence to establish a claim of negligent entrustment, as he had no knowledge that Woodbridge was driving his car. The record does not contain a response from Appellant to the motions for summary judgment nor is there any notation on the appearance and execution docket indicating that Appellant filed a response. We note that Appellees filed a document styled, "reply to memorandum in opposition filed by plaintiff Mitchell." At best, we can only speculate that Appellant forwarded a responsive motion to Appellees but neglected to file it with the trial court.

{¶5} On December 9, 1998, the trial court filed a judgment entry granting Appellees' motions for summary judgment. The trial court stated that it was undisputed that father did not know that Woodbridge drove the car until after the accident, father did not give Woodbridge permission to use the car and he did not give son permission for Woodbridge to use the car. Appellant filed her notice of appeal on December 29, 1998.

{¶6} Appellant's brief to this Court contains no stated assignment of error nor any issue for review. This is in direct violation of App.R. 16(A)(3)(4). However, Appellant appears to

argue that the trial court erred in granting the motions for summary judgment. Appellant contends that there was a question as to whether father implicitly permitted his son to loan the car to third parties. As her only support for this belief, Appellant argues that the deposition testimony of the Whites was self-serving. Appellant admits that pursuant to Civ.R. 56, a trial court is not permitted to weigh the credibility of evidence when considering a motion for summary judgment. However, Appellant insists that credibility is a concern when the evidence in support of a motion for summary judgment appears to be uncontroverted in favor of the moving party. Appellant states that this is the case where credibility is manifestly critical to determining that there is no genuine issue as to the existence of that fact. *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163. Based on the record before us, Appellant's argument lacks merit.

{¶7} When reviewing a motion for summary judgment, an appellate court reviews the judgment independently with no deference given to the trial court's decision. *Bell v. Horton* (1996), 113 Ohio App.3d 363, 365.

{¶8} Civ.R. 56(C) states in part:

{¶9} " * * * Summary Judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts, and written stipulations of fact, if any, timely filed in the action, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor * * *."

{¶10} In addition, summary judgment under Civ.R. 56 is proper where:

{¶11} "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds could come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

{¶12} *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶13} A party moving for summary judgment, "* * * bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once the initial burden is satisfied by the moving party, the non-moving party has the reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. *Id.*

{¶14} In the present case, Appellant relies on *Killilea v.*

Sears, Roebuck & Co., supra, for the proposition that credibility can be at issue in a motion for summary judgment where the evidence in support of such motion appears to be uncontroverted in favor of the moving party. Thus, Appellant contends that when credibility is manifestly critical to determining that there is no genuine issue as to the existence of that fact, the trial court must delve into the credibility of the evidence. Specifically, Appellant states that the deposition testimony of the Whites is self serving and therefore suspect.

{¶15} Appellant has misconstrued and misapplied the *Killilea* court's holding. In that case, the court stated:

{¶16} "Resolution of a motion for summary judgment does not include trying the credibility of witnesses. If an issue is raised on summary judgment, which manifestly turns on the credibility of the witness because his testimony must be believed in order to resolve the issue, and the surrounding circumstances place the credibility of the witness in question--for example, where the potential for bias and interest is evident--then, the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness."

{¶17} *Id.*, 167, citing *Duke v. Sanymetal Products Co.* (1972), 31 Ohio App.2d 78, 83.

{¶18} The *Killilea* court stated further:

{¶19} "Credibility concerns normally arise in summary judgment proceedings when the affidavits or depositions of witnesses are in conflict concerning a fact to be proved. Under these situations, it is evident that resolution of the factual dispute will depend, at least in part, upon the credibility of the witnesses, and trial courts routinely deny summary judgment.

However, credibility concerns can also be present where, on the face of evidentiary documentation supporting a motion for summary judgment, the moving party's evidence on a factual issue appears to be uncontroverted. This will be the case where, under the circumstances, credibility manifestly is critical to a determination that there is no genuine issue as to the existence of that fact."

{¶20} Id., 167-168.

{¶21} In the present matter, the credibility of the Whites is not manifestly critical to determining that there is no genuine issue of material fact. The two substantive issues in the present case are whether Appellant has presented evidence to support a negligent entrustment claim against father and whether Woodbridge was covered by the insurance policy.

{¶22} To prevail on her claim of negligent entrustment, Appellant must establish that the motor vehicle was driven with the permission of the owner, the driver was in fact incompetent and the owner knew or had knowledge of these facts. From this, Appellant may imply that at the time of the entrustment the entrustee was unlicensed or incompetent or unqualified. *Gulla v. Straus* (1950), 154 Ohio St. 193, 201. In their motions for summary judgment, Appellees cited the deposition testimony of the Whites, both of whom stated that father did not give permission to Woodbridge to drive the car. (Father depo. pp. 10, 19, 42; Son depo. pp. 7, 8).

{¶23} As Appellees notified the trial court of the basis of their motions, the burden shifted to Appellant to demonstrate a dispute of material fact. As noted, Appellant did not file a

motion in opposition to Appellees' motions. The deposition testimony of the Whites is the only evidence on record. Even if we assume their deposition testimony is completely self-serving, Appellant has not presented any evidence that Woodbridge, in fact, had the permission of father to drive the car. Without a scintilla of evidence to contradict the Whites, credibility was not manifestly critical to determining that there is no genuine issue as to the existence of that fact.

{¶24} Turning to the question of whether Woodbridge was covered by the insurance policy, the policy provides at page 6 that, among others, an insured driver is, "[a]ny other person while using [the insured car] if its use is within the scope and consent of [the owner or the owner's spouse]." Appellees presented deposition testimony that father did not give Woodbridge permission to drive his car and that he did not give son permission to allow Woodbridge to drive the car. (Father, depo. pp. 10, 19, 42; son depo. p. 8). Again, as Appellant failed to file a responsive pleading, Appellant has failed to meet her reciprocal burden to demonstrate an issue of material fact as to whether Woodbridge had the permission of the owner or his spouse to drive the car. Completely denying the believability of the Whites' deposition testimony is not enough when Appellant has not demonstrated any facts to support that Woodbridge was an insured driver under the policy. Appellant

cannot hope to prove her claims by using a negative; that is, she cannot prove Woodbridge had the requisite consent by merely claiming that father and son are not credible in their assertions to the contrary. Some evidence of express or implied permission was critical to support Appellant's claims; she offered none.

{¶25} As Appellant has not met her reciprocal burden to demonstrate a dispute of material fact, we hold that the trial court correctly granted Appellees' motions for summary judgment. Appellant's assignment of error is overruled and the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.