NO. COA01-439

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

DUANE COX,
Plaintiff

v. Johnston County
No. 99 CVS 02739

JOHN DOE and JORGE
IBARRA GARCIA,
Defendants

Appeal by plaintiff from order entered 12 December 2000 by Judge Jack A. Thompson in Johnston County Superior Court. Heard in the Court of Appeals 24 January 2002.

Lucas, Bryant, Denning & Edward, P.A., by Robert V. Lucas and Sarah E. Edwards, for plaintiff.

Bailey & Dixon, L.L.P., by Kenyann Brown Stanford and Rita Lane Hanshumaker, for defendant Jorge Ibarra Garcia.

BRYANT, Judge.

Plaintiff Duane Cox was injured in an automobile accident that occurred on 3 March 1999 on RP 1003 near the Town of Wilson Mills, North Carolina. Plaintiff was driving northbound on RP 1908 when the accident occurred. Plaintiff alleged that the accident occurred when a 1987 Dodge van traveling northbound on RP 1003 that was owned by defendant Jorge Ibarra Garcia and driven by defendant John Doe, ran through a stop sign and struck plaintiff's vehicle. Immediately after the accident, Doe fled the scene of the accident

on foot.

Plaintiff commenced this action on 29 November 1999, seeking damages he sustained as a result of the accident. In his complaint, plaintiff alleged Garcia was negligent in that he: 1) negligently entrusted his vehicle to Doe, 2) did not ensure that Doe would stay present at the scene after the accident, and 3) failed to provide police with the identity of Doe. On 4 February 2000, Garcia filed his answer and subsequently filed a motion for summary judgment on 29 September 2000.

Plaintiff deposed Garcia on 25 October 2000. During deposition, Garcia testified that on the evening of 28 February 1999, a homeless migrant worker, arrived at Garcia's home in search of a place to spend the night. The man identified himself as Geronimo Rivera (John Doe). Neither Garcia nor any of Garcia's relatives that lived in Garcia's home knew Doe, however, Garcia allowed him to spend the night.

Garcia testified that the next morning, 1 March 1999, he left the keys to the van in his closet as usual and proceeded to work. Upon arriving home that afternoon, Garcia discovered that one of the keys to the van was missing. On 2 March 1999, defendant determined that none of his relatives had the missing key. Thereafter, Garcia suspected that Doe might have taken the key.

Garcia testified that on 3 March 1999, he left home at 5:45 a.m. and drove his 1987 Chevrolet to work. When he left home, the van was parked at his home. The accident occurred at approximately 6:05 a.m. that same date. The officer investigating the accident,

Trooper D. R. Wilkerson, went to Garcia's home to continue his investigation. Two of Garcia's brothers were home when Trooper Wilkerson arrived. Trooper Wilkerson, in his affidavit, stated that Garcia's brothers informed him that the van had been stolen.

Garcia testified that on 4 March 1999, he went to a DMV office and reported the van stolen. A few days later, Garcia met with a member of the North Carolina Highway Patrol to discuss the release of the van from a storage unit. Garcia informed the officer that the driver's alleged name was Geronimo Rivera. The storage unit released the van to Garcia several days later. Garcia was never charged with any criminal or traffic violations as a result of the accident.

A hearing on Garcia's motion for summary judgment was held at the 13 November 2000 civil session of Johnston County Superior Court with the Honorable Jack A. Thompson presiding. Garcia's motion was granted by order filed on 30 November 2000. Plaintiff filed notice of appeal on 12 December 2000.

On appeal, plaintiff argues that the trial court erred in granting defendant Garcia's motion for summary judgment. We disagree.

A motion for summary judgment may be properly granted when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 159, 284 S.E.2d 697, 699 (1981). For summary judgment to be granted, the moving party must

produce evidence, which he has available for presentation at trial, sufficient to compel a verdict in his favor as a matter of law. *See Cockerham v. Ward*, 44 N.C. App. 615, 618, 262 S.E.2d 651, 654, *rev. denied by* 300 N.C. 195, 269 S.E.2d 622 (1980). If the non-moving party fails to counter the effect of the moving party's evidence by presenting his own evidence sufficient to create a genuine issue of material fact, this failure will result in a judgment against the non-moving party. *See id.*

I.

Plaintiff first argues that Garcia's actions and the discrepancies in Garcia's statements create a genuine issue of material fact as to the weight to be given to Garcia's testimony. Plaintiff states that Garcia did not report the theft of his van until the day after the accident. In addition, plaintiff states that Garcia was equivocal in articulating the number of days Doe stayed at his home. Plaintiff argues that the abovementioned actions and statements reflect on Garcia's credibility; and that issues of witness credibility cannot be properly resolved in a hearing on a motion for summary judgment. We disagree.

Plaintiff is correct in that it is generally within the province of the jury to resolve conflicts in testimony and to determine the weight to be given to a witness's statement. *See Thomson v. Thomas,* 271 N.C. 450, 455, 156 S.E.2d 850, 853 (1967). However, plaintiff fails to recognize the distinction between resolving conflicts in evidence and presenting evidence to show that a conflict exists. Quite simply, you do not reach the issue

of resolving conflicts in evidence until you have shown that conflicts do in fact exist. Plaintiff has not shown that the discrepancies of which he complains, create a genuine issue of material fact. Therefore we overrule this assignment of error.

II.

Plaintiff next argues that there existed a genuine issue of material fact as to whether Doe had permission to operate Garcia's vehicle. We disagree.

To establish a *prima facie* case for the tort of negligent entrustment, plaintiff must show that the owner "'entrusts [his vehicle's] operation to a person whom [the owner] knows, or by the exercise of due care should have known, to be an incompetent or reckless driver' who is 'likely to cause injury to others in its use.'" *Swicegood v. Cooper*, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995) (citations omitted). In defendant's deposition testimony, he denied ever giving Doe permission to drive his van. Plaintiff has not presented any evidence that would contradict defendant's denial. Therefore, we find that plaintiff has failed to rebut defendant's forecast of evidence as relates to a negligent entrustment claim.

As to the remainder of plaintiff's claim, assuming that Garcia breached a duty that he owed to plaintiff to ensure that Doe would remain on the scene after the accident; and assuming he breached a duty that he owed to plaintiff to inform the police of the driver's identity, plaintiff has not shown or even argued that these alleged breaches were the proximate cause of any injury to plaintiff. *See*

Young v. Fun Services-Carolina, Inc., 122 N.C. App. 157, 159, 468 S.E.2d 260, 262, *rev. denied by* 344 N.C. 444, 476 S.E.2d 134 (1996) ("The essential elements of negligence are: Duty, breach of duty, proximate cause, and damages.") Therefore, we hold that the trial court did not err in granting Garcia's motion for summary judgment.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).