2012 IL App (1st) 102865-U

THIRD DIVISION
February 8, 2012

No. 1-10-2865

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY as subrogee of SUN RAY HEATING, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	No. 08 L 260
JD MUELLER, INC. f/k/a MUELLER'S TRUCK REPAIR, INC.,	)	Honorable Jennifer Duncan-Brice
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court erred in granting summary judgment in favor of defendant where a question of material fact exists as to whether defendant's employee negligently spliced the engine block heater cord of the vehicle at issue because the evidence, when viewed in the light most favorable to plaintiff, could support such an inference.

¶ 2 Plaintiff, American Family Mutual Insurance Company, as subrogee of Sun Ray Heating, Inc. (Sun Ray), appeals from an order of the circuit court of Cook County granting summary

judgment in favor of defendant, JD Mueller, Inc. On appeal, plaintiff contends that the court erred in granting summary judgment where a genuine issue of material fact exists as to whether defendant's allegedly negligent conduct was the proximate cause of its injuries. For the reasons that follow, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 On June 9, 2008, plaintiff filed a complaint against defendant for negligence in which it asserted that defendant replaced the engine block heater and engine block heater cord on Sun Ray's 1995 Ford Econoline 350 cutaway van on or about April 26, 2000. Plaintiff also asserted that Sun Ray was an Illinois corporation that owned and operated a heating and air conditioning business with an office and warehouse in Matteson, Illinois, and that defendant was authorized to perform automotive repair. Plaintiff further asserted that on October 5, 2003, a Sunday, the van at issue was parked inside Sun Ray's warehouse when a fire started in its engine compartment and spread to the entire building.

¶ 5 Plaintiff alleged that defendant had a duty to replace the block heater and cord so as not to damage Sun Ray's property, that it breached that duty by negligently and carelessly replacing the heater and cord, and that Sun Ray suffered property damage as a direct and proximate result of its negligence. Plaintiff further alleged that it had paid Sun Ray $1,740,452.18 for the property damage caused by the fire under the terms of an insurance policy it had previously entered into with Sun Ray. Plaintiff requested the court enter judgment in its favor and against defendant in the amount of not less than $1,740,952.18, plus costs.

¶ 6 On March 31, 2010, defendant filed a motion for summary judgment and a supporting

memorandum of law in which it asserted that plaintiff could not offer evidence to establish that it negligently spliced the block heater cord in Sun Ray's van or that the fire at issue was caused by its alleged negligence. Defendant attached the deposition testimony of numerous people to its motion, including David Sundeen, Anthony Jager, Beth Anderson, Mike Poerio, James Mueller, and John Burgess, and also attached a sworn statement by Poerio.

¶ 7 David Sundeen, the president and majority owner of Sun Ray, testified that he bought the van at issue prior to 2000 and that the purpose of an engine block heater was to prevent the diesel fuel in the engine from thickening by keeping it warm. Sundeen also testified that the van had trouble starting when it had not been used for over 24 hours and that Sun Ray employees would plug the heater cord into an outlet using an extension cord over the weekends so the van would not have trouble starting the following Monday. Anthony Jager, a driver for Sun Ray, testified that one of Sun Ray's drivers parked the van in Sun Ray's facility and plugged in the heater cord on the Friday before the fire and that none of the drivers had ever accidentally pulled the van out of its parking space while the heater cord was still plugged in to the outlet.

¶ 8 Beth Anderson, a licensed engineer, testified that she was retained by plaintiff to examine the electrical system and appliances in Sun Ray's warehouse and determine what role they may have played in causing the fire. Anderson conducted an investigation of Sun Ray's warehouse on October 8, 2003, three days after the fire, determined that the heater cord had been spliced using the twist and tape method about eight inches away from the plug that connected to the extension cord, and opined that the fire was caused by the splice. Although the actual splice was destroyed in the fire, Anderson knew the cord had been spliced because there were two different wire sizes

in that area of the cord. Anderson explained that the poor connection at the point of the splice caused damage to the cord's insulation until the two wires came in contact with one another, which caused an arcing event that ignited the insulation and surrounding combustible materials. Anderson further explained that the insulation breakdown from the poor connection was gradual and that the cord could have been spliced weeks, months, or years before the fire.

¶ 9 Mike Poerio related in his sworn statement that he worked as a mechanic/technician for defendant from 1996 to 2001 before leaving to start his own business. Poerio further related that he installed the block heater and cord at issue and that he did not install those items improperly or splice the cord. Poerio testified at his deposition that he replaced the heater and cord on or about April 26, 2000, and did not splice the cord when he did so. Poerio explained that a new heater came with a cord, that he always installed the new cord along with the heater, and that it was unsafe to splice a block heater cord or use the twist and tape method to splice a cord. Poerio further testified that he had a good relationship with the people at Sun Ray and that it became his client when he stopped working for defendant and started his own business.

¶ 10 James Mueller, a co-owner of defendant, testified that he hired Poerio in 1996 and trusted him as a mechanic and that Poerio would have made more money by installing a new heater cord instead of splicing it because he could have charged more for labor. John Burgess, a mechanic for defendant since 1998, testified that Poerio was a good mechanic and would not use the twist and tape method to splice a cord, that there was no benefit to splicing a heater cord as opposed to installing a new one, and that it was especially unlikely that Poerio would splice the cord at issue using the twist and tape method because he was friends with people at Sun Ray.

¶ 11 Defendant attached an invoice to its motion which was dated April 26, 2000, and shows that it replaced the engine block heater and cord of Sun Ray's van. Defendant also attached invoices from Poerio's Repair and an invoice from T & T Auto Care, which show that work had been done on the van numerous times between October 2001 and May 2003, but do not show that any work was done to the heater or cord.

¶ 12 On July 2, 2010, plaintiff filed a response to defendant's motion for summary judgment in which it asserted that summary judgment was improper because the evidence showed that the fire was caused by a splice in the heater cord and that defendant was the only entity to perform work on the heater and cord from April 2000 to the time of the fire. Defendant filed a reply in which it asserted that plaintiff could not present evidence showing that it was responsible for the fire and attached numerous invoices from TRL Tire Service Corp., which show that work had been done on the van between March 2001 and October 2002, but do not show that any work was done to the heater or cord.

¶ 13 On August 24, 2010, the circuit court entered a written order granting defendant's motion for summary judgment. In doing so, it found that plaintiff had failed to establish that defendant was the proximate cause of the fire where there was no direct or circumstantial evidence showing that it improperly installed the heater or was responsible for splicing the cord. Plaintiff now appeals from this order.

¶ 14 ANALYSIS

¶ 15 Plaintiff contends that the circuit court erred in granting summary judgment in favor of defendant because a genuine issue of material fact exists as to whether defendant was responsible

for splicing the engine block heater cord of Sun Ray's truck. Summary judgment is proper where the pleadings, depositions, admissions, affidavits, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). A triable issue of fact exists where there is a dispute as to a material fact, or where reasonable people might differ in drawing inferences from facts which are not in dispute. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163-64 (2007). A defendant may prevail on its motion for summary judgment by disproving the plaintiff's case with uncontradicted evidence that would entitle it to judgment as a matter of law or by establishing that the plaintiff lacks sufficient evidence to prove an essential element of its cause of action. *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. We review the circuit court's grant of defendant's motion for summary judgment *de novo*. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004).

¶ 16 To state a legally sufficient claim of negligence, plaintiff must allege facts establishing that defendant owed it a duty of care, that defendant breached that duty, and that the breach was the proximate cause of its injuries. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). In its order granting summary judgment in favor of defendant, the circuit court stated that plaintiff could not demonstrate that defendant was responsible for splicing the heater cord of Sun Ray's van. Thus, although the court framed its ruling in terms of its conclusion that plaintiff could not establish that defendant was the proximate cause of Sun Ray's injuries, its ruling was based on its determination that plaintiff could not demonstrate that defendant negligently spliced the cord.

¶ 17 Plaintiff asserts, however, that a trier of fact could reasonably infer that Poerio spliced the cord from the circumstantial evidence showing that he installed the heater and cord and that no other entity accessed the cord at the point it was spliced from the time it was installed to the fire at Sun Ray's warehouse. Defendant responds that there is no direct evidence that Poerio spliced the cord and that the circumstantial evidence does not support the inference that he did so where numerous people had access to it after its installation.

¶ 18 A plaintiff may establish a defendant's negligence through the use of circumstantial evidence. *Mort v. Walter*, 98 Ill. 2d 391, 396 (1983); *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 397 (2000). Circumstantial evidence is proof of facts and circumstances from which a trier of fact may infer other connected facts that usually and reasonably follow according to common experience. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 99 (2008). Circumstantial evidence can only support an inference that is reasonable and probable (*First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106 (2006)), and while such evidence need not exclude all other possible inferences, "it must be of such a nature and so related as to make the conclusion reached the more probable" (*Romano v. Municipal Employees Annuity & Benefit Fund of Chicago* , 402 Ill. App. 3d 857, 864 (2010)).

¶ 19 Anderson testified that the heater cord of Sun Ray's van had been spliced using the twist and tape method at a point about eight inches away from the plug connecting it to the extension cord and that the its insulation was damaged by the poor connection from the splice. As a result, the two wires in the cord came in contact with one another, causing an arcing event that ignited the insulation and surrounding combustible materials. Because the breakdown of the insulation

happened gradually, Anderson could not determine whether the fire occurred weeks, months, or years after the cord had been spliced. The deposition testimony of Anderson thus shows that the splicing of the heater cord caused the fire at Sun Ray's warehouse and that the cord may have been spliced years before the fire. The evidence also shows that Poerio installed the engine block heater and cord about 3½ years before the fire while he was working for defendant. Based on this evidence, plaintiff maintains that a trier of fact could reasonably infer that Poerio spliced the cord.

¶ 20 Defendant asserts that the inference plaintiff seeks to establish is not reasonable where Poerio denied splicing the cord and it could have been spliced by any of the many people that had access to it after it was installed. The record shows that Sun Ray employees regularly handled the cord where Sundeen testified that they plugged it in on weekends so the van would not have trouble starting on the following Monday. However, Jager testified that none of the drivers had ever pulled the van out of the parking space while the cord was still plugged into the outlet. In addition, although the invoices from Poerio's Repair, T & T Auto Care, and TRL Tire Service, Corp., show that numerous repairs were made to the van after the heater had been installed, none of the invoices show that work was done on the heater or the cord.

¶ 21 Viewing the evidence in the light most favorable to plaintiff, we determine that a question of material fact exists as to whether Poerio spliced the heater cord. A trier of fact could find it unlikely that the cord was spliced by one of Sun Ray's employees or another mechanic where Jager testified that Sun Ray's drivers had never damaged the cord by pulling the van out of its parking space while it was plugged in and the invoices for repairs to the van do not show that any

work was done on the heater or cord after they had been installed. If the trier of fact also found Poerio not to be a credible witness, it could then decline to believe his denial as to splicing the cord and find that he likely spliced the cord when he installed the heater where the splice was the result of an affirmative act, rather than routine wear and tear, and it was unlikely that any of the people who had access to the cord other than Poerio spliced it.

¶ 22 In reaching this determination, we note that a trier of fact could also find Poerio to be a credible witness, reject the testimony of Jager, and reasonably infer that it is as likely or more likely that the cord was spliced by a Sun Ray employee or another mechanic in the 3½ years after it was installed than it was by Poerio. However, a court must not resolve disputed factual matters or make credibility determinations when ruling on a motion for summary judgment (*Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 236 (1996)), and we thus reserve such determinations for the trier of fact. We therefore conclude that the circuit court erred in granting summary judgment in favor of defendant where a genuine issue of material fact exists as to whether Poerio spliced the heater cord of Sun Ray's van.

¶ 23 CONCLUSION

¶ 24 Accordingly, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this order.

¶ 25 Reversed and remanded.