2015 IL App (3d) 140410-U

Order filed May 7, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

JEREMY DROEGE and STEPHANI DROEGE, Individually and as Next Friend of JACOB DROEGE, ETHAN DROEGE and JONATHAN DROEGE, minors, and BETTY DROEGE,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiffs-Appellants,	)	
v.	)	Appeal No. 3-14-0410 Circuit No. 11-L-320
J.B. HUNT TRANSPORT, INC., a foreign corporation, and JAMES BENSON,	)	
Defendants-Appellees.	)	Honorable Stephen Kouri, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiffs' motion for leave to amend complaint pursuant to section 2-604.1 where plaintiffs failed to establish a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.

¶ 2 Plaintiffs, Jeremy and Stephani Droege, instituted a negligence action in the Peoria County circuit court against defendants, J.B. Hunt Transport, Inc., and James Benson, following

a collision between plaintiffs' vehicle and a semi-truck owned by J.B. Hunt and driven by Benson. Plaintiffs were awarded compensatory damages in the amount of $753,000.

¶ 3 During the trial, plaintiffs sought leave to amend their complaint in order to plead willful and wanton conduct on the part of defendants and to seek punitive damages. After a hearing, the trial court denied plaintiffs' motion.

¶ 4 Plaintiffs appeal, claiming that the trial court erred in denying their motion for leave to amend.

¶ 5 We affirm.

¶ 6 BACKGROUND

¶ 7 Plaintiffs, Jeremy and Stephani Droege, filed a 14-count complaint against J.B. Hunt Transport, Inc., and James Benson, alleging that defendants' negligence caused plaintiffs' injuries.

¶ 8 On October 2, 2010, Benson was traveling southbound on Route 29 in J.B. Hunt's 2010 Freightliner semi-truck. Plaintiffs, along with their children Jacob, Ethan, and Jonathan, and Jeremy's mother Betty, were traveling northbound on Route 29 in their Dodge van. The evidence established that Benson momentarily took his eyes off the road to reach for a map that he kept on the floor of his truck's cab, causing him to steer the truck over the centerline of the highway and into the northbound lane. The truck collided head-on with the plaintiffs' vehicle, causing significant injuries to every occupant in the plaintiffs' van.

¶ 9 Plaintiffs instituted the instant suit to recover damages arising from the collision. The counts against J.B. Hunt were based upon an agency theory. J.B. Hunt filed an answer to plaintiffs' complaint, admitting that at all relevant times, Benson was an agent of J.B. Hunt.

Defendants also admitted fault. It is uncontested that Benson reaching for the map on the floorboard caused the accident.

¶ 10 At the conclusion of the trial on January 23, 2014, the trial court entered a judgment on the verdicts in favor of the plaintiffs totaling $753,000 in compensatory damages.

¶ 11 On January 9, 2013, during the course of the trial, plaintiffs filed a motion pursuant to sections 2-616 and 2-604.1, requesting leave to amend their complaint to add counts for willful and wanton conduct and to include a prayer for relief seeking punitive damages. Plaintiffs' memorandum of law in support of their motion for leave to amend their complaint specifically sought to add a count against J.B. Hunt for negligent hiring, to add counts against both Benson and J.B. Hunt for "willful and wanton conduct in the operation of the semi-tractor trailer" and to add a count against J.B. Hunt for their "willful and wanton conduct in hiring an unfit driver." Plaintiffs noted that they were not seeking punitive damages against J.B. Hunt in regard to the negligent hiring count, but they did include a prayer for relief seeking punitive damages for all willful and wanton counts.

¶ 12 The motion alleged that discovery yielded information that would establish a reasonable likelihood of proving facts at trial to support an award of punitive damages. Specifically, that: (1) Benson maintained an Illinois address since August 15, 2007, and his Wisconsin-issued CDL was invalid in Illinois pursuant to section 6-514 of the Illinois Vehicle Code (625 ILCS 5/6-514 (West 2010)); (2) Benson had his driver's license or privileges revoked on two separate occasions, once in Wisconsin in 1994 for a DUI offense, and again in Wisconsin in 2002 relating to an unpaid fine; (3) Benson was convicted for theft of movable property in 1992 in Wisconsin; (4) Benson was convicted for disorderly conduct in 2009 in Wisconsin; (5) Benson's application for employment at J.B. Hunt stated that Benson had pled guilty to driving under the influence on

two separate occasions, once in 1994 in Racine, Wisconsin, and again in 1994 in Warren, Illinois; (6) Benson was convicted of the traffic offense of speeding 14 or less over the limit in a commercial vehicle in 2008; (7) Benson has had three wives, one of which charged him twice for failure to pay child support; (8) Benson filed for Chapter 7 bankruptcy twice, in February 1998 and again in April 2004; (9) Benson was a defendant in a foreclosure proceeding in Wisconsin; (10) a restraining order against Benson was filed in 2002 for domestic abuse and; (11) Benson had been involved in four accidents: three in 2005 in Wisconsin and one in 2008, also in Wisconsin.

¶ 13 Plaintiffs then made an offer of proof, submitting documents to support their allegations. Defendants filed a motion in response, and the trial court heard argument.

¶ 14 On February 25, 2013, the trial court entered an order denying plaintiffs' motion for leave to amend their complaint. The court stated that plaintiffs failed to carry their burden of satisfying the "reasonable likelihood" standard of section 2-604.1, and that they did not allege facts showing willful and wanton conduct on the part of either J.B. Hunt or Benson. In fact, the court noted that most of the facts plaintiffs alleged in regard to Benson were both irrelevant to his fitness to operate a truck and highly prejudicial. As for J.B. Hunt, the court found that "[m]any of plaintiffs' allegations attempt to impose a far greater obligation of investigation upon an employer than has ever been imposed." Finally, the court noted that Benson did have a valid Wisconsin CDL and the mere fact he should have obtained one in Illinois (assuming for purposes of discussion that such was required) says nothing about his ability to properly operate a commercial vehicle in accordance with the requirements of due care.

¶ 15 Plaintiffs filed a motion to reconsider, which the trial court also denied.

¶ 16 The case proceeded to trial, resulting in a jury verdict for the plaintiffs in the amount of $753,000 in compensatory damages. The trial court entered a judgment on the verdicts on January 23, 2014.

¶ 17 On February 4, 2014, plaintiffs filed a posttrial motion to allow the amending of the complaint to include counts of willful and wanton misconduct on behalf of all six plaintiffs against both defendants and for a new trial on punitive damages. The trial court denied the motion on April 14, 2014.

¶ 18 Plaintiffs appeal that denial only as to J.B. Hunt.

¶ 19 ANALYSIS

¶ 20 Plaintiffs contend that the trial court erred in denying leave to amend their complaint to plead willful and wanton conduct and to seek punitive damages pursuant to section 2-604.1 (735 ILCS 5/2-604.1 (West 2012)). Specifically, plaintiffs allege that evidence elicited during discovery indicated Benson was unfit to be a commercial driver, thus plaintiffs had demonstrated a reasonable likelihood of proving facts of willful and wanton conduct sufficient to support an award of punitive damages. As such, section 2-604.1 mandated that the trial court allow plaintiffs' motion to amend.

¶ 21 At the outset, we note that the parties disagree as to the proper standard of review. Both parties rely on *Stojkovich v. Monadnock Building*, 281 Ill. App. 3d 733 (1996). In the context of a trial court's denial of plaintiff's leave to amend pursuant to section 2-604.1, the *Stojkovich* court found that the deferential abuse of discretion standard should be applied where there has been an evidentiary hearing and witnesses have testified. *Id*. at 743. However, where the trial court makes its determination based only upon documentary submissions and credibility is not a factor, the legal conclusion to be drawn from a given set of facts is reviewed *de novo*. *Id*.

¶ 22 Defendants argue that abuse of discretion is the proper standard where plaintiffs had the opportunity to present live evidence and call witnesses but chose not to do so. Where plaintiffs' motion for leave to amend was based entirely upon documentary evidence we find, like *Stojkovich*, that the proper standard of review *is de novo*. However, such a determination is rendered largely academic given that we find that under either standard, plaintiffs' claims for punitive damages must fail.

¶ 23 We turn now to section 2-604.1, which provides in relevant part as follows:

> "In all actions on account of bodily injury *** 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).

¶ 24 As noted above, plaintiffs' motion for leave to amend sought to add a count against J.B. Hunt for negligent hiring, as well as counts against both defendants for willful and wanton conduct in the operation of the semi-truck and a count against J.B. Hunt for "willful and wanton conduct in hiring an unfit driver." They contend that facts about Benson's background and character that were known, or should have been known by J.B. Hunt warrant an award of punitive damages. In essence, all counts sound in negligent hiring, retention and entrustment.

¶ 25 Plaintiffs point out that a cause of action for negligent hiring exists in common law in the state of Illinois. *Bryant v. Livigni*, 250 Ill. App. 3d 303, 311 (1993) (citing *Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920 (1979)). Willful and wanton conduct, defined as " 'a course of action which shows actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others' " can give rise to punitive damages. See *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 448 (1992). Both *Bryant* and *Easley* recognized that it is settled law that a cause of action exists in Illinois for negligent hiring of an employee, and that if defendant's conduct could properly be characterized as willful and wanton then punitive damages are recoverable. *Bryant*, 250 Ill. App. 3d at 311; *Easley*, 69 Ill. App. 3d at 931.

¶ 26 In *Mattyasovszky*, 61 Ill.2d at 36-37, our supreme court adopted the complicity rule of section 217C the Restatement (Second) of Agency (1958) and stated that punitive damages can be awarded against a principal for the act of an agent if, but only if: (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of his employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

¶ 27 While an employer can be held liable for punitive damages under some scenarios, the burden remains on the plaintiffs to establish a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages pursuant to section 2-604.1. " 'It has long been established in this State that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of

others ***.' " *Barton v. Chicago & North Western Transportation Co.*, 325 Ill. App.3d 1005, 1030 (quoting *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186 (1978)). Plaintiffs have failed to meet their burden, where the facts cited could not be considered willful and wanton by any stretch of the imagination. In fact, plaintiffs' allegations appear to be nothing more than an assassination of defendant Benson's character, and as the trial court correctly stated, completely irrelevant to the question of whether or not he was able to operate a commercial vehicle using due care.

¶ 28 Those allegations are similarly irrelevant to the question of whether defendant J.B. Hunt recklessly employed Benson and whether the company knew, or should have known, about Benson's alleged unfitness. We fail to see how the fact that Benson had three failed marriages or filed for Chapter 7 bankruptcy twice has any bearing whatsoever on his ability to drive a truck, or why J.B. Hunt should have thought to consider that in its hiring process. Convictions for theft and disorderly conduct may give rise to some questions regarding his general moral character, but also lack any connection to Benson's ability to operate a truck. It is well within J.B. Hunt's prerogative to hire employees as it sees fit, regardless of a criminal record that bears no relation to operating a semi-tractor trailer. If we were to hypothetically view this case through the lens of a negligent hiring claim, plaintiffs must also establish a causal relationship between the particular unfitness and the act that caused the injury. See *Huber v. Seaton*, 186 Ill. App. 3d 503, 508 (1989). Divorce and bankruptcy simply do not ring this bell.

¶ 29 Likewise, plaintiffs place a great amount of emphasis on Benson's conviction for a DUI in 1994, which we note occurred almost two decades prior to the accident. They argue that Benson's employment application with J.B. Hunt indicated that he had two DUI convictions, one in Wisconsin and one in Illinois. Under Illinois law, plaintiffs posit, Benson is disqualified for life from driving a commercial vehicle pursuant to section 6-514 of the Illinois Vehicle Code

(625 ILCS 5/6-514(b) (West 2012)). However, Benson vehemently denied ever being convicted of two DUIs, and, contrary to plaintiffs' assertion, there is no indication that J.B. Hunt failed to conduct any kind of inquiry or investigation into Benson's criminal record. Furthermore, there is no hint or allegation that either alcohol or drugs played any role in this accident.

¶ 30 Finally, even assuming Illinois law required Benson to have an Illinois-issued CDL, it does not automatically render his Wisconsin-issued CDL invalid. Nor does this administrative oversight (assuming there was one) by J.B. Hunt qualify as a conscious disregard for the safety of others.

¶ 31 Plaintiffs' quest for punitive damages on the facts of this case would lead to an absurd result in practice. If every employer could be considered willful and wanton in employing a person who has filed for bankruptcy, gotten divorced, or received a traffic ticket, the vast majority of people would be out of a job—no employer would take the risk. We do not fnd that the facts alleged by plaintiffs would lead a reasonable person to conclude that Benson was unfit to drive a commercial vehicle in Illinois and that it would, therefore, be reckless to hire him in that capacity. See *Mattyasovzky*, 61 Ill. 2d at 36-37.

¶ 32 We accordingly find that the trial court did not err in denying plaintiffs' motion for leave to amend their complaint pursuant to section 2-604.1.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit clerk of Peoria County is affirmed.

¶ 35 Affirmed.