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NO. 4-13-0483

FILED
February 24, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JERROD BLAIR and CORINA BLAIR, Plaintiffs-Appellants, v. PENNELL FORKLIFT SERVICE, INC., Defendant-Appellee.	))))))))	Appeal from Circuit Court of Sangamon County No. 09L309 Honorable John Schmidt, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Justice Pope dissented.

ORDER

¶ 1 *Held*: Where plaintiffs failed to establish that defendant owed them a duty of care based on a voluntary undertaking, the trial court did not err in granting defendant's motion for summary judgment and denying plaintiffs' motion for partial summary judgment.

¶ 2 In February 2013, plaintiffs, Jerrod Blair and Corina Blair, filed a second amended complaint against defendant, Pennell Forklift Service, Inc. (Pennell), alleging Pennell was negligent in the inspection and maintenance of a forklift used at Jerrod's place of employment. In April 2013, plaintiffs filed a motion for partial summary judgment. In May 2013, Pennell filed its motion for summary judgment. The trial court found Pennell did not owe a duty to plaintiffs, granted Pennell's motion for summary judgment, and denied plaintiffs' motion for partial summary judgment.

¶ 3 On appeal, plaintiffs argue the trial court erred in denying their motion for partial

summary judgment and granting Pennell's motion for summary judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Fastenal Corporation (Fastenal) is an industrial supply company offering a wide variety of products, including fasteners and cutting tools. At all relevant times in this case, it operated a warehouse in Springfield and utilized a forklift in its warehouse operations. The Fastenal building was "one big open area," with the manager's office and restrooms. In his position as warehouse manager, Jerrod had an office that measured about 15 feet by 15 feet with a door that shut. Pennell serviced forklifts for its customers.

¶ 6 In November 2009, plaintiffs filed a complaint against Pennell, alleging it breached its duty of care in the negligent inspection of the forklift (count I). Jerrod alleged Pennell agreed to inspect, maintain, repair, and service the forklift, including monitoring the carbon monoxide it emitted. Jerrod alleged Pennell undertook a duty to exercise reasonable care to ensure Fastenal employees, including Jerrod, were not exposed to carbon monoxide emissions that would harm their health. The forklift allegedly began emitting dangerous levels of carbon monoxide at least as early as April 2008, and Jerrod claimed Pennell did not make this discovery until September 2008. The alleged failure to detect the harmful emissions caused Jerrod to suffer injury. Corina, Jerrod's wife, alleged in count II that Pennell's negligence made Jerrod unable to fulfill his spousal duties.

¶ 7 In December 2009, Pennell filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)). Pennell argued it owed no duty to perform any services not specifically referenced by the service agreement. Pennell also argued Jerrod failed to allege he suffered any actual injury caused by Pennell's supposed negligence.

¶ 8 In February 2013, plaintiffs filed a second amended complaint. In count I, Jerrod

alleged a Pennell representative undertook to inspect and repair a forklift on May 19, 2008, and the work included a check of the exhaust and emissions system. Jerrod claimed the Pennell representative determined the exhaust and emissions from the forklift were not of a dangerous nature and noted on an inspection report that the "Exhaust/Emissions" were found to be "OK." It was not until September 5, 2008, that a Pennell representative discovered the forklift was emitting dangerous levels of carbon monoxide. Jerrod alleged Pennell failed to inspect the forklift in a proper fashion, including the failure to use exhaust and carbon monoxide detection devices to assist in determining if the forklift was emitting carbon monoxide at harmful levels. In count II, Corina alleged she had been deprived of the value of society, companionship, and relationship with Jerrod.

¶ 9 In April 2013, plaintiffs filed a motion for partial summary judgment on the issues of duty and breach of duty. Plaintiffs claimed Pennell owed a duty to Jerrod under a voluntary-undertaking theory of liability and the failure to inspect the carbon monoxide emissions from the forklift was a breach of that duty.

¶ 10 In May 2013, Pennell filed a motion for summary judgment. Pennell claimed it had no duty under the service agreement to perform the type of test plaintiffs alleged Pennell was negligent in failing to perform and it had no duty under the Occupational Safety and Health Act (OSHA) (29 U.S.C. § 654) because Pennell was not Jerrod's employer. Pennell also claimed plaintiffs had no evidence the forklift was emitting unsafe levels of carbon monoxide at the time Pennell serviced it.

¶ 11 The following evidence was elicited from various depositions of the parties. Jeff Pennell testified he is the owner of Pennell and has 24 employees working for him. He had 33 years of experience in servicing and maintaining forklifts. In regard to the preventative

maintenance check, Pennell stated the company takes a loss each time one is conducted but it allows the company to develop a relationship with the customer that might lead to further repair work.

¶ 12 Pennell agreed carbon monoxide is odorless, tasteless, colorless, and cannot be detected by any of the human senses. Pennell also agreed carbon monoxide emissions can cause serious injury and even death to humans. He stated it was important for the owner of a propane-powered forklift that is operated inside to monitor the carbon monoxide emissions. He also stated OSHA puts that responsibility on the owner. Pennell only had one carbon monoxide wand monitor in 2008. He stated the exhaust consists of the mechanical parts that carry burnt fuel and air from the engine to the outside and the emissions come out of the exhaust pipe. When asked what a check of the exhaust and emissions entails, Pennell stated the inspector looks for signs of smoke or "a flutter in the exhaust."

¶ 13 A. Service Agreement Between Fastenal and Pennell

¶ 14 On January 21, 2008, Fastenal and Pennell entered into a preventive maintenance service agreement (service agreement), wherein Fastenal authorized Pennell to perform services at intervals of 180 days at Fastenal's Springfield store. As district manager and on behalf of Fastenal, Rick Crippen signed the service agreement, which authorized Pennell to perform services, in part, as follows:

> "The scope of this agreement is intended to cover only those repairs and services which are of repetitive nature. And will be made as outlined under the Preventative Maintenance Service Agreement. It is not our intention to undertake responsibility for emergency repairs, or repairs of an extensive nature requiring

replacement of major assemblies, or repairs to those assemblies.

Service charge for the Preventative Maintenance work shall be $56.00 flat labor fee for each unit serviced. Motor, transmission, and differential oil, lubrication grease (other than lubricant for chassis lubrication), miscellaneous small parts, or any other material necessary to return the truck to proper running order, will be billed at prevailing established prices.

In the event the owner/supervisor requests service or repairs to his industrial equipment other than shown on this Preventative Maintenance Service Agreement, Pennell Forklift Service, Inc. agrees to perform the service or repairs at $71.00 per hour for service truck and technician. Emergency service call repair, which includes nights and weekends, will be billed at $106.50 per hour with a four hour minimum." (Emphasis in original.)

In conversations with Crippen, Pennell assured him the company would "always do what's right and maintain his equipment just as we do our own."

¶ 15 The service agreement did not make reference to the use of a carbon monoxide tester. When asked if he requested the use of a carbon monoxide tester every time preventative maintenance was provided, Crippen answered he had not. (In fact, Crippen, prior to September 2008, never requested Pennell to test for carbon monoxide.) Crippen also testified once carbon monoxide was suspected, a carbon monoxide test was authorized and Fastenal was charged a fee for that test.

¶ 16 B. Pennell's Inspection Report

¶ 17 The inspection report for internal combustion forklifts contains the following statement: "Based on visual inspection, where possible, or operational checks in the care of internal parts." The inspection report contains various items to be checked under the headings of "safety," "operational checks," "engine compartment checks and lube," "fuel systems checks," "check and lube linkage," "steer axle and steer system," "drive axle checks," and "upright/front end checks." Boxes provide space for the inspector to mark "OK," "ADJ," and "Need[s] Repair." Under the "operational checks" category, tasks to consider include, *inter alia*, fluids, the starting system, brakes, steering, and "exhaust/emissions."

¶ 18 C. May 2008 Preventative Maintenance Inspection

¶ 19 Jim Qualls testified he worked at Pennell as a service technician before retiring. To perform preventative maintenance for a customer, Qualls used a checklist provided by Pennell. In checking for any potential problems with carbon monoxide emissions, Qualls stated as follows:

> "Well, I would first talk to my customer and ask them if they had any problems. If they did not have any problems with the fork truck, then I would take and actually get on the unit, start the unit up, drive the unit as far as operation and test. If the engine was running great, not missing, running fine, didn't have any—you couldn't smell as far as it being rich, or running rich, or wasn't putting out any smoke or anything like that, it was running fine, then you would go ahead and check that it was okay. If you had any indications that it wasn't, as far as being advised by the

> customer, or whether the engine was running poorly, you would take and ask them for an emissions check and also a tune-up. You would recommend a tune-up on the thing, or whether or not it was an [liquid petroleum (LP)] carburetor, whether or not the carburetor was bad."

The Fastenal forklift was an older unit that did not have a catalytic converter, the absence of which makes it more dangerous as it relates to carbon monoxide emissions. On May 19, 2008, Qualls ran the forklift "and it ran fine, and the exhaust was coming out the tailpipe, and I didn't see any smoke, didn't smell anything. My eyes weren't burning from too rich a fuel. It was running fine." On the inspection report, the "exhaust/emissions" category was marked "OK." Qualls did not make any notes that recommended Fastenal check the carbon monoxide emissions. He did not have a wand available to check carbon monoxide levels. The only thing he found wrong with the forklift was a light in need of repair. Qualls stated a carbon monoxide test was not included in a preventative maintenance agreement and it "is an additional service that is conducted on a repair record."

¶ 20 D. Jerrod's Diagnosis of Carbon Monoxide Exposure

¶ 21 Crippen stated he never heard any complaints about the forklift prior to September 2008, when Jerrod complained of experiencing tingling sensations, headaches, and feeling run-down. Jerrod went to the doctor and was diagnosed with carbon monoxide exposure. Jerrod checked his house and vehicle before checking his place of employment. Jerrod took a digital carbon monoxide detector to work and stated it went "berserk" when the forklift was running. Once it was determined there were elevated levels of carbon monoxide, the fire department was called and the store was closed for part of a day.

¶ 22 E. September 2008 Servicing

¶ 23 Pat Heise testified he has worked as a service technician at Pennell for 16 years. A preventative maintenance inspection for the forklift at issue in this case would take about 1.5 to 2 hours. When asked how he would test the "exhaust/emissions" in a preventative maintenance check, Heise stated "[j]ust visually, and just by accelerating the engine, whatever. If there is a plume of blue smoke or whatever coming out of the back, I would say there is an emissions problem." Further, he stated: "Use your ears and your eyes and your nose, and if everything appears okay, then it would be checked okay."

¶ 24 Heise stated a "good running engine emits between 0.4 and 0.7[%] carbon monoxide." After Fastenal suspected carbon monoxide issues with its forklift, Heise conducted a test on the forklift in September 2008. His initial test registered a carbon monoxide reading of 8.25%. After deciding a new carburetor was necessary, Heise ordered one and installed it. Thereafter, Heise's carbon monoxide test registered a reading of "0.49% at idle." He had no idea how long the carburetor had not been functioning properly. The propane-powered forklift was eventually replaced with an electric model.

¶ 25 F. Trial Court Ruling

¶ 26 In May 2013, the trial court found Pennell did not owe a duty to plaintiffs. Thus, the court granted Pennell's motion for summary judgment and denied plaintiffs' motion for partial summary judgment. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, plaintiffs argue the trial court erred in denying their motion for partial summary judgment and granting Pennell's motion for summary judgment. We disagree.

¶ 29 A. Standard of Review

¶ 30 "Summary judgment is appropriate where '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 a judgment as a matter of law.' " *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). We construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opposing party. *Illinois State Bar Ass'n Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032, 1036, 911 N.E.2d 1144, 1148 (2009). On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 31 B. Negligence Actions and Defendant's Duty

¶ 32 To prevail on a claim of negligence, "the plaintiff must prove that the defendant owed a duty, that the defendant breached that duty, and that defendant's breach was the proximate cause of injury to the plaintiff." *Bell v. Hutsell*, 2011 IL 110724, ¶ 11, 955 N.E.2d 1099. Unless the defendant owes a duty to the plaintiff, "there can be no recovery in tort for negligence." *Bell*, 2011 IL 110724, ¶ 11, 955 N.E.2d 1099. Whether a duty exists is a question of law that is reviewed *de novo*. *Bell*, 2011 IL 110724, ¶ 11, 955 N.E.2d 1099.

¶ 33 C. Voluntary Undertaking and Duty of Care

¶ 34 In the case *sub judice*, plaintiffs claim Pennell owed them a duty of care when it voluntarily undertook to inspect emissions from the forklift.

> "Under the voluntary-undertaking theory, where a person voluntarily agrees to perform a service necessary for the protection of another person or their property, a duty may be imposed on the

> party undertaking the service; that party must perform the service in such a manner as not to increase the risk of harm to the other person who relies on the undertaking. [Citation.] One who is negligent in the undertaking will be held liable for the foreseeable consequences of the act if another suffers harm because they relied on the undertaking." *Claimsone v. Professional Property Management, LLC.*, 2011 IL App (2d) 101115, ¶ 21, 956 N.E.2d 1065.

See also *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32, 605 N.E.2d 557, 560 (1992). This theory of liability is expressed in sections 323 and 324A of the Restatement (Second) of Torts, which have been adopted by our supreme court. *Bell*, 2011 IL 110724, ¶ 12, 955 N.E.2d 1099.

¶ 35 Section 324A provides as follows:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of

Torts § 324A (1965).

¶ 36 "The essential element of the voluntary[-]undertaking doctrine is an undertaking, and the duty of care imposed on a defendant is limited to the extent of his undertaking." *Iseberg v. Gross*, 366 Ill. App. 3d 857, 865, 852 N.E.2d 251, 257-58 (2006); see also *Bell*, 2011 IL 110724, ¶ 12, 955 N.E.2d 1099 (stating the duty of care "is limited to the extent of the undertaking"). Our supreme court has noted "[t]he theory is narrowly construed." *Bell*, 2011 IL 110724, ¶ 12, 955 N.E.2d 1099.

¶ 37 To determine whether Pennell owed a duty to plaintiffs, we must determine the extent of any voluntary undertaking. Plaintiffs alleged Pennell and Fastenal entered into a service agreement to service Fastenal's forklift and that agreement, as well as the inspection report, established the services Fastenal had a right to expect from Pennell. Upon the inspection of the forklift in May 2008, a Pennell technician represented the "exhaust/emissions" were "OK." In September 2008, following complaints from Fastenal, a Pennell technician discovered the forklift was emitting dangerous levels of carbon monoxide. Plaintiffs claimed Pennell failed to inspect and maintain the forklift in a proper fashion, failed to warn Fastenal employees of the dangerous condition inside the warehouse, and failed to warn the employees that carbon monoxide emission levels had not been checked.

¶ 38 Here, Pennell and Fastenal entered into a preventative maintenance service agreement pertaining to Fastenal's forklift. The service agreement provided, in part, as follows:

> "The scope of this agreement is intended to cover only those repairs and services which are of repetitive nature. And will be made as outlined under the Preventative Maintenance Service Agreement. It is not our intention to undertake responsibility for

> emergency repairs, or repairs of an extensive nature requiring replacement of major assemblies, or repairs to those assemblies."

The service agreement stated the service charge for the preventative maintenance work was $56. It is clear here that Pennell voluntarily undertook to provide preventative maintenance under the service agreement.

¶ 39 The question then becomes what did the preventative maintenance entail? The inspection report indicates work would be "based on visual inspection, where possible, or operational checks in case of internal parts." The inspection covered matters of safety, operational checks, as well as checks of the engine, fuel system, linkage, steering, drive axle, and upright and front end. Under the "Operational Checks" area of the inspection report was a line for "exhaust/emissions" and boxes where the technician could check whether the item was "OK," whether it needed an adjustment, or whether it needed to be repaired.

> "An allegation of negligence based upon a contractual obligation, although sounding in tort rather than contract, is nonetheless defined by the contract. [Citations.] Thus, the scope of duty is determined by the terms of the contract. [Citation.] A defendant's duties will not be expanded beyond the scope of duties required by the contract." *Eichengreen v. Rollins, Inc.*, 325 Ill. App. 3d 517, 525, 757 N.E.2d 952, 959 (2001).

¶ 40 Here, nothing in the service agreement or inspection report indicates Pennell voluntarily agreed to test the carbon monoxide levels of the forklift as part of the preventative maintenance inspection. Carbon monoxide is not even mentioned in the service agreement or the inspection report. The service agreement provided it was intended to cover "only those repairs

and services which are of a repetitive nature." The inspection report informed Fastenal the preventative maintenance would be based on visual inspection where possible or operational checks in the case of internal parts. Nothing suggests Pennell would include a test of carbon monoxide levels, which could not be done with accuracy through a visual or operational test. Considering the documents at issue and narrowly construing the voluntary-undertaking theory, Pennell cannot be said to have agreed to test carbon monoxide levels.

¶ 41 Plaintiffs argue the language of the service agreement and inspection report could be considered ambiguous. Plaintiffs point toward the lack of definitions as to repairs and services that are of a "repetitive nature," what constitutes an "emergency repair" or a "repair of an extensive nature," what "visual inspection" entails, and an ambiguity exists as to whether forklift emissions would be checked. Plaintiffs argue any ambiguities in the documents should be interpreted against Pennell.

¶ 42 Considering the deposition testimony, there is no evidence Jeff Pennell or Qualms conveyed to Fastenal that carbon monoxide levels would be checked. Pennell stated an operational check of exhaust and emissions involved a visual check for smoke, listening for a flutter in the exhaust, and detecting any exhaust odor that would indicate there was something wrong with the engine. He also stated preventative maintenance is "an oil change, filter and grease" and anything beyond that goes on a work order. Qualms stated the preventative maintenance check involved him driving the forklift, listening to the engine, and determining by smell whether the engine was "running rich." If the engine was not emitting smoke and was "running fine," he would check it as "OK." As Fastenal's district manager, Crippen testified he did not request the use of a carbon monoxide tester every time preventative maintenance was provided by Pennell.

¶ 43 Here, it is clear none of the principals involved with the formation of the service agreement or the actual inspection of the forklift believed carbon monoxide emissions testing was to be performed by a Pennell technician. Plaintiffs claim no one told Crippen that such tests would not be performed. However, the focus of the voluntary undertaking is on what Pennell actually promised to perform. To do otherwise would render the voluntary-undertaking theory useless, as a plaintiff could go beyond the actual promise and include matters never discussed. To establish that Pennell owed a duty under the voluntary-undertaking theory, plaintiffs would have had to show Pennell specifically agreed to test carbon monoxide levels—verbally or through its service agreement or inspection report. No such evidence exists here.

¶ 44 The pertinent documents and deposition testimony in this case show Pennell did not voluntarily undertake to test carbon monoxide emissions during the inspection of Fastenal's forklift. As no duty existed, plaintiffs cannot recover. Accordingly, the trial court did not err in granting Pennell's motion for summary judgment and denying plaintiffs' partial motion for summary judgment.

¶ 45 III. CONCLUSION

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

¶ 47 Affirmed.

¶ 48 JUSTICE POPE, dissenting.

¶ 49 Because I do not agree Pennell clearly had no duty under the service agreement to check for elevated carbon monoxide levels, I respectfully dissent.

¶ 50 The forklift in question was fueled by propane gas. Pennell undertook in its service agreement to inspect "Exhaust/Emissions" and indicated in its May 2008 inspection report the "Exhaust/Emissions" were "OK." I believe a jury should be allowed to determine whether Pennell owed a duty to Fastenal and its employees to check for excessive carbon monoxide emissions when it knew the propane-fueled forklift was being operated indoors and, after inspecting the forklift, certified it was "OK," knowing Fastenal was relying on Pennell to perform appropriate inspections. In my opinion, a jury could find it was reasonable for the Fastenal employees to rely on this representation by Pennell, where Pennell was in a superior position to know what tests should be performed to be sure the forklift was safe to operate indoors. I would reverse the grant of summary judgment in this case.