

STATE OF MICHIGAN
COURT OF APPEALS

DWAYNE TRIPLETT,

Plaintiff-Appellant,

v

NATIONAL SEMI-TRAILER CORP.,
d/b/a DOERRS TRAILER LEASING CO.,
and T.V. MINORITY COMPANY, INC.,

Defendants-Appellees.

UNPUBLISHED

December 12, 2000

No. 211548

Wayne Circuit Court

LC No. 95-524074-NI

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants summary disposition in this negligence action. We affirm.

I

On June 21, 1994, plaintiff, a tractor/trailer driver and independent contractor,¹ drove a tractor-trailer rig to Toledo for defendant T.V. Minority Company, Inc. (TVM), dropped off the trailer, and picked up a different trailer, the one at issue in the instant litigation. TVM leased the trailer at issue from defendant National Semi-Trailer Corp. (National) on June 2, 1994. National had had new brakes installed on the trailer after a prior lessee returned it to National on May 4, 1994.

Under the lease between TVM and National, lessee TVM was "to do brake jobs at their cost while in their possession [sic]." The lease stated in a section entitled "Lessee's Daily Responsibilities:" "1. Maintain proper tire air pressure: repair flat tires. 2. Maintain proper oil levels in axles. 3. Perform minor light repairs and brake adjustments." The lease also stated in a section entitled "Conditions of Lease Agreement:"

¹ George Franczyk, for whom plaintiff was an independent contractor, owned the tractor plaintiff drove.

Lessee acknowledges Trailer has been properly maintained and is in good condition, working order and repair . . . Lessee further acknowledges that Trailer complies with the rules and requirements of all applicable authorities and all laws, statutes and regs relating to traffic safety, highway protection and loan requirements, if any.

* * *

Maintenance and Inspection Lessee shall, at its own cost and expense, during the term hereof, maintain and keep Trailer in good, safe and satisfactory repair, including, without limitation, [requi]rement to replace any parts of Trailer, including tires and tubes, so as to maintain Trailer in the same operating condition and appearance as when received. Lessor shall, at all times, [have the] right to inspect Trailer, but shall be under no obligation to do so, and Lessee's obligation to keep Trailer in good repair shall not be affected in any manner by the failure of Lessor [to inspect] Trailer.²

An inspection sheet dated June 2, 1994, shows that 100% of the trailer's brake linings remained, and that the braking system had been checked. A Vehicle Condition Report dated June 3, 1994, signed by Timothy Bachs, an agent of TVM, states that the brakes were "100%."

Plaintiff alleged that on the morning of June 22, 1994, while on I-94 on a run from Detroit to Toledo, he attempted to slow the rig when he saw a truck stopped ahead, but was unable to stop due to faulty brakes, and rear-ended another vehicle, then crossed three lanes of traffic and side-swiped another vehicle before coming to a complete stop. Plaintiff alleged that a proximate cause of the collision was defendants' negligence in maintaining the trailer, contrary to the Michigan Vehicle Code, and specifically, in failing to inspect the vehicle to insure that it was in safe condition; failing to maintain the trailer brakes in good working order; failing to train, supervise, instruct and control competent agents in the proper procedures in replacing or repairing the braking system; negligently permitting the trailer to be operated in an unsafe condition when defendants knew or should have known that injuries could result to plaintiff; and negligently entrusting the repairs of the trailer to an incompetent person unfit to repair or replace the braking system. Plaintiff alleged that as a direct and proximate result of defendants' negligence, plaintiff was thrown about the tractor and sustained severe, permanent and progressive injuries, including a closed head injury, seizures, oculomotor dysfunction, and chronic cervical strain.

After discovery closed, defendants brought a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that plaintiff could not show that defendants had breached their duty to maintain the trailer³ and, alternatively, that if they were negligent, their negligence was not a proximate cause of plaintiff's injuries.

² The bracketed portions are not legible on the copy before us.

³ Although defendants' motion for summary disposition argued that they owed no duty to
(continued...)

Plaintiff's response to defendants' motion attached copies of the police accident reports, Federal Motor Carrier Safety Regulation CFR 396, and a copy of an invoice of Boulevard & Trumbull Towing, where the trailer was towed after the accident. Plaintiff also attached one page of the deposition testimony of Ed Quillen, TVM's safety director, in which he opined that if the brakes were out of adjustment four full turns, there would have been no braking power. Plaintiff also attached similar deposition testimony that there would be no brakes and the first time the driver tried to come to a stop, the lack of breaking power would be apparent. Plaintiff attached one page of the deposition testimony of Tony Stamps, the Boulevard & Trumbull Towing Company employee who adjusted the trailer's brakes after the accident. While examining a receipt stating that the brakes were out of adjustment four turns, Stamps testified that the receipt showed that he worked on the trailer, not the tractor, that the \$35.00 charge stated on the invoice represented the garage's typical hourly rate, and that it took him about twenty-five minutes to adjust the brakes on the trailer.

The circuit court granted summary disposition on the basis that plaintiff failed to raise an issue of fact whether the trailer was unsafe when it was provided to him, stating in pertinent part:

I know that I have testimony that would indicate that the four turns would mean effectively no brakes. I know that we have testimony wherein Mr. Triplett indicated that as of that day he had brakes and the brakes worked multiple times.

I have no expert testimony or otherwise that would tell me either, that it could have come from excellent to four turns out, could or could not have from delivery to the time when the incident occurred, nor do I have any testimony that would allow me to determine that if the brakes worked at noon, either they could or they could not have gone four turns out of alignment by 12:30, I mean picking the time of his accident. All of that.

Plaintiff's counsel stated that she did have deposition testimony to the effect that if the brakes were four turns out of alignment at that point, they could not have been a hundred percent when the trailer was leased to TVM. Plaintiff's counsel stated that the testimony was not attached to her response to defendants' motion and asked for additional time to provide it to the court. The court responded that plaintiff's counsel could do so in a motion for reconsideration, and that it would allow the record to be augmented on reconsideration.

Plaintiff's motion for reconsideration argued that he introduced evidence showing that the trailer brakes were four turns out of alignment at the time of the collision and that that was equivalent to having no brakes at all. Plaintiff stated that he was providing the testimony the

(...continued)

plaintiff, defense counsel clarified at the hearing on defendants' motion that his argument was actually that plaintiff could not show that defendants breached a duty to plaintiff.

circuit court had considered missing from his response to defendants' motion, i.e., deposition testimony of the tractor's owner, Franczyk, that the trailer brakes could not have gotten that far out of adjustment within a few miles and that, if the brakes were four turns out of adjustment after the accident, they must have been out of adjustment when plaintiff picked up the trailer on June 21, 1994, the day before the accident. Plaintiff's motion for reconsideration further argued:

While it is true that Plaintiff himself testified that he was, in fact, able to stop the trailer on the few stops he made before this collision, according to Kenneth Schmidt, B&W's equipment controller, it is quite possible that the tractor's brakes were also stopping the trailer, before it was loaded but that it is much more difficult to stop a fully loaded trailer. It is unlikely that this would be possible at all with the vehicle fully loaded and on an incline which is the case at bar.

The evidence presented clearly establishes a question of fact regarding Defendants' breached duty to provide a safely maintained vehicle. The Court and parties were misled at the motion hearing and the Court would have reached a different result if all of this evidence had been before it.

Franczyk testified that the trailer was serviced and inspected a week or two before the accident, and that the state inspected the brakes on the tractor two weeks before the accident, finding no defects, and that :

Q Is it possible, sir, that an individual can operate your – strike that. Is it possible that Dwayne Triplett could have driven your Kenworth hauling an empty trailer on the way back from Toledo with just the racks and been able to stop at all the appropriate places with the trailer brakes out of adjustment?

A I've been driving for fourteen years and there's no way in this world that he could have done that if those brakes were that far out of adjustment. The empty racks alone on that trailer weigh between ten and twelve thousand pounds. There was weight in that trailer.

Like I said [sic], I've been driving for fourteen years. From the first time you hit that brake pedal, there was something wrong [sic]. I sincerely feel he didn't want to take the time to notify somebody or do anything about it.

Q You don't know that though?

A I suspect. You asked me my opinion.

Q Is it also your opinion that there was something wrong from the time he picked up that trailer to the time he was involved in the accident?

A Well, he alleges that at the time of the accident the brakes were out of adjustment. *If they were in fact out of adjustment at the time of the accident, they were out of adjustment the day before in Toledo.* That did not –

Q Why?

A That kind of an adjustment doesn't happen within a few miles.

Q You're talking about the four turn maladjustment.

A That's what was quoted by Dwayne, yes. The four turns out of adjustment, I think he got that from the towing company. I'm not sure what—

Q Take a look [sic] at Deposition Exhibit No. 1.

A That is Boulevard Trumbull Towing.

Q Is that the towing company that towed your tractor?

A Yes, it is.

* * *

Q Did you have any other conversation with him [plaintiff]?

A Well, yeah, we talked about the truck, went out there and looked at it. He was inquiring about the brakes. I helped him – I talked to the man at the desk and tried to find the mechanic that adjusted the brakes.

Q On the truck or the trailer?

A The trailer. Supposedly Dwayne had asked the towing company to go out and check the brakes on the trailer and –

Q Had they done that?

MR. FOLEY [*defendants' counsel*]: Objection. Hearsay. Go ahead.

THE WITNESS: You know, apparently – I don't know. Apparently this [invoice] is showing that they did, and we tried to track this person down, couldn't do it at that time and we left. I gave him a ride home.

BY MR. GORDON: [*plaintiff's counsel*]:

Q The person wasn't there?

A I can't recall what happened, why we couldn't find him. This is a huge yard. Some guy – I think it was Tony that we were looking for.

Q Tony Stamps?

A I – I don't know his name. Never did speak with him that day.

Portions of the deposition testimony of Kenneth Schmidt, equipment controller for TVM and B&W, an affiliate of TVM, were submitted to the circuit court. Schmidt testified that it was his responsibility to set a maintenance schedule for the trailers, depending on how many trips they made a day or week, either on thirty, sixty or ninety day increments, and that the maintenance included brakes. He further testified:

Q The trailer. When the driver is supposed to inspect the trailer, what's he supposed to inspect?

A All the lights, brake adjustment, air leaks, physical damage, tire wear, tire pressure, doors, anything that's wrong with it. Supposed to do what they call a walk around.

Q That's eyeballing the –

A Brakes, lights, ICC bumper, anything physically – is operational on it.

Q What are they physically supposed to do vis-a-vis checking the brakes?

A If the brakes are in adjustment.

Q How are they supposed to visually check that?

A They have the – two ways you can do it. You can look at the brake shoes – the distance between the drums and the shoes and by the travel of the push rod on the brake cams – slack adjusters.

Q When you adjust these slack adjusters, are they done by turning?

A Some are automatic, some are by either right or left adjustment.

Q By turning?

A Yes.

Q Would you as a mechanic who's been in the business for thirty-seven years be able to determine whether or not a brake was out of adjustment by four turns just by looking at it?

A On a trailer, yes.

Q How?

A The distance between a brake shoe and a drum.

Q Do you expect a driver to be able to know whether it's out four turns just by visually looking at it?

A Yes.

Q Would the driver know whether it was out three turns or five turns?

A Yes.

Q How?

A The distance between the drum and the shoes.

Q You could look at a brake on a trailer and tell me whether it was three turns out of adjustment or four turns out of adjustment just by looking at it?

A Not definitely the turns, no.

Q You could tell me whether it was grossly out of adjustment by looking at it; is that right?

A Or needed adjustment.

Q How would you determine how many turns you'd have to make to bring it back into adjustment?

A I don't know what you mean by turns. I don't use turns for brake adjustment. That's – I don't know who wrote the turns down.

Q What do you use?

A I check the plate or the travel and the maxi to the slack adjuster.

Q The maxi is what, sir?

A That's the air chamber that actuates your brakes.

Q *Is it easier to stop a loaded trailer or an empty trailer?*

A *I'm not a truck driver. I don't know.*

Q *You're a mechanic, sir.*

A *Um-hmm.*

Q *Do you understand what the impact of a load has [sic] on a vehicle?*

A *Oh, I know that.*

Q *So is it easier to stop a loaded vehicle or an empty vehicle?*

A *A lot of varies to it [sic]. I don't have the answer to it.*

* * *

Q In general, would you agree with me that it's easier to slow or to brake an empty trailer than it is one that's loaded?

A Yes. [Emphasis added.]

Also, before the circuit court were excerpts of Bachs' deposition testimony including that when he picked up the empty trailer on June 3, 1994, he inspected it, noted it had new brakes, and drove it less than ten miles, and deposited it. Bachs testified that when he inspects a trailer, he makes sure the brakes are "adjusted up," and that a driver would know after trying to stop one time, by the amount of foot pressure required, whether the trailer brakes were out of adjustment.

Defendants' response to plaintiff's motion for reconsideration argued that Franczyk's testimony that if the brakes "were in fact out of adjustment four turns at the time of the accident, they were out of adjustment the day before in Toledo," did not create an issue of fact because it was mere speculation on Franczyk's part, and because plaintiff's testimony that he performed various inspections of the brakes, including before leaving Toledo, would have to be regarded as untruthful. Defendants argued that in order to create a question of fact, plaintiff's counsel "must call his own client a liar," and that plaintiff had not filed an affidavit stating that he had lied at deposition.

The circuit court denied plaintiff's motion for reconsideration. This appeal ensued.

II

Plaintiff first argues that a genuine issue of material fact remained whether defendants breached their duty to maintain the trailer's braking system in a safe condition. Under the circumstances presented here, we disagree.

We review the circuit court's grant of summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and the circuit court must consider the documentary evidence submitted in the light most favorable to the nonmovant. *Id.* The moving party has the initial burden of supporting its position by documentary evidence; the burden then shifts to the nonmovant to establish that a genuine issue of disputed fact exists. *Id.* at 455.

In order to prove negligence, a plaintiff must show that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated that duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993).

There is no dispute that National put all new brakes on the trailer on May 4, 1994; that the brakes were inspected and found to be at 100% on June 2, 1994; that defendant TVM (Bachs) picked up the trailer on June 3, 1994, inspected the brakes and found them at 100%; that TVM

put the trailer into service on June 11, 1994; that plaintiff picked up the trailer in Toledo on June 21, 1994; that the trailer was in plaintiff's exclusive control from that point until the accident; that plaintiff testified at deposition that he did a pre-trip inspection and found the brakes in fine working condition, drove the trailer from Toledo to Detroit without incident, performed a post-trip inspection and found the brakes working fine; that on the morning of June 22, 1994 he did a pre-trip inspection of the trailer at home and found everything in working condition, left home to pick up a load of axles at a Detroit Chrysler plant without incident, that at around 9:45 a.m. plaintiff backed the trailer into the plant's loading dock for loading, after which he left the plant premises; that after leaving the plant with the rig fully loaded, he stopped to make a phone call and the brakes were working fine, and later stopped at two or three red lights before getting on I-94 and the brakes were working fine.

The testimony before us is that the life of brakes such as those at issue is typically 50,000 miles, and that the new brakes on the trailer had only several thousand miles on them when the accident occurred. Schmidt, TVM's agent, testified that he was responsible for placing each trailer on a thirty, sixty or ninety day maintenance schedule and the record is clear that only nineteen days elapsed from the time TVM found the brakes to be 100% on June 3, 1994, and the accident date of June 22, 1994.

The invoices from Boulevard & Trumbull Towing submitted below were dated June 23, 1994, the day after the accident, and state that the brakes were out of adjustment four turns. Schmidt's and Bachs' testimony that a routine visual inspection would have told plaintiff that the brakes were out of adjustment is uncontradicted. Plaintiff's deposition testimony is clear that on the day before and the day in question, he did numerous visual inspections of the trailer's brakes, as well as checked them by applying the hand-valve and seeing if they "grabbed."

Plaintiff presented Franczyk's deposition testimony that if the brakes were in fact four turns out of adjustment at the time of the accident, they were out of adjustment the day before. Accepting as true that the brakes were for turns out of adjustment after the accident, the theory plaintiff relied on in his motion for reconsideration, that the tractor brakes alone could stop the rig when the trailer was unloaded, but could not stop the fully-loaded rig, is unsupported and does not account for plaintiff being able to stop the fully-loaded rig to make a phone call and at several red lights, without detecting any problem, yet minutes later, not be able to stop the rig on the freeway. Although plaintiff, in his motion for reconsideration, asserted that Schmidt testified that it is possible that the tractor brakes could have stopped the unloaded, but not the loaded rig, the deposition excerpts presented to the court do not support this theory. Schmidt testified that he is not a truck driver, and was only able to agree that it is generally true that a fully loaded rig is harder to stop than an unloaded one. Schmidt did not testify that the tractor brakes alone could have stopped the rig, either loaded or unloaded, and Franczyk testified that the tractor alone could not have stopped the *unloaded* rig, which would have weighed about ten thousand pounds. Franczyk testified that a truck driver would have known right away of a rig's braking problems had the brakes been four turns out of adjustment, and Schmidt testified that a truck driver would see the problem on visual inspection. Plaintiff presented no contrary testimony. In sum, plaintiff presented nothing to explain whether, or how, a trailer's brakes could go from being operational and working fine on June 21, 1994 and the morning of June 22, 1994, to being four turns out of adjustment later in the morning of June 22, 1994. There is no testimony or affidavit before us,

expert or otherwise, to support plaintiff's theory. The circuit court did not err in concluding that plaintiff failed to present sufficient evidence to raise a genuine issue of fact whether defendants breached their duties to plaintiff.

We have reviewed the documentary evidence supplied to the circuit court and conclude that plaintiff presented insufficient evidence to raise a genuine issue of fact that he was improperly trained and supervised or that such was a proximate cause of the accident. There is no evidence before us from which it could be inferred that plaintiff did not know how to visually inspect the brakes, or otherwise check the brakes' operation via the hand valve and other methods. Defendants submitted uncontradicted documentary evidence below that plaintiff had a commercial driver's license, had prior trucking experience, had passed a Bureau of Motor Carrier Safety written exam, and had signed a document stating that he had received and understood materials and procedures discussed therein, including a safety manual, Department of Transportation handbook, trip report forms and log sheets. Further, it is questionable whether this claim was even pleaded in the complaint.

Affirmed.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder