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Court of Appeals of Nebraska.

Kristopher R. KOTINEK, appellant and cross-appellee
v.
Matthew L. WILLARD and LaVern Weis, appellees and cross-appellants, and Allied Property and Casualty Insurance Company, intervenor-appellee.

No. A-02-1276. | Oct. 5, 2004.

Appeal from the District Court for Nuckolls County: Stephen Illingworth, Judge. Affirmed.

Attorneys and Law Firms

Daniel L. Lindstrom and Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Dean J. Sitzmann and Cathy S. Trent, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

INBODY, MOORE, and CASSEL, Judges.

Opinion

INBODY, Judge.

INTRODUCTION

***1** Kristopher R. Kotinek appeals from the order of the Nuckolls County District Court granting LaVern Weis' motion for summary judgment on the issue of negligent entrustment. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On May 10, 2000, Kotinek filed an amended petition alleging that he had been injured in an accident on July 25, 1998. Kotinek claimed that on the date of the accident, Matthew L. Willard, "under the influence of alcohol, did cause serious bodily injury to ... Kotinek by running into him with a motor vehicle" and that "at the time of the incident [Weis] was the rightful owner of the vehicle operated by ... Willard." Kotinek further claimed that Weis "gave permission to ... Willard to operate the vehicle used to run into [Kotinek]" and that "prior to the time of the incident ... Willard had committed numerous traffic violations while in the process of operating a motor vehicle and conducted his driving activities in a generally reckless manner to the knowledge of ... Weis."

In the petition's first two causes of action, Kotinek claimed that Willard caused him bodily injury through his intentional conduct or, in the alternative, through his negligent conduct. In the petition's third cause of action, entitled "Negligent Entrustment of Defendant," Kotinek alleged that Weis "negligently gave permission to ... Willard to operate a motor vehicle he owned when [Weis] knew, or in the exercise of reasonable care should have known," that Willard was "incompetent, inexperienced, or reckless as the operator of a motor vehicle." Kotinek further asserted that "as a direct and proximate result of the aforementioned negligent actions by" Willard and Weis, Kotinek "suffered multiple personal injuries."

On February 6, 2002, Weis made a motion for summary judgment on the issue of negligent entrustment, alleging that "the pleadings, affidavits, and other evidence indicate there is no genuine issue of material fact, and ... Weis is entitled to judgment as a matter of law." A hearing was held on Weis' motion on April 8. At the hearing, Weis offered, without objection, exhibits 1 and 2, which were depositions given by Weis and Willard. Kotinek offered exhibits 3 and 4, over Weis' objection. Exhibits 3 and 4 were certificates of title to the vehicle involved in the accident; the certificates purported to show that Weis was the titled owner of the vehicle.

In Weis' deposition, Weis said he had been married to Willard's mother, Lola Willard (Lola), until she passed away in 2000. Weis testified that Willard had lived with Weis and Lola for "two or three months" after they had married, but he was not sure of the exact time that Willard

lived with them. Weis said that Willard was not living with them at the time of the accident, but that he had spent some time at Weis and Lola's home in the days leading up to the accident. Weis described his relationship with Willard as "[p]retty close." He said that they had "spent time together and mechanicing [sic] and cutting wood together and so forth, got along fine." Weis said that he was unaware of any problems Willard had with alcoholism and that he was not aware that Willard had had any legal problems. Weis noted that while he had seen Willard "drink a beer," he had never seen Willard intoxicated. He also noted that he and Lola never discussed the possibility that Willard may have a drinking problem.

***2** Weis next said that on July 25, 1998, Willard was the owner of the 1982 Chevrolet pickup involved in the accident because Weis "gave him a bill of sale for it," and that Weis had delivered the pickup to Willard on July 19 as payment for "work that he had done." Weis said that he also signed the title over to Willard on July 19. Weis further said that before July 19, Willard had driven the pickup "around the yard ... just around the premises." Weis said that he had not seen Willard on the day of the accident and that he had not seen him since July 19 or 20 prior to the accident. Weis noted that Willard had told him about the accident "a day or so" after it happened, and Weis reiterated that he had "[n]o knowledge whatsoever" of any trouble Willard had had with law enforcement prior to the accident. Weis claimed that he was never aware of any instances in which Willard "drove any of his vehicles while under the influence of drugs or alcohol," that he was unaware of any "law violations" that Willard had "regarding his vehicle," and that he did not know of any instances in which Willard was "driving the vehicle in an unsafe manner" and had not seen Willard "drive a vehicle unsafely." Weis concluded by saying that he told Willard not to drive the pickup after July 19, 1998, "until he had insurance on it."

In Willard's deposition, he claimed that he broke up with his girl friend on July 25, 1998, the day of the accident. Willard noted that he and his girl friend "ended up splitting up, and it kind of triggered me back on to the drinking." He claimed that prior to the breakup, his level of alcohol consumption had "dropped off," and that he began drinking heavily on the day of the accident "[p]robably around noon." Willard claimed that he got the pickup from Weis "[s]ometime in-in July" and that he was the owner of the pickup on the day of the accident. Willard said that he "[d]id some mechanical work for [Weis] to get the truck" and that Weis had given Willard the pickup because "he couldn't afford to pay me with money." Willard said that Weis wrote out a bill of sale and signed over the title to the pickup to Willard on July 19. Willard specifically denied that the bill of sale was "prepared after the 25th of July and backdated to the 19th of July."

Willard admitted that his operator's license had been suspended in Kansas for "[u]npaid speeding tickets" and that his license had been suspended once in Nebraska, although he was "not real sure why ." He said that Weis had maintained insurance on the pickup after Willard acquired it because Willard did not have the money to purchase insurance, but that Willard had made improvements to the vehicle and had paid for the vehicle's upkeep. Willard admitted that he never filed the title and that he never obtained a new registration for the pickup. He said that he had never had any conversations with either Weis or Lola about his "driving record, law violations, [or] suspension of license." Willard further said that he had never discussed his alcoholism with Weis or Lola, that Lola did not express concern to him about his drinking, and that he "kept [his alcoholism] hid from [Weis and Lola]."

***3** On July 18, 2002, the district court entered its order regarding Weis' motion for summary judgment. The district court found that

> [t]here may be an issue of fact as to whether ... Willard owned the 1982 Chevrolet pickup truck as of July 19, 1998. The problem with [Kotinek's] third cause of action surviving a motion for summary judgment is that [Weis] correctly points out there is no evidence that [Weis] permitted ... Willard to operate the vehicle while he was intoxicated or that [Weis] knew or should have known that ... Willard was too intoxicated to operate the vehicle properly. [Weis] cites *Gibb v. Strickland,* 245 Neb. 325, 513 N.W.2d 274 (1994) and *Geir v. Gleason,* 189 Neb. 156, 157, 201 N.W.2d 388, 389 (1972) for the proposition that to hold a Defendant negligent for negligent entrustment the Plaintiff must prove the Defendant knew the

> person was intoxicated or had a reason to know of the person's propensity to become intoxicated. [Kotinek] has failed to present any evidence in that regard. Any negligence attributable to ... Willard therefore cannot be imputed to [Weis].

Accordingly, the district court granted Weis' motion for summary judgment on the issue of negligent entrustment and dismissed Kotinek's third cause of action. Kotinek has timely appealed to this court.

ASSIGNMENTS OF ERROR

Kotinek asserts that the district court erred when it granted Weis' motion for summary judgment. On cross-appeal, Weis and Willard allege that the district court erred when it failed to find that Willard was the legal owner of the vehicle on the day of the accident.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003).

In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *KN Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

ANALYSIS

Summary Judgment.

Kotinek asserts that the district court erred when it granted Weis' motion for summary judgment on the issue of negligent entrustment.

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Big Crow, supra.* In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

***4** In *Suiter v. Epperson*, 6 Neb.App. 83, 571 N.W.2d 92 (1997), this court examined the issue of negligent entrustment. In *Suiter*, we noted that in cases of negligent entrustment,

> "[t]he controlling rule is as follows: The law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others.... A motor vehicle is not an inherently dangerous instrumentality and the owner is not generally liable for its negligent use by another to whom it is entrusted to be used. Liability may arise, however, if the owner permits operation of his motor vehicle by one whom he knows or should have known to be so incompetent, inexperienced, or reckless as to render the vehicle a dangerous instrumentality when operated by such person. In order to establish such a liability on the part of an owner it must be shown that he had knowledge of the

> driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted...."

6 Neb.App. at 99-100, 571 N.W.2d at 104.

Thus, to prevail on a theory of negligent entrustment, a plaintiff must prove two things: that a defendant owned the vehicle and that "he had knowledge of the driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted."

The district court, in sustaining Weis' motion for summary judgment, found that "there is no evidence that [Weis] permitted ... Willard to operate the vehicle while he was intoxicated or that [Weis] knew or should have known that ... Willard was too intoxicated to operate the vehicle properly." The court then noted that "to hold a Defendant negligent for negligent entrustment the Plaintiff must prove the Defendant knew the person was intoxicated or had a reason to know of the person's propensity to become intoxicated."

In his brief, Kotinek asserts that this proposition, relied on by the district court, "is simply not the correct standard. The court must also consider whether the owner knew or should have known that the driver was inexperienced, incompetent, or [a] reckless driver." Brief for appellant at 12. We agree. The district court erred when it only considered whether or not Weis knew that Willard was intoxicated or had reason to know that Willard had a propensity for becoming intoxicated. However, our analysis does not end here. As was noted earlier, summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003). Further, on a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *KN Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003). Thus, we must come to an independent conclusion regarding Weis' motion for summary judgment.

***5** At the hearing on Weis' motion for summary judgment, Weis offered exhibit 1, his own deposition taken by Kotinek's attorney, and exhibit 2, which was Willard's deposition. In Weis' deposition, he said that although he felt he had a "[p]retty close" relationship with Willard, he had never seen Willard intoxicated, he was not aware that Willard had had any kind of problem with alcoholism, and he had not discussed with Lola Willard's drinking. Weis further noted during his deposition that he had never seen Willard drive a vehicle unsafely, nor was he aware of any instances where Willard drove a vehicle while he was under the influence of alcohol or drugs. Weis also said that he had "no knowledge whatsoever" about any problems that Willard may have had with law enforcement prior to the accident. Willard, in his deposition, testified that he had not been drinking much in the time leading up to the accident and that on the day of the accident, he drank heavily after breaking up with his girl friend. He said that he had never had any conversations with either Weis or Lola about his drinking problems, and when asked if Lola had expressed any concern to him about his drinking, Willard responded that he "kept it hid[den] from them."

As was previously noted:

> "In order to establish such a liability on the part of an owner it must be shown that he had knowledge of the driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted...."

Suiter v. Epperson, 6 Neb.App. 83, 100, 571 N.W.2d 92, 104 (1997). Additionally, since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate such party's entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.*

The evidence offered by Weis in support of his motion for summary judgment demonstrated that he was entitled to a judgment as a matter of law if that evidence remained uncontroverted. Thus, the burden to produce contrary evidence shifted to Kotinek. In his petition, Kotinek alleged that Weis was the owner of the pickup on the day of the accident and that he "knew, or in the exercise of reasonable care should have known" that Willard was "incompetent, inexperienced, or reckless as the operator of a motor vehicle." However, although he was able to produce some evidence to suggest that Weis may have still technically owned the pickup on the day of the accident, he was unable to produce any evidence to controvert Weis' evidence that Weis knew nothing about Willard's alleged "incompetency, inexperience, or recklessness as an operator of a motor vehicle." Weis' evidence suggesting that he knew nothing of Willard's problems with alcohol also remained uncontroverted.

***6** In his brief, Kotinek argues that "even assuming that the evidence was not in direct conflict, the grant of summary judgment was still error." Brief for appellant at 22. To support this assertion, he cites *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998). In *Schade*, the Nebraska Supreme Court noted that "[w]here reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted." 254 Neb. at 231, 575 N.W.2d at 624. "In fact, summary judgment is not appropriate even where there are no conflicting evidentiary facts if the ultimate inferences to be drawn from those facts are not clear." *Id.* at 231-32, 575 N.W.2d at 624-25. "Where two reasonably logical inferences are available ... appellate courts are obligated to draw the inference most favorable to the nonmoving party." *Id.* at 232, 575 N.W.2d at 625.

However, in the instant case, the only inference to be drawn from the evidence produced at the summary judgment hearing was that Weis did not know about Willard's problems with alcohol, nor did he possess knowledge that Willard may be an incompetent, inexperienced, or reckless driver. No other "reasonably logical inferences" are available from the evidence produced. See *Schade, supra.* Weis produced sufficient evidence, if uncontroverted, to show that he was entitled to summary judgment on the issue of negligent entrustment; the burden then shifted to Kotinek to produce evidence to controvert Weis' evidence. The only evidence presented by Kotinek may have created doubt about the ownership of the vehicle on the day of the accident, but in no way did it controvert Weis' evidence regarding Weis' lack of knowledge about Willard's driving or alcohol abuse problems. Because Kotinek was unable to sustain his burden of controverting Weis' evidence, Weis was entitled to summary judgment on the issue of negligent entrustment. The district court's order granting Weis' motion for summary judgment was not error, and the court's order is affirmed.

Cross-Appeal.

On cross-appeal, Weis and Willard allege that the district court erred when it failed to find that Willard was the legal owner of the vehicle in question on the day of the collision. Because we found that the district court did not err in granting Weis' motion for summary judgment, this issue now becomes moot. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003). As a general rule, a moot case is subject to summary dismissal. *Id.* Thus, Weis and Willard's cross-appeal is dismissed as moot.

CONCLUSION

We find that the district court did not err when it granted Weis' motion for summary judgment. Accordingly, the judgment of the district court is affirmed.

Affirmed.