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2017 IL App (4th) 160363-U

NO. 4-16-0363

FILED
March 3, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DANIEL O'BRIEN,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
JULIA SINES,	)	No. 12L57
Defendant-Appellee.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment (1) denying plaintiff leave to file an amended complaint with a second count seeking punitive damages, (2) refusing to give plaintiff's jury instructions regarding willful and wanton misconduct, and (3) awarding summary judgment in defendant's favor regarding defendant's alleged use of her cell phone at the time of the car accident.

¶ 2 In April 2012, plaintiff, Daniel O'Brien, filed a complaint alleging defendant, Julia Sines, acted negligently in causing a May 2010 car accident in which plaintiff was injured. In January 2015, the trial court denied plaintiff's motion for leave to amend his complaint with a second count (1) alleging defendant's willful and wanton misconduct in using her cell phone at the time of the car accident, and (2) seeking punitive damages pursuant to section 2-604.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-604.1 (West 2012)). In August 2015, plaintiff filed an amended complaint, adding an allegation that defendant acted negligently in operating her motor vehicle while using her cell phone. In November 2015, the court granted defendant's

motion for partial summary judgment regarding the allegation that defendant acted negligently by using her cell phone at the time of the accident. Following a jury verdict in favor of plaintiff, the court entered judgment in favor of plaintiff and awarded compensatory damages.

¶ 3 Plaintiff appeals, arguing the trial court erred in (1) denying his motion for leave to amend the complaint with a second count seeking punitive damages, (2) refusing to give the jury instructions regarding willful and wanton misconduct, and (3) granting partial summary judgment in favor of defendant regarding her alleged use of her cell phone at the time of the car accident. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On May 4, 2010, plaintiff and defendant were involved in a vehicular accident in which defendant hit the rear end of plaintiff's vehicle as he sat at a red light. In turn, the impact forced plaintiff's vehicle into the rear end of the car in front of him. Plaintiff's vehicle was damaged and plaintiff himself was injured, leading to the instant litigation.

¶ 6 A. Pretrial Procedure

¶ 7 In April 2012, plaintiff filed a complaint alleging defendant's negligence caused the car accident on May 4, 2010, which injured plaintiff. The complaint asserted defendant was negligent in failing to (1) reduce her speed to avoid an accident; (2) brake to avoid an accident; and (3) keep a proper lookout for other vehicles. In June 2014, plaintiff filed a motion for leave to file an addendum to his complaint. The motion sought (1) to add count II, alleging defendant breached her duty to refrain from willful and wanton conduct by operating her motor vehicle while distracted by texting on her cell phone; and (2) punitive damages.

¶ 8 In January 2015, plaintiff filed a memorandum in support of his motion for leave to file an addendum to his complaint with documentary exhibits attached. Included as exhibit A,

the traffic crash report indicated the accident occurred at 6:15 p.m. on May 4, 2010. Plaintiff also attached a stipulation (for the limited purpose of the trial court's consideration of plaintiff's motion for leave to file an addendum) that defendant had a graduated driver's license at the time of the accident. Finally, plaintiff attached an affidavit from a representative of Sprint, defendant's cell phone company, and a copy of defendant's phone bill for the period from April 23, 2010, through May 22, 2010. The affidavit indicates defendant's cell phone sent or received 9,429 text messages during that time period. The phone bill showed that between 6:09 p.m. and 6:11 p.m. on May 4, 2010, defendant made two outgoing calls and received two incoming calls, each of which was less than one minute in duration.

¶ 9 In her response, defendant alleged the two outgoing calls were made to Jenna Patrick and the two incoming calls were made by John Sines, defendant's father. Defendant included as an exhibit an excerpt of Patrick's discovery deposition where she testified she was not on the phone with defendant at the time the accident occurred. Defendant also included John Sines' affidavit in which he denied talking to defendant on the phone at the time the accident occurred. On January 28, 2015, following a hearing, the trial court denied plaintiff's motion for leave to file an addendum to his complaint. The transcript of this hearing is not in the record on appeal.

¶ 10 In July 2015, plaintiff filed a motion for leave to file an amended complaint, which the trial court granted the following month. The amended complaint alleged defendant negligently (1) failed to reduce her speed to avoid an accident, (2) failed to brake to avoid an accident, (3) failed to keep a proper lookout for other vehicles, and (4) operated her motor vehicle while distracted by using a wireless phone.

¶ 11 In September 2015, defendant filed a motion for partial summary judgment as to the allegation she operated her motor vehicle while distracted by using a wireless phone. The transcript from plaintiff's discovery deposition was attached to the motion for summary judgment. Plaintiff testified he did not notice anything about the manner in which the car behind him was driving prior to the accident. Plaintiff further testified he was unaware of the impending accident until his vehicle was struck. Also attached to the motion for summary judgment was a transcript of defendant's discovery deposition. Defendant testified she was not talking or texting on her cell phone at the time of or immediately before the accident. Finally, the traffic report, cell phone bill, Patrick's discovery deposition transcript, and John Sines' affidavit were all attached as exhibits to the motion. In November 2015, the trial court granted defendant's motion for partial summary judgment. In December 2015, the court entered a written order granting defendant's motion for summary judgment and striking paragraph 12(d) in the amended complaint, which alleged defendant was negligent in "[o]perating her motor vehicle while distracted by using a wireless phone." Following the entry of summary judgment, defendant stipulated to negligence in that she acted or failed to act in one of the ways claimed by plaintiff. The parties further stipulated to proceed to trial only on the issues of proximate cause and damages.

¶ 12 B. Jury Instructions and Verdict

¶ 13 Relevant to this appeal, plaintiff offered two instructions, Illinois Pattern Jury Instructions, Civil, Nos. 14.01 and 14.04 (hereinafter IPI Civil). Plaintiff's instruction No. 21, IPI Civil No. 14.01, read "When I use the expression 'willful and wanton conduct' I mean a course of action which shows actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others." Plaintiff's

instruction No. 22, IPI Civil No. 14.04, read "It was the duty of the defendant, before and at the time of the occurrence, to refrain from willful and wanton conduct which would endanger the safety of the plaintiff."

¶ 14 In January 2016, the jury entered a verdict in favor of plaintiff. Accordingly, the trial court entered judgment in favor of plaintiff and awarded compensatory damages.

¶ 15 C. Posttrial Motion

¶ 16 Plaintiff's February 2016 posttrial motion claimed the trial court erred in (1) failing to allow plaintiff to question defendant as to the four phone calls made or received shortly before the accident; (2) failing to admit the phone bill showing the four phone calls; (3) failing to admit testimony from a Sprint employee regarding the four phone calls; (4) failing to admit the evidence deposition testimony of the same Sprint employee regarding the four phone calls; (5) failing to permit plaintiff to ask defendant whether she had a graduated driver's license at the time of the accident; (6) granting defendant's motion for partial summary judgment; (7) "[s]triking the allegations of willful and wanton misconduct in the plaintiff's Amended Complaint"; and (8) "refusing plaintiff's tendered Jury Instruction 20.01, which included an [*sic*] the allegation that the defendant was operating her cell phone at or near the time of the occurrence, and plaintiff's tendered Jury Instruction 14.01, which included the definition of willful and wanton conduct." In April 2016, the trial court denied plaintiff's posttrial motion.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, plaintiff claims the trial court erred in (1) denying plaintiff leave to amend his original complaint with a second count alleging willful and wanton misconduct based on defendant's alleged use of her cell phone at the time of the accident and seeking punitive

damages; (2) improperly instructing the jury as to willful and wanton conduct; and (3) in granting partial summary judgment in favor of defendant as to the alleged use of her cell phone at the time of the accident. We turn first to plaintiff's claim regarding punitive damages.

¶ 20 A. Punitive Damages

¶ 21 The parties appear to disagree as to the proper standard of review. In his opening brief, plaintiff argued the trial court abused its discretion in denying leave to file an amended complaint seeking punitive damages. Defendant first argued this claim was forfeited but, in the alternative, argued the court did not abuse its discretion in denying leave to file the punitive damages claim. In his reply brief, however, plaintiff argues the appropriate standard of review is *de novo* because the trial court heard only argument at the hearing and based its decision on documentary evidence, all of which is contained in the record on appeal. However, we need not resolve this dispute because—even in the absence of forfeiture—we reject plaintiff's claim under either standard of review. We turn now to the court's ruling denying plaintiff's motion to amend his complaint to include a count seeking punitive damages.

¶ 22 Section 2-604.1 of the Code provides, in part,

> "In all actions on account of bodily injury or physical damage to property, based on negligence *** where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable

> likelihood of proving facts at trial sufficient to support an award of punitive damages." 735 ILCS 5/2-604.1 (West 2012).

In determining whether plaintiff has met his burden to establish a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages, we are mindful of the supreme court's guidance in *Loitz v. Remington Arms Co., Inc.*, 138 Ill. 2d 404, 563 N.E.2d 397 (1990).

> "It must be recognized *** that '[n]egligence is not the same as wantonness' [citation], and that '[p]unitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence' [citation]. 'Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in a crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others.' [Citation.] In this context, willful and wanton misconduct ' "approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it." ' [Citation.]" *Id.* at 415-16, 563 N.E.2d at 402.

¶ 23 Plaintiff argues the circumstantial evidence of the number of text messages defendant sent during the month the accident occurred and the four phone calls made shortly before the accident creates a question of fact for the jury to determine whether defendant's cell phone use contributed to the accident and constituted willful and wanton misconduct.

¶ 24 In this case, we need not determine whether the use of a cell phone while driving—even in violation of a statute—is enough to prove willful and wanton misconduct. Here, plaintiff has failed to produce evidence, either direct or circumstantial, that defendant used her cell phone at the time of the accident. The evidence of defendant's cell phone use consisted of four phone calls (each of which lasted less than one minute) made minutes before the time the accident occurred. Although plaintiff points to the high number of text messages defendant sent or received during the month of the accident and calculates that it averages out to some 314 text messages per day (or 20 per hour, if defendant was awake for 12 hours), this is not circumstantial evidence that defendant was using her phone *at the time of the accident*.

¶ 25 Circumstantial evidence must support a reasonable and probable, not merely possible, inference. *Stojkovich v. Monadnock Building*, 281 Ill. App. 3d 733, 739, 666 N.E.2d 704, 709 (1996).

> "When a party seeks to rely on circumstantial evidence, the conclusion sought must be more than speculative, it must be the only probable conclusion that could be drawn from the known facts. [Citation.] If the circumstantial evidence allows for an inference of the nonexistence of a fact which is just as probable as its existence, the conclusion that it exists is not a reasonable

> inference, but rather a matter of speculation, surmise, and conjecture. [Citation.]" *Id.*

Speculation, surmise, and conjecture does not constitute proof, and will not support a reasonable inference. *Id.*

¶ 26 Pointing to the number of text messages sent by defendant during the month of the accident and arguing the inference is defendant used her phone at the time of the accident is speculating. Because the Sprint records contained only the total number of text messages sent and no time or date stamps, the evidence does not allow for an inference that defendant was probably using her phone at the time of the accident. It allows only for the speculation that it is merely possible she was using her cell phone. Moreover, plaintiff has introduced no other circumstantial evidence that would support this inference. The four phone calls made shortly before the accident do not indicate she was using her phone minutes later when the accident occurred. Moreover, defendant testified she was not using her phone, and defendant's father and Patrick (the other caller) testified they were not on the phone with her at the time of the accident. Plaintiff testified he did not notice anything unusual about how defendant was driving, nor did he testify that defendant appeared to be using her cell phone. As the evidence introduced by plaintiff involved speculating as to defendant's conduct, we conclude the evidence was insufficient to sustain plaintiff's burden under section 2-604.1 of the Code of showing a reasonable likelihood of proving facts at trial that would support an award of punitive damages. Accordingly, we affirm the trial court's judgment denying plaintiff's motion to amend his complaint to seek punitive damages.

¶ 27 B. Jury Instructions

¶ 28 Plaintiff contends the trial court erred in refusing plaintiff's jury instruction Nos. 21 and 22, which are IPI Civil Nos. 14.01 and 14.04.

¶ 29 We conclude plaintiff has forfeited his argument with regard to plaintiff's instruction No. 22 because he does not address it in his posttrial motion. The posttrial motion alleged the trial court erred in "Refusing plaintiff's Jury Instruction No. 11, IPI Civil No. 20.01, which included an [*sic*] the allegation that the defendant was operating her cell phone at or near the time of the occurrence, and plaintiff's Jury Instruction No. 21, IPI Civil No. 14.01, which included the definition of willful and wanton conduct." Plaintiff's instruction No. 11, based on IPI Civil No. 20.01, fits the description in the posttrial motion. However, plaintiff does not raise a claim with regard to this instruction on appeal. Plaintiff's instruction No. 22 was IPI Civil No. 14.04. Because neither instruction No. 22 nor IPI Civil No. 14.04 was raised in the posttrial motion, we conclude plaintiff has forfeited review of this claim of error. See *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 35, 35 N.E.3d 117. Even if this claim were not forfeited, we would still conclude the court did not err in refusing to give the instruction for the same reason we conclude the court properly refused to give plaintiff's instruction No. 21, as discussed below.

¶ 30 Plaintiff's instruction No. 21, on the other hand, is IPI Civil No. 14.01. Because this instruction was properly preserved in the posttrial motion, we turn to the claim of error regarding the refusal of this instruction. It is within a trial court's discretion to determine what jury instructions should be given. *Pleasance v. City of Chicago*, 396 Ill. App. 3d 821, 830, 920 N.E.2d 572, 580 (2009). We will reverse the court's decision only upon finding an abuse of discretion. *Id.*

¶ 31 In this case, plaintiff and defendant stipulated to defendant's *negligent* conduct and further stipulated to proceeding to trial on causation and damages. Moreover, plaintiff's

amended complaint stated a claim based solely on negligence, not willful and wanton misconduct. Because defendant admitted to the negligent conduct, the instruction was entirely unnecessary. "The instruction provided multiple definitions of willful and wanton conduct while none of them were pertinent to the issue[s] at trial, namely," causation and damages. *Id.* at 831, 920 N.E.2d at 580. The instruction would have served to focus the jury on defendant's conduct, of which there was no evidence and which was not at issue in the trial. Accordingly, we conclude the trial court did not abuse its discretion in denying plaintiff's instruction No. 21.

¶ 32 C. Summary Judgment

¶ 33 Finally, plaintiff contends the trial court erred in granting defendant's motion for partial summary judgment as to the allegation defendant acted negligently in operating her vehicle while distracted by her cell phone.

¶ 34 "We review a trial court's entry of summary judgment *de novo*." *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 39, 33 N.E.3d 288. The purpose of summary judgment is not to try factual issues but, rather, to determine if genuine issues of material fact exist. *Evans v. Brown*, 399 Ill. App. 3d 238, 243, 925 N.E.2d 1265, 1270 (2010). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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." 735 ILCS 5/2-1005(c) (West 2012). "A defendant in a negligence suit is entitled to summary judgment if he can demonstrate that the plaintiff has failed to establish a factual basis for one of the required elements of a cause of action for negligence." *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654, 658, 619 N.E.2d 172, 175 (1993).

¶ 35 To recover for negligence, a plaintiff must establish the existence of a duty owed by the defendant, a breach of that duty, and injury proximately caused by that breach. *Id.* Here, plaintiff has failed to come forward with evidence of defendant's negligence based on her alleged cell phone use. "Liability must be premised on evidence and not on conjecture or speculation." *Id.* "Where the proven facts demonstrate that the nonexistence of the fact to be inferred [from circumstantial evidence] appears to be just as probable as its existence, then the conclusion that exists is a matter of speculation, surmise, and conjecture, and the trier of fact cannot be permitted to make that inference." *Keating v. 68th & Paxton L.L.C.*, 401 Ill. App. 3d 456, 473, 936 N.E.2d 1050, 1066 (2010). As discussed above, the evidence here does not establish that it is probable, rather than merely possible, that defendant's use of her cell phone caused the accident. "[O]n a motion for summary judgment, a fact will not be considered in dispute if raised by circumstantial evidence alone unless the circumstances or events are so closely related to each other that the conclusions therefrom are probable, not merely possible." *Jewish Hospital of St. Louis v. Boatmen's National Bank of Belleville*, 261 Ill. App. 3d 750, 755, 633 N.E.2d 1267, 1272 (1994). The mere speculation that defendant must have been using her phone because she texted often is insufficient to create a genuine issue of material fact. Accordingly, we conclude the trial court did not err in granting defendant partial summary judgment as to the claim of negligence based on defendant's alleged use of her cell phone.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the trial court's judgment.

¶ 38 Affirmed.