SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-00401

PRESENT: LINDLEY, J.P., MONTOUR, GREENWOOD, AND NOWAK, JJ.

MICHAEL BIALECKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HBO BUILDERS WEST, INC., DEFENDANT-RESPONDENT.

RICHARD G. COLLINS, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (NOLAN M. HALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered March 15, 2022. The order granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained after he attempted to unscrew a reservoir cap on a truck owned by defendant. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint.

The truck, equipped with a front-end snow plow, malfunctioned while plaintiff was driving it to someone who had agreed to purchase it from defendant. Plaintiff's wife and another individual were joint owners of defendant and, at times, plaintiff would provide services to defendant, which included using the truck, three to four times, to plow defendant's parking lot.

As plaintiff was driving the truck to the buyer, "everything" on the dashboard display "turned red," and plaintiff pulled the truck to the side of the road. Plaintiff attempted to investigate the cause of the problem by opening the hood, checking the oil, and looking for signs of overheating, such as smoke and steam. Thereafter, plaintiff attempted to discern whether the reservoir needed more water. As he was turning the plastic reservoir cap, "it exploded," causing plaintiff injuries. Eventually, a New York State Police Trooper came upon the scene and explained to plaintiff that the plow, at its position, was blocking airflow to the engine. The Trooper then obtained water and antifreeze, replenished those liquids in the truck, and followed plaintiff as he completed the delivery to the buyer, who

took possession of the truck after determining that there were no problems with it.

The complaint alleged that defendant's agents or employees were negligent and careless in, inter alia, failing to maintain the truck, failing to install the plow correctly, and failing to train plaintiff on the proper use of the plow. In its answer, defendant denied the material allegations and asserted that plaintiff's conduct was the sole proximate cause of his injuries.

Following discovery, defendant moved for summary judgment, contending that plaintiff's act of unscrewing the reservoir cap was an unforeseeable intervening act breaking any causal nexus to defendant's alleged negligence, that defendant owed no duty of care to plaintiff, and that plaintiff's conduct was the sole proximate cause of his injuries. Supreme Court granted defendant's motion without explanation. We agree with plaintiff that the court erred in granting the motion.

Plaintiff correctly contends that defendant failed to meet its burden of establishing as a matter of law that plaintiff's act of unscrewing the reservoir cap constituted an unforeseeable intervening cause of the accident. As the Court of Appeals has recognized, "[w]hen a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant's negligence" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]). Thus, "[i]t is only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, [that it] may . . . possibly break[ ] the causal nexus" (*id.* [internal quotation marks omitted]; *see Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1267 [4th Dept 2019]).

Typically, the question whether a particular act is extraordinary or foreseeable is a question of fact for the factfinder inasmuch as the determination of "what is foreseeable and what is normal may be the subject of varying inferences" (*Hain*, 28 NY3d at 529 [internal quotation marks omitted]; *see e.g. Sauceda-Ocampo v H&M Hennes & Mauritz LP, H&M*, 177 AD3d 433, 434 [1st Dept 2019]; *Munoz v Kiryat Stockholm, LLC*, 162 AD3d 889, 890 [2d Dept 2018]).

Here, there are triable issues of fact whether plaintiff's conduct was a normal and foreseeable consequence of the truck's mechanical issues (*see generally Calabrese v Smetko*, 244 AD2d 890, 891 [4th Dept 1997]). We thus conclude that defendant failed to meet its initial burden with respect to whether plaintiff's conduct constituted an unforeseeable intervening cause.

Inasmuch as the court did not explain the basis for its determination to grant defendant's motion, we must address the contentions raised by defendant as alternative theories to affirm the order (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]).

In support of its motion and in response to this appeal, defendant has contended that plaintiff's conduct in attempting to open the reservoir cap was the sole proximate cause of his injuries. "Where . . . the sole legal cause of [a] plaintiff's injuries is [their] own reckless conduct, which showed a disregard for an obvious hazard, a defendant is not liable in negligence" (*Brown v Metropolitan Tr. Auth.*, 281 AD2d 159, 160 [4th Dept 2001]; *see Olsen v Town of Richfield*, 81 NY2d 1024, 1026 [1993]). The Court of Appeals has defined "the well-established tort concept of recklessness, . . . as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome" (*Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *see Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). On this record, we conclude that defendant failed to establish as a matter of law that plaintiff's conduct, in investigating the cause of the malfunction and checking the water level in the reservoir, was of an unreasonable character, was done in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, or was done with conscious indifference to the outcome.

In further support of its motion and in response to this appeal, defendant has contended that it did not owe a duty to plaintiff, a permissive driver of defendant's vehicle. "The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is . . . a question of law for the courts" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988], *rearg denied* 72 NY2d 953 [1988]). "Although the existence of a duty is an issue of law for the courts . . . , once the nature of the duty has been determined as a matter of law, whether a particular defendant owes a duty to a particular plaintiff is a question of fact" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). The owner of a vehicle can be liable to permissive guests, users, or occupants if the owner knew or should have known of defects in the vehicle (*see Singleton v Bishop*, 19 AD2d 595, 595 [1st Dept 1963]; *see also Elfeld v Burkham Auto Renting Co.*, 299 NY 336, 346 [1949]; *Higgins v Mason*, 255 NY 104, 109 [1930]; *Bloomfield v General Elec. Co.*, 198 AD2d 655, 657 [3d Dept 1993]; *Brzostowski v Coca-Cola Bottling Co.*, 16 AD2d 196, 202 [4th Dept 1962]; *Knapp v Gould Auto, Inc.*, 252 App Div 430, 433 [4th Dept 1937]). Even assuming, arguendo, that plaintiff was not acting as an agent of defendant while driving the truck for defendant, we conclude that defendant failed to establish as a matter of law that defendant did not know or should not have known of the purported defects in the truck.

We therefore reverse the order, deny defendant's motion, and reinstate the complaint.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court