

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

CARNELL TROUTMAN,	)	
	)	CIVIL NO. 65/1995
Plaintiff	)	
	)	
vs.	)	ACTION FOR DAMAGES
	)	
RICHARD J. ROWE and ANTILLES AUTOMOTIVE,	)	
	)	
Defendants.	)	
		<u>NOT FOR PUBLICATION</u>

APPEARANCES:

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CABRET, Judge

MEMORANDUM OPINION
(Filed: November 14, 1997)

THIS MATTER comes before the Court on defendant Antilles Automotive's ("Antilles") motion for summary judgment and motion to deem summary judgment motion conceded. Plaintiff failed to oppose both motions.

This matter arises from a two vehicle accident which took place on November 25, 1994. The plaintiff was the driver of one vehicle and the defendant Rowe was the driver of the other vehicle.

Antilles owned the vehicle that was driven by Rowe. Plaintiff alleges that Antilles is liable to her for her injuries sustained in the accident on two grounds:

- (1) Antilles negligently entrusted the vehicle to Richard Rowe, knowing that Richard Rowe is a negligent, reckless, and careless driver¹; and
- (2) Antilles is responsible for the negligent acts of Richard Rowe on the basis of respondeat superior².

For the following reasons, the Court will grant Antilles' motion for summary judgment.

SUMMARY JUDGMENT STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if the pleadings, depositions, answers to interrogatories 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. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Therefore the threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). It must be noted, however, that

summary judgment is usually not appropriate in negligence cases because the application of the reasonable person standard normally requires a full exposition of all the underlying facts and circumstances. Barron v. Honeywell, Inc., Micro Switch Div., 69 F.R.D. 390, 392 (D.C.Pa. 1975);

¹ See plaintiff's complaint, paragraph 15.

² See plaintiff's complaint, Count IV.

See also TSC Industries, Inc. v. Northway, Inc., 96 S.Ct.2126, 426 U.S. 406 (1976).

If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed.R.Civ.P. 56(e)(1996). Where the moving party has the burden of proof on the relevant issues and the non-moving party has failed to oppose the summary judgment motion, the court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Anchorage Associates v. V.I. Board of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990). Where the moving party does not have the burden of proof on the relevant issues, this means that the court must determine that the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law. Id.

DISCUSSION

In the instant matter, plaintiff claims that Antilles is liable for her injuries on the theories of negligent entrustment and respondeat superior. It is well established in this jurisdiction that an owner is not liable per se by reason of his interest in an automobile unless it is proven that the owner's negligence caused the accident and was a direct cause of the injury or damage, or unless it is proved that said negligence was that of the owner's agent or employee acting within the scope of his employment. See Hanley v. Jones, 21 V.I. 190, 192 (Terr. Ct. 1984)(citing Smith v. Hertz Rent-A-Car, 262 F.Supp. 431, aff'd, 377 F.2d 885 (3d Cir. 1967); See also Estephane v. Hobson, 18 V.I. 396, 398 (D.VI 1981)(the caselaw of this jurisdiction establishes that the owner of a vehicle is not liable for the negligence of a bailee absent another factor such as negligent entrustment or

employment relationship).

I. Negligent Entrustment

Courts in the Virgin Islands look to the Restatements of the Law issued by the American Law Institute, in the absence of statutes or local law to the contrary. 1 V.I.C. § 4 (1995); See also Ducrot v. Marshall & Sterling, Inc., 30 V.I. 332 (D.VI 1994). The Restatement (Second) of Torts § 390 (1977) states

Chattel for Use by Person Known to be Incompetent. One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

For negligent entrustment to be established, there must be:

- (1) entrustment of a chattel to a party;
- (2) likelihood that such a party because of youth, inexperience, or otherwise would use the chattel in a manner involving unreasonable risk of harm to himself and others whom the entruster should expect to be endangered;
- (3) knowledge or reason to know by the entruster of such a likelihood; and
- (4) proximate cause of the harm to plaintiff by the conduct of the entrustee.

Estephane, 18 V.I. at 398.

Antilles has shown that no issue of material fact exists as to plaintiff's negligent entrustment claim. Antilles directs the Court to plaintiff's response to Interrogatory No. 1 of Antilles Second Set of Interrogatories.³ The Interrogatory asks plaintiff to "identify all facts which you contend support

³ See Antilles Motion for Summary Judgment, Exhibit C.

your claim that Antilles Automotive knew, or had reason to know, that because of Richard Rowe's youth, inexperience or otherwise, Richard Rowe would likely use the vehicle he was driving in a manner involving unreasonable risk of harm to himself and others." Plaintiff's response is as follows:

It is foreseeable that an individual can look the other direction and run into a stopped vehicle. Thus, defendant has reason to know that such conduct is foreseeable and part of the risk of driving.

This allegation by plaintiff is insufficient to establish a negligent entrustment claim which requires a showing that defendant Rowe was unfit or incompetent to drive at the time of the accident. See Hanley, 21 V.I. at 193. Nowhere in the record does the plaintiff contend that defendant Rowe was impaired, intoxicated, or otherwise unable to drive at the time of the accident and that Antilles knew of this fact. The fact that defendant Rowe states that he "got into the accident when he took his eyes off the road to tune in the radio"⁴ hardly suffices to serve as the basis for a negligent entrustment claim. Thus, the Court finds that no material issue of fact remains as to plaintiff's claim for negligent entrustment.

II. Respondeat Superior

The plaintiff's second theory of liability is based on *respondeat superior*, that is, that an employer is responsible for the negligence of its employees that occurs within the course and scope of their employment. See Williams v. Rene, 72 F.3d 1096, 33 V.I. 297, 301 (3d Cir. 1995);

⁴ See Rowe's Responses to Plaintiff's First Set of Interrogatories, Interrogatory No. 12 and Antilles Motion for Summary Judgment, Exhibit A- Police Traffic Report.

Restatement (Second) of Agency §219 (1958)⁵. Restatement (Second) of Agency § 228(1)(a),(b) (1958) provides that conduct of a servant is within the scope of employment if it is the kind he is employed to perform and it occurs substantially within the authorized time and space limits while section 228(2) states that conduct is not within the scope of employment if it is "too little actuated by a purpose to serve the master." Thus, the general rule is that employees are not within the scope of their employment while traveling to and returning from work. McFarlane v. Jones Masonry, 25 V.I. 43 (Terr.Ct. 1990). Some circumstances that may take a case out of the general rule is when there are express instructions by the employer or when the trip serves some specific purpose of the employer other than merely providing for the presence of the employee at the work place. Williams, 33 V.I. at 302 (citations omitted).

In Pacheco v. United States, 409 F.2d 1234, 1237 (3d Cir. 1969), the Third Circuit held that,

⁵ RESTATEMENT (SECOND) OF AGENCY § 219 states

1) A master is subject to liability for the torts of his servants committed while acting during the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a nondelegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

generally speaking, proof of a defendant's ownership of a vehicle creates a presumption that the driver was acting within the scope of employment. This presumption is rebuttable. In the instant matter, there is no dispute that Rowe was employed by Antilles Automotive and that he was driving an automobile owned by Antilles Automotive at the time of the accident.⁶ Accordingly, a Pacheco presumption arises in favor of the plaintiff and Rowe has the burden of proving that he was not acting within the scope of his employment.

The record in this case contains ample evidence to rebut a Pacheco presumption. Antilles has provided an affidavit of Richard Rowe where he testifies that at the time of the accident, he was driving from the Antilles Automotive facility to his home in Judith's Fancy for the sole purpose of having lunch there.⁷ He also states that at the time of the accident, he was not on his way to pick up anything for Antilles Automotive Corporation, or to further the interests of Antilles Automotive Corporation in any way.⁸ Nothing in the record contradicts Rowe's testimony. Accordingly, the Court finds that there is ample evidence to support a finding that Rowe was using the automobile for his own personal convenience and not on the business of Antilles and that no material issue of fact exists as to plaintiff's claim that Antilles is liable to him on the theory of respondeat superior.

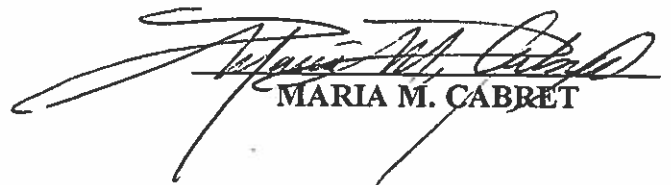
⁶ See Antilles Motion for Summary Judgment, Exhibit B- Affidavit of Richard Rowe, paragraphs 2 and 3.

⁷ Richard Rowe's Affidavit, paragraph 5.

⁸ Id. At paragraph 6.

CONCLUSION

Defendant Antilles Automotive has shown the absence of any genuine issues of material fact in the instant matter. Specifically, the Court finds that the record is devoid of any evidence to support plaintiff's claim that (1) Antilles negligently entrusted a vehicle to Rowe or (2) Rowe was acting within the scope of his employment with Antilles at the time of the accident to support plaintiff's claim that Antilles is liable to him under the theory of respondeat superior. Accordingly, the Court will grant defendant Antilles Automotive motion for summary judgment.


MARIA M. CABRET