Nehil v. Ladjack

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Argued September 11, 2007

Before Judges Coburn, Grall and Chambers.

In this personal injury and wrongful death motor vehicle accident case, plaintiffs settled with some of the defendants, gave stipulations of dismissal with prejudice to other defendants, and proceeded against the only remaining defendants, Kennedy Insurance Agency, Inc., and one of its employees, defendant Gary Florczyk.

The claims arose on May 23, 2003, when defendant Robert Ladjack, Jr., drove a dump truck leased to defendant AJ Juba, Inc. ("Juba"), into a car operated by plaintiff Linda Nehil.

Kennedy and Florczyk had placed insurance on the truck for Juba. Plaintiffs alleged in their complaint that before Juba purchased the insurance, its principal, Arthur Juba, told Florczyk that he would not hire Ladjack as a driver unless his driving record was free of violations. Plaintiffs further alleged that Florczyk agreed to determine whether Ladjack had a safe driving record; and then intentionally or negligently advised Arthur that Ladjack's driving record had no violations when in fact there were numerous violations. Finally, plaintiffs alleged that Arthur permitted Ladjack to drive one of his company's truck in reliance on the misinformation he had received from Florczyk. These defendants obtained summary judgment, and plaintiffs appeals. We affirm.

These are the relevant facts. In late May 2002, Arthur hired Ladjack for Juba to drive a commercial dump truck. At that time, Arthur asked Ladjack if he had a valid driver's license, but he did not ask any questions about his driving record or involvement in accidents. Ladjack had not been involved in any accidents involving personal injury, and his license permitted him to drive commercial vehicles.

Later on, Arthur provided Ladjack's name and driver's license number to Florczyk, who had advised him that the insurance company required Kennedy to obtain and transmit to it a copy of Ladjack's motor vehicle driving record. Florczyk obtained Ladjack's record for the past five years, which experts on both sides agreed was standard in the insurance industry. The record revealed a speeding violation in 1999 (47 miles per hour in a thirty-five mile an hour zone), which resulted in an assessment of two points under the Motor Vehicle Code. The record also revealed that six points were credited to Ladjack, which implied previous moving violations. Finally, the motor vehicle

record declared that Ladjack's driver's license was in "Good Standing."

Arthur's depositions contain the following questions and answers on Ladjack's motor vehicle record:

Q: When you hired him [Ladjack], did you check his driving record at all?

A: Yes. His license was given to the insurance company. The insurance company runs an abstract, and they tell me, yes, either keep him, or no, he's no good.

Q: And Gary Florsick (sic) told you it was okay to hire this guy?

A: Yeah, the insurance company said that he had a clean record. He had no accidents. He had no tickets.

Q: Would you have hired this particular driver if you knew he had a number of traffic tickets and suspensions on his license?

A: No.

Q: Why is that?

A: Because I don't believe in hiring anybody who has a blemish on their license. [Emphasis added.]

Q: Do you remember at some point after you asked for the motor vehicle check to be done that Mr. Florczyk called you and said we did the motor vehicle lookup and Ladjack is in good standing or something like that?

A: Yes. I was told he had a clean record.

Q: Mr. Florczyk, did he discuss anymore than he had a clean record? Did he say I can't show it to you under some federal law?

A: Yeah. He said there's some kind of privacy act.

Q: And he mentioned that to you or you knew about it?

A: Yes, but he just told that the insurance company said he was an acceptable driver.

Q: And he said he had a clean record, right?

A: Yup.

Q: Did you ask him how many years back he had gone to check it out?

A: No.

Q: Did you ask any details about the record at all?

A: No, just as long as he had a clean record.

Q: Mr. Juba, when you were advised by Mr. Florczyk that Mr. Ladjack had a clean record, did you assume that he meant the entire record?

A: Yes, sir, that he had a clean driving record.

Q: With no violations at any time, correct?

A: Yes.

Q: Would you have hired this man if you had known he had numerous moving violations and his license had been suspended?

A: Would have never been in my truck.

Ladjack's entire driving record, obtained during this litigation, showed four speeding violations, two committed before 1997, and six violations for operating a motor vehicle while his license was suspended or revoked, numerous failures to appear, and driver and insurance surcharges.

After Ladjack was hired by Juba and before the Nehil accident, Ladjack was convicted while driving Juba vehicles of speeding on June 13, 2002, and of failing to observe a traffic light on October 2, 2002, and had his license briefly suspended. Arthur was advised of those matters before the Nehil accident, and nonetheless retained Ladjack as a driver, and took that course despite his deposition testimony that he would not hire anybody "who has a blemish on their license."

In reviewing the grant of summary judgment, we "must determine whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the disputed issues in favor of the non-moving party." Singer v. Beach Trading Co., Inc., 379 N.J. Super. 63, 72-3 (App. Div. 2005).

Plaintiffs rest their case on the fundamental principle pronounced long ago by our former Supreme Court that when "any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more other persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill."

Van Winkle v. American Steam Boiler Co., 52 N.J.L. 240, 247 (Sup. Ct. 1890). More recent expressions of this and related principles appear in the Restatement (Second) of Torts §§ 310, 311 and 324A (1965).

We consider first whether defendants' conduct comes within section 324A, which 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 undertaking.

[Id. at § 324A.]

Although plaintiffs alleged in their complaint that Arthur told Florczyk that Ladjack would not be hired unless his driving record was free of any violations, no evidence was submitted to support that allegation. The complaint next alleged that Florczyk agreed to determine if Ladjack had a safe driving record, but no evidence was submitted to establish that as a fact. Rather, it is quite clear that Arthur understood that he was not entitled to receive any details of Ladjack's driving record from Florczyk, and that, as he put it, "[t]he insurance company runs an abstract, and they tell me, yes, either keep him, or no, he's no good."

In short, there is no evidence that Florczyk undertook to perform any service for Arthur other than providing a driving license abstract to the insurance company and thereafter advising if the insurance company would permit Ladjack to be an insured under its policy. Since Florczyk performed as agreed, completing his undertaking in all respects, section 324A provides no support for plaintiffs' cause of action.

Section 310 expresses this related concept for conscious misrepresentation involving risk of physical harm:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows

(i) that the statement is false, or

(ii) that he has not the knowledge which he professes.

[Id. at § 310.]

Under section 310, there can be liability for conscious misrepresentations. Here, the concept of conscious misrepresentation could be applicable only with respect to the information Floyczyk obtained for the five-year period. The only words allegedly spoken by Florczyk that might be seen as making that section relevant were that Ladjack had a "clean record." If that phrase could be fairly understood in this context as meaning that Ladjack never having had a moving violation, then one could argue that Florczyk, based on the five-year motor vehicle abstract he obtained, knew the statement was false. But we are satisfied that in this context, particularly given Arthur's understanding that he was not entitled to receive any details about Ladjack's driving record, the phrase meant no more than that Ladjack had a driver's license that was in good standing, and that he was insurable, and that no reasonable jury could find otherwise. Moreover, under a comment to section 310 "liability is based upon the unreasonable risk of physical harm which is involved in the misrepresentation . . . ." Restatement (Second) of Torts, § 310 Comment a (1965). Applying that principle, we are also satisfied that a reasonable person in Florczyk's position would not have inferred that permitting Ladjack to drive created an unreasonable risk of physical harm to another just because he had some moving violations, particularly when the insurance company was willing to accept him as an insured under its policy. Therefore, section 310 does not advance plaintiffs' cause.

Finally, section 311 expresses the following principle for negligent misrepresentations involving risk of physical harm:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

[Id. at § 311.]

Plaintiffs again rely on the assertion that the information provided, namely that Ladjack had a "clean record," was false. But that is only so if that phrase should be taken in this context as meaning that Ladjack never had a moving violation under the Motor Vehicle Code, an interpretation rejected above. Furthermore, Florczyk had no reason to know that Arthur would have been concerned with violations that did not render Ladjack uninsurable from the insurance company's point of view or that he would rely on the phrase "clean record" as grounds for retaining Ladjack as an employee. Plaintiffs argue that this section is applicable because defendants "knew that Juba was relying on them to check his employee's driving history." But, as we have also noted, there is no evidence in support of that assertion. In fact, all these defendants knew was that Juba wanted to know if the insurance company would insure Ladjack, and that was the essence of what was conveyed. Therefore, section 311 provides no support for plaintiffs' claim.

Plaintiffs' reliance on Reynolds v. Lancaster County Prison, 325 N.J. Super. 298, (App. Div. 1999) cert. denied, 163 N.J. 394 (2000), a dog-bite case, is misplaced. Although we accepted section 311 as generally expressing the law of New Jersey, id. at 314, we allowed recovery because before the transfer of the dog to plaintiff's employer, defendant knew that the dog was trained to attack and had bitten its handlers on five occasions, and nonetheless represented that the dog was friendly toward people. Id. at 325. By contrast, defendants in the instant case had no information indicating that Ladjack was a dangerous driver; all they knew was that he had some moving violations under the Motor Vehicle Code, a fact which standing by itself hardly shows that one cannot be safely entrusted with a motor vehicle.

Plaintiffs' case stands or falls on the above sections of the Restatement (Second) of Torts (1965). Since none of them provide a basis for holding the defendants liable, we are obliged to affirm.

Affirmed.