

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

CARISSA ZAKERS,

Plaintiff/Petitioner,

vs.

ANDREW CUFFY d/b/a ANDREW AUTO BODY,

Defendant/ Respondent.

CASE NO.: ST-12-SM-126

ACTION FOR DEBT

MEMORANDUM OPINION

I. INTRODUCTION

Before this Court is the April 16, 2012, notice of appeal of the March 30, 2012, Judgment that dismissed Petitioner Carissa Zakers' debt action against Respondent Andrew Cuffy d/b/a Andrew Auto Body. Upon consideration of the record, the parties' pleadings, and the applicable law, the Court concludes that the Magistrate's Judgment should be affirmed.

II. BACKGROUND

The record reveals that on September 13, 2011, Carissa Zakers noticed two warning lights illuminated briefly on the dashboard of her 2006 325i BMW. The lights indicated that her car was possibly overheating and an oil change was needed. On September 14, 2011, Zakers called Andrew Cuffy, owner of Andrew Auto Repairs, and told him about the car's warning lights. Cuffy told Zakers to bring the car to his repair shop, and on Friday, September 16, 2011, Zakers took her car into Cuffy's shop. After an inspection Cuffy confirmed that the car's cooling system was malfunctioning and was causing the car to overheat, and Cuffy explained to Zakers that a new thermostat and oil change was needed to fix these problems. The parties agreed that Cuffy would order the parts and would do the repairs. Before Zakers left the shop with her car, Cuffy warned her to drive carefully since repairs were still needed.

During the following week, Zakers drove the car and the warning lights blinked again. On Tuesday and Thursday, Zakers called Cuffy inquiring about the arrival of the ordered parts, and he told her the parts had not arrived. On Friday, September 23, 2011, Zakers called Cuffy and informed him that she was at the Sugar Estate post office and the car was overheating. Cuffy told Zakers to pull the car over to the side of the road and park the car so it could cool down. Zakers parked the car for less than an hour and then resumed driving. Later that day, Cuffy saw Zakers driving the car and tried to warn her, but although she saw him, she choose to ignore his warning attempt and drove her car home.

On Monday, September 26, 2011, Zakers returned to Cuffy's shop, and when she arrived, the car's engine was overheated. Without starting the vehicle, Cuffy pushed the car into the shop to let it cool down, where it remained unexamined until the parts arrived a few days later. When the parts were delivered, Cuffy learned that he received the wrong parts and he observed that several bolts on the car's exhaust system were broken, about which he notified Zakers.

Upon receiving the correct parts, Cuffy finished the repairs previously identified, but the car would not start. Cuffy then performed another examination and found problems with the car's eccentric cam sensor, pistons, and compression system. Cuffy notified Zakers of the new problems and told her that the repair would be further delayed since he was waiting on parts for his diagnosis scanner, which he needed to reprogram the car. Because of this additional delay, Cuffy rented Zakers a car for the week and requested that she be patient with him. When Cuffy finally notified Zakers that he has the needed tools and parts to complete the repairs, Zakers told him to stop work on the car. Cuffy informed Zakers that the repairs were not finished, but Zakers insist that she no longer wanted him to repair the car and would collect her car with a tow truck. On December 1, 2011, Zakers had her car towed from Cuffy's shop to her home.

This matter came on for trial on March 28, 2012, before the Magistrate. After hearing the sworn testimony and reviewing the admitted evidence, the Magistrate found that Zakers failed to prove that Cuffy was indebted to her. The Magistrate found that since Zakers continued to drive the car knowing that it was not repaired, she assumed the risk of further damaging the car. The Magistrate also found that an affidavit from Zakers' new mechanic was insufficient evidence that Cuffy damaged the car. The Magistrate concluded that Cuffy was not liable and dismissed the Complaint. The Magistrate's decision was later memorialized on March 30, 2012, and on April 16, 2012, Zakers filed a petition for review.

III. DISCUSSION

A. The Magistrate's factual findings are supported by the record.

Zakers appeal primarily challenges the Magistrate's factual findings arguing that she provided sufficient evidence to satisfy her burden of proof at trial. Specifically, Zakers points to her extensive testimony regarding the notices she gave Cuffy about the car's overheating problem, and the subsequent advice Cuffy gave her about driving the car if it overheated. Zakers also argues that the affidavit of her new mechanic, which was admitted into evidence, also supported her claim that Cuffy caused additional damage to her vehicle, rendering it inoperable. Additionally, Zakers claims that because Cuffy never repaired the car's overheating problem, damaged the water pump, returned the car to her in an inoperable condition, and admitted to owing her for a windshield blade, there is sufficient evidence that Cuffy is liable to her for negligent repair and damage to the car.

Pursuant to Super. Ct. R. 322.3(b)(1), the Superior Court reviews a Magistrate's factual determinations for clear error. The Magistrate found that, while Cuffy had inspected Zakers' car and determined that it was overheating on September 16, 2011, Cuffy had not begun to repair the car until after September 26, 2011, when Zakers brought the car in for a second time, because he had to wait for a replacement thermostat to arrive. In the meantime, the Magistrate found that Zakers had continued to drive the car after September 16, 2011, despite being warned by Cuffy to be "careful" due to the potential for the car to overheat prior to being repaired. The Magistrate also found that during the period between September 16, 2011, and September 26, 2011, the car's engine warning light continued to come on, but Zakers did not inform Cuffy of further problems until September 23, 2011. Moreover, the Magistrate found that when Zakers called Cuffy on September 23, 2011, to inform him that the car was overheating, Cuffy advised her to let the car cool off for a sufficient period of time. However, she did not let it cool sufficiently and proceeded to drive the car home against Cuffy's advice. While Zakers argues that Cuffy's testimony was inconsistent and therefore not credible, the Court recognizes that the Magistrate is in the best position to weigh the credibility of the witnesses' testimony and evidence. As such, upon a review of the record and considering all factual determinations are reviewed only for clear error, the Court concludes that the Magistrate's findings are clearly supported by the record by both the testimony of Cuffy and Zakers.

Zakers does not specifically challenge the Magistrate's application of the facts to the law, but generally argues that the Court erred when it found that Cuffy was not indebted to her for the alleged damage to her car. Considering Plaintiff's *pro se* status and that, pursuant to Super. Ct. R. 322.3(b), "legal findings, statements of law, and the application [of the law] . . . are to be afforded plenary review," the Court will briefly discuss the applicable Virgin Islands law. Since the case raises issues regarding both negligent repair pursuant to Restatement (Second) of Torts § 323 and failure to warn of a dangerous condition pursuant to Restatement (Second) of Torts § 388, the Court will discuss each standard in turn.

A. Restatement (Second) of Torts § 323

Under the Restatement (Second) of Torts § 323, made applicable to the Virgin Islands pursuant to 1 V.I.C. § 4, a mechanic "is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."¹

The Magistrate correctly found that Zakers did not prove her case by a preponderance of the evidence under § 323 because the Magistrate determined that the damages caused to Zakers' car could not be attributed to Cuffy's conduct.² Specifically, the record supports the Magistrate's finding that Cuffy exercised reasonable care because he inspected the car, determined it was overheating and needed a new thermostat, and subsequently warned Zakers to be "careful" when driving.³ Only after Zakers drove the car into Cuffy's shop on September 26, 2011, a little over a week after Cuffy's initial diagnosis, was additional damage to the car observed. Specifically, after the second inspection, the car was diagnosed as having several problems with the engine including broken engine bolts and eccentric cam sensor, piston, and compression system problems. Given that the record suggests that Zakers increased the damage to the car since she continued to drive it knowing about its overheating problem, even after Cuffy initially examined the car on September 16, 2011, the Court cannot conclude that the Magistrate erred in finding Zakers' proof inadequate.

In support of her claim that Cuffy was negligent in his repairs, Zakers offered an affidavit from another mechanic, Franky Gonsalves, who inspected her car after December 2011. However, as previously discussed, all factual findings are reviewed for "clear error." Here, the record supports the Magistrate's determination that the affidavit was insufficient to establish that Cuffy was responsible for the damage to the car. Specifically, a review of the record reveals that Gonsalves did not look at the car when it was initially given to Cuffy or within a reasonable time thereafter. As such, Gonsalves' determination that the "main reason for the initial overheating of the Vehicle was the water pump needed to be . . . replaced" was speculative.

While the Court finds that Cuffy was not responsible for the damage to car that was a result of the car overheating, the Court finds that the Magistrate committed error by failing to consider Zakers' claim for the replacement of at least one of the car's windshield wiper blades. Specifically, Cuffy testified and admitted that he owed Zakers for a single wiper blade,⁴ but neither party testified as to the reason why the wiper blade was missing when the car was returned to Zakers' possession. Since any damage to the

¹ Restatement (Second) of Torts § 323 (1965).

² Transcript, March 28, 2012, at 84.

³ Cuffy testified that the problems with the broken engine bolts, eccentric cam sensor, pistons, and compression system were the result of the car being continuously driven while it was overheating. Cuffy testified that he performed all necessary tests and procedures based on the information Zakers gave him when he initially inspected the car on September 16, 2011, and again after he received the car in his shop on September 26, 2011. On the other hand, while Zakers points out that entire repair process took an extraordinary amount of time, Zakers failed to present any evidence demonstrating that Cuffy did not follow the proper procedure for identifying or addressing the car's multiple problems.

⁴ Transcript, March 28, 2012, at 3.

windshield wiper blade could not logically be as a result of the car overheating, the Court finds that the Magistrate did not make sufficient findings to determine whether Cuffy exercised reasonable care in maintaining or replacing the windshield wiper blade. However, upon review of the record, the Court finds that this error was harmless because Zakers provided no evidence or testimony regarding the repair, replacement, or cost of a windshield wiper blade and, thus, did not prove by a preponderance of the evidence that she was entitled to recover for the missing windshield wiper blade. Specifically, Zakers testified that when she picked up the car on December 1, 2011, she paid Cuffy for the car parts and his labor,⁵ but the receipt from Andrew Auto Repair⁶ does not list a windshield wiper blade as one of the parts that Zakers paid for. Further, none of Zakers' exhibits that consisted of receipts for additional parts and repairs performed after Zakers picked up the car on December 1, 2011, listed parts or described work related to the car's windshield wiper blades.

B. Restatement (Second) of Torts § 388

To succeed on a claim under Restatement (Second) of Torts §§ 404,⁷ 388, also made applicable to the Virgin Islands pursuant to 1 V.I.C. § 4, a plaintiff must show that the defendant

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.⁸

Comment *b* of Restatement (Second) of Torts §388 further explains that

one who supplies a chattel for another to use for any purpose is subject to liability for physical harm caused by his failure to exercise reasonable care to give to those whom he may expect to use the chattel any information as to the character and condition of the chattel which he possesses, and which he should recognize as necessary to enable them to realize the danger of using it.

In other words, where the repair of a car is concerned, a car mechanic has a duty to inform those persons he expects will use the car all relevant information he knows or has reason to know which may make the car likely to be dangerous, except where the person for whose use the car is supplied will realize it's dangerous condition.

Here, the Magistrate correctly found that Zakers did not prove her case by a preponderance of the evidence under § 388 because the Magistrate determined that Zakers knew that the car was at a risk of overheating after Cuffy initially inspected it on September 16, 2011.⁹ Further, there is no evidence that Cuffy increased or otherwise created a dangerous condition with Zakers' car. On appeal, Zakers appears to dispute whether Cuffy gave her a sufficient "warning" of the risk of overheating. However, the Court

⁵ Transcript, March 28, 2012, at 74-77.

⁶ Plaintiff's Exhibit 12.

⁷ Restatement (Second) Torts § 404 (1965) ("One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels.").

⁸ Restatement (Second) Torts § 388 (1965).

⁹ The Magistrate found that Cuffy initially determined that Zakers' car needed a new thermostat, but Zakers' "assumed the risk" of driving the car while the car engine light was coming on during the week that Cuffy was waiting for the thermostat to arrive. Transcript, March 28, 2012, at 82-83. While the Magistrate does not explicitly find that Cuffy told Zakers that the car was overheating, both parties testified that they had knowledge that the engine ran the risk of overheating until it was repaired. Both parties also testified that Cuffy informed Zakers that the thermostat needed to be replaced to repair the overheating problem.

reiterates that factual findings are reviewed for clear error. The Magistrate clearly found that Cuffy told Zakers to be "careful" while driving the car¹⁰ and even told her to pull over to let the car cool down on September 23, 2011, when Zakers called Cuffy to tell him the car was overheating. Based on the Magistrate's findings and a review of the record, there is sufficient evidence upon which to conclude that Cuffy exercised reasonable care when he warned Zakers of the dangerous condition of the car both on September 16, 2011, and September 23, 2011.

C. Assumption of the Risk

The Court also held that Zakers "assumed the risk of continuing to drive the car" when the warning light continued to come on and the car was overheating.¹¹ Pursuant to Restatement (Second) Torts § 496A, if a plaintiff is aware of the defendant's negligent conduct and assumes the hazardous risk, the plaintiff cannot recover from such harm.¹² Under Virgin Islands law, the Court must look at the following factors: "(1) the plaintiff had knowledge of the risk involved, (2) the plaintiff appreciated the character of that risk, (3) the plaintiff voluntarily assumed that risk and (4) the plaintiff's conduct in knowingly and voluntarily confronting risk was reasonable."¹³ Because the Court has already found that Zakers did not prove beyond a preponderance of the evidence that Cuffy was negligent pursuant to § 323 and § 388, the Court need not consider whether the "assumption of the risk" defense is applicable to the present matter.

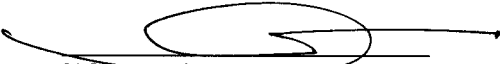
However, assuming *arguendo* that § 496A applies, Zakers would still not prevail because there is sufficient evidence that Zakers assumed the risk of danger after receiving notice from Cuffy that the car was not repaired in that she continued to drive the car. Specifically, according to Zakers' testimony, she first noticed two warning lights on her car for overheating and oil levels problems in mid-September. Zakers also testified that on September 16, 2011, Cuffy inspected the car, and told her that additional parts were needed that he did not have in his shop for the repair. She also testified that Cuffy told her to drive safely given the car's condition and to pull off the road to allow the car to cool if it overheats. Zakers also testified that she continued to drive the car for another week. Based on these facts, after September 16, 2011, Zakers had sufficient knowledge that her car was having overheating problems. Zakers also had knowledge that Cuffy did not repair her car and, based on his warning, driving it could cause additional overheating and damage. Despite this knowledge, Zakers chose to continue to drive the car after September 16, 2011, for another week.

For the foregoing reasons, the March 30, 2011, Judgment is affirmed. An Order consistent with this Opinion shall follow.

Dated: December 5, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

¹⁰ Transcript, March 28, 2012, at 83.

¹¹ Transcript, March 28, 2012, at 83.

¹² Restatement (Second) Torts § 496A ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.").

¹³ *In re Tutu Wells Contamination Litigation*, 909 F. Supp. 999, 1003 (D.V.I. 1995).