IN THE COURT OF APPEALS

LARRY W. SHORTER and JANET SHORTER, as parents of NICHOLAS G. SHORTER, deceased and individually,	)	KNOX CIRCUIT
	)	C.A. NO. 03A01-9704-CV-00132
Plaintiffs-Appellants	)	
vs.	)	HON. WHEELER A. ROSENBALM JUDGE
JAMES STEWART McMANUS and KATHERYN LOUISE McMANUS,	)	AFFIRMED AND REMANDED
Defendants-Appellees	)	

WILLIAM A. REEVES, Wise & Reeves, P.C., Knoxville for Appellants.

LINDA J. HAMILTON MOWLES, Lewis, King, Krieg, Waldrop & Catron, P.C., Knoxville, for Appellees.

OPINION

McMurray, J.

This case arises out of a tragic motor scooter accident in which Nick Shorter, the thirteen year old son of the plaintiffs,

was killed. The plaintiffs sued the parents of Nick's friend Dusty McManus, who had driven the scooter to Nick's house. Dusty allowed Nick to ride the scooter. Nick was involved in an accident which resulted in his death. Plaintiffs seek damages from Dusty's parents alleging that the defendants are liable under the theories of negligent entrustment, negligent supervision, negligent maintenance of the vehicle and negligence per se.[1] The defendants moved for summary judgment which was granted by the trial court. This appeal resulted.[2] We affirm the judgment of the trial court.

Plaintiffs raise the following issues on appeal which are taken verbatim from their brief:

> 1. Whether a legal duty exists to a neighborhood child under the theories of Negligent Entrustment, Negligent Supervision, or Negligence per se?
>
> 2. Whether [the] death of Plaintiffs' son was reasonably foreseeable?
>
> 3. Whether Summary Judgment was appropriate for Defendants in [a] Negligence Action?

The appellants' issues are stated somewhat abstractly, however, we will address them as they apply to the circumstances of this case. We will first look to the propriety of summary judgments in negligence actions. It is now well-settled that summary judgments are appropriate in negligence actions when the

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[1] Dusty is not a party to this action.

[2] No issue is raised on appeal regarding the negligent maintenance of the vehicle.

requirements of Rule 56, Tennessee Rules of Civil Procedure have been met.

> The Supreme Court initially expressed some reluctance concerning the use of summary judgments in negligence cases. Bowman v. Henard, 547 S.W.2d 527, 530 (Tenn. 1977). However, it has now held unequivocally that summary judgments are not disfavored procedural devices and that they may be used to conclude any case that can and should be resolved on legal issues alone. Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993). Thus, our role on appeal is not to dwell on the nature of the cause of action but rather to determine whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991); Hill v. City of Chattanooga, 533 S.W.2d 311, 312 (Tenn. App. 1975).

Mansfield v. Colonial Freight Sys., 862 S.W.2d 527 (Tenn. App. 1993).

We will now turn our attention to whether summary judgment was proper in this case. The standard of review of the trial court's action in granting a motion for summary judgment is so well-settled that we do not deem it necessary to state it in this opinion.

FACTS

In August of 1995, the defendants allowed their son Dusty to trade his four-wheel all-terrain vehicle for a Honda Aero 125 motor scooter. The scooter had a certificate of title and was "street legal." Both defendants, Mr. and Mrs. McManus, testified by deposition that their family rule was that no one was to ride the scooter on a public road under any circumstances, and that Dusty was well aware of the rule. Portions of the parties' depositions

and affidavits will be set out in more detail later in this opinion.

On September 12, 1995, Nick Shorter called Dusty and asked him to bring his motor scooter over because he wanted to ride it. Both Dusty and Mrs. McManus testified that Dusty asked his mother if he could go to the Shorters' house. She declined to give permission because the trip entailed driving on public roads in contravention of the family rule. Mrs. McManus stated that after she told Dusty no, it was her understanding that he was just going to ride on their property as he often did. However, Dusty disregarded his mother's directive and went over to the plaintiffs' residence.

Dusty testified that Mrs. Shorter was at the house when he arrived but that she left shortly thereafter. She told the boys not to ride their vehicles until Mr. Shorter got home. Dusty stated that he assumed she meant by this remark that Nick was not to ride his four-wheeler until his dad was there. Both of the plaintiffs testified in their affidavits that Nick was strictly forbidden to ride any two-wheeled motorized vehicles.

Mr. Shorter arrived about five minutes after Mrs. Shorter left the house. He testified that "at no time had I given permission to my son Nick to ride the McManus motor scooter" and that he was unaware that Dusty had let Nick ride until it had already happened. Dusty stated that Nick asked him if he could ride the scooter, and

he said yes, and watched Nick ride it down the road and back. On this first trip, Dusty said Nick was on the scooter "about one minute" and that he never left his sight. Dusty testified that Nick had never ridden the scooter before.

After the first ride, the two boys went inside for a short time and Dusty got ready to leave because it was approaching time for football practice. At this point, Dusty testified that the following conversation occurred:

> [Nick] said, let me ride your scooter again. I said, no. You can some other time, and he said, well, okay and bye, and I was walking out. I was fixing to leave, and he came out there and kept on begging, so I said, all right.

Dusty told Nick to "go where he did the first time," but this time, "he kept on going." Nick drove the scooter out of Dusty's sight, and after a few minutes, Dusty went inside to tell Mr. Shorter what was going on. They got in Mr. Shorter's truck to look for Nick.

The circumstances of the fatal accident are not clear from the record. The plaintiffs in their brief, without a citation to the record, state that "the Plaintiffs' thirteen-year-old son was killed after losing control of the cycle, and striking a pickup truck across the center line of the roadway." The driver of the other vehicle has never been a party to this lawsuit.

DISCUSSION

We will first examine the question of "negligent entrustment." "There are four elements in a claim for negligent entrustment: (1) an entrustment of a chattel, (2) to a person incompetent to use it, (3) with knowledge that the person is incompetent, and (4) that is the proximate cause of injury or damage to another." Nichols v. Atnip, 844 S.W.2d 655, 659 (Tenn. App. 1992).

Assuming, without deciding, that the first three elements of negligent entrustment have been established, the critical and determinative question is that of "proximate cause." Our Supreme Court has carefully established the analysis to be used for determining whether proximate cause exists.

* * * *

> ... Our opinions have recognized that proximate causation is the "ultimate issue" in negligence cases. Lancaster v. Montesi, 216 Tenn. 50, 390 S.W.2d 217, 220 (Tenn. 1965); Roberts v. Robertson County Bd. of Ed., 692 S.W.2d 863, 871 (Tenn. App. 1985). ...
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> Taken as a whole, our cases suggest a three-pronged test for proximate causation: (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. (Citations omitted).

McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991).

We believe that the determination of the issue of negligent entrustment rests upon the question of foreseeability on the part

of the defendants. In Pittman v. Upjohn Co., 890 S.W.2d 425, 428 (Tenn. 1994) (citing Doe v. Linder Constr. Co., 845 S.W.2d 173, 177 (Tenn. 1992)) we find the following explanation of the principle:

> The term reasonable care must be given meaning in relation to the circumstances. Ordinary, or reasonable, care is to be estimated by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury. The risk involved is that which is foreseeable; a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. 'The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury.' ... The pertinent question is whether there was any showing from which it can be said that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff's injuries.

The question here is whether, from the undisputed evidence and all reasonable inferences to be drawn therefrom, the defendants could have reasonably foreseen, that Dusty would, in contravention of direct denial of permission to ride the scooter to the Shorter residence, disregard his parents' instructions. Further, was it reasonably foreseeable that Nick (the deceased) would in contravention of his parents' express instructions not to ride the scooter, nevertheless do so?

The deposition of the plaintiff, Larry W. Shorter, was filed in support of the defendants' motion for summary judgment. In his deposition, Mr. Shorter was asked the following questions and gave the following answers:

> Q. When you saw the motor scooter and saw Dusty, did you say anything to him on that day, September 12th, about the incident with Tyler Kitts?
>
> A. To Dusty?
>
> Q. Yes.
>
> A. I did not.
>
> Q. Did you say anything to Dusty on that time or any other time about whether or not Nick was to ride the motor scooter.
>
> A. Never.
>
> Q. So the only person you had told anything about whether or not Nick could ride the motor scooter was Nick, and you told him he was not to do so.
>
> A. That is true.

An affidavit of Mr. Shorter was also filed. In the affidavit, Mr. Shorter stated:

> At no time had I given permission for my son Nick to ride the McManus motor scooter. There were no discussions on September 12, 1995, or at any other time, about Nick being allowed to ride the motor scooter. I had instructed Nick to never ride any two wheeled motorized cycle, specifically including the McManus motor scooter.

The deposition of the plaintiff, Janet Shorter was also filed in support of the defendants' motion for summary judgment. In her

deposition, she was asked the following question and answered as indicated:

> Q. Did you yourself ever have any discussions with Nick about whether or not he was allowed to ride a motor scooter or motorcycle?
>
> A. He was absolutely not to ride a motorcycle and he was told that.

The affidavit of Janet Shorter was also filed in which she stated: "[A]t no time had I given permission for my son Nick to ride the McManus motor scooter. I instructed Nick not to ride the McManus motor scooter on September 12, 1995, in Dusty's presence."

It is clear from the above testimony and affidavits of the plaintiffs, Larry W. Shorter and Janet Shorter, Nick's parents, that Nick had been expressly denied permission to ride the motor scooter. He, as did Dusty, ignored his parents' instructions.

The depositions of the defendants, Mr. & Mrs. McManus were also filed. The deposition of Mr. McManus established that he had never given permission to Dusty to ride the scooter on public roads, but on the contrary, had expressly forbidden him to do so. It also established that Dusty on other occasions had disobeyed his parents and was duly disciplined. The deposition of Mrs. McManus contained the following questions and answers:

Q. Did you or your husband have a rule about using the headlight on the four-wheeler?[3]

A. I don't know.

Q. Did you have any rules about where the four-wheeler could be used or driven?

A. Yes, on our property.

Q. What does that include?

A. I don't understand what you mean.

Q. What do you mean? How do you — when you say on our property, what does that include or involve?

A. We live on a farm. It's a family — a big family — his family has a big farm. All through the woods, I mean, they can go through the woods. I mean its just a big area. They had plenty of space to ride.

* * * *

Q. Who made these rules?

A. Jim and I made the rules.

* * * *

Q. We have been talking — I asked first about the four-wheeler. Did the same general rules apply to the motor scooter?

A. Yes.

Q. Was its use restricted to the property, the farm you have described, of the relatives.

A. Yes.

We are cognizant of the multitude of cases which hold that foreseeability is generally a question for the jury. "... foreseeability as the key to the duty issue, is generally a

[3]Dusty had previously owned a "four-wheeler" which was traded for the motor scooter involved in this case.

question of fact for the jury, unless no reasonable person could dispute the only reasonable outcome. McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991); City of Elizabethton v. Sluder, 534 S.W.2d 115 (Tenn. 1976)." McCall v. Wilder, 913 S.W.2d 150 (Tenn. 1995).

Under all the circumstances of the case, we are not prepared to say that a person of ordinary intelligence and prudence could have foreseen that Dusty would disregard his parents' express instructions, especially his mother's express denial of permission to ride to the Shorter residence on the date of the accident, nor that Nick would likewise disregard his parents' express instructions regarding two-wheeled vehicles generally and the express prohibition to ride the McManus scooter on the date of the accident. We are, therefore, of the opinion that there is no genuine issue of a material fact as to the requirement of foreseeability as defined by McClenahan, supra. Viewing the evidence in the light most favorable to the non-moving party, the plaintiffs, we are of the opinion that the undisputed evidence in the record and all reasonable inferences that may be drawn therefrom entitle the defendants to judgment as a matter of law in accordance with Rule 56, Tennessee Rules of Civil Procedure on the issue of negligent entrustment.

We will next discuss briefly the question of negligent supervision on the part of the defendants. The leading case on parental liability for negligent supervision is Bocock v. Rose, 373 S.W.2d 441 (Tenn. 1963). Bocock makes it clear that parental

liability in this context is by no means vicarious, but is based on the parent's own negligence in failing to properly supervise his or her child. The Bocock court enunciated the following rule regarding negligent supervision:

> We find and so hold parents may be held liable for the dangerous habits of their minor children causing injuries and damages to others, when, (1) the parent has opportunity and ability to control the child, and (2) the parent has knowledge, or in the exercise of due care should have knowledge, of the child's habit, propensity or tendency to commit specific wrongful acts, and (3) the specific acts would normally be expected to cause injury to others, and (4) the parent fails to exercise reasonable means of controlling or restraining the child.

Id. at 445.

Bocock involved children who committed an intentional tort, assault and battery, and the parents were alleged to have known the children's tendency or proclivity to commit assault and battery on others, and failed to restrain them from doing so. Id. We believe the distinction between intentional torts and negligence in this context is important, and that the Bocock analysis is better suited to cases involving parental liability for the intentional torts of their minor children. The language of the third element of the test, requiring a showing that the specific act "would normally be expected to cause injury to others," lends support to this conclusion. An intentional tort, such as the assault and battery in Bocock, is much more likely to be the kind of act which would "normally be expected" to cause injury.

It is apparent that the plaintiffs' negligent supervision claims would fail even under a Bocock analysis, however, because it requires a showing that the "parent fail[ed] to exercise reasonable means of controlling or restraining the child." In this case, the unrefuted evidence in the record is that on each occasion that the defendants discovered Dusty had been on a public road in disregard of their family rule, they punished him by taking his keys to the scooter away for at least a week. On the occasion at issue, Mrs. McManus told Dusty he could not go to the Shorters, and there was no particular reason why she should have suspected he would disobey her.

It might well be argued that the plaintiffs also failed to supervise their child and that their failure to supervise was a supersedeing or intervening cause of the accident.

> The intervening cause doctrine is a common-law liability shifting device. It provides that a negligent actor will be relieved from liability when a new, independent and unforseen cause intervenes to produce a result that could not have been foreseen. Glenn v. Conner, 533 S.W.2d 297, 301-02 (Tenn. 1976); Brown v. City of Kingsport, 711 S.W.2d 607, 609 (Tenn. Ct. App. 1986). The doctrine only applies when (1) the intervening act was sufficient by itself to cause the injury, Underwood v. Waterslides of Mid-America, Inc., 823 S.W.2d 171, 180 (Tenn. Ct. App. 1991), (2) the intervening act was not reasonably foreseeable by the negligent actor, Evridge v. American Honda Motor Co., 685 S.W.2d 632, 635 (Tenn. 1985), and (3) the intervening act was not a normal response to the original negligent actor's conduct. McClenahan v. Cooley, 806 S.W.2d at 775; Solomon v. Hall, 767 S.W.2d 158, 161 (Tenn. Ct. App. 1988).

Waste Mgmt. v. South Cent. Bell Tel. Co., 1997 Tenn. App. LEXIS 117 filed at Nashville February 21, 1997. See Also McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996); Haynes v.

Hamilton County, 883 S.W.2d 606, 612 (Tenn. 1994); Ford Motor Co. v. Wagoner, 183 Tenn. 392, 401, 192 S.W.2d 840, 844 (1946).

It is difficult to see what other precautions the defendants could have taken to enforce their family rule, short of disallowing Dusty to have or ride a scooter at all. Since the McManuses own a farm large enough for their children to ride around on without going on the road, we are not prepared to dictate that these parents should not have allowed their son to have a scooter in order to avoid liability for negligent supervision. The Supreme Court has recently recognized that "imposing a parental duty of 'constant surveillance and instruction' would place an overwhelming burden on parents since it is virtually impossible to supervise a child 24 hours a day." Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994) (citing Holodook v. Spencer, 364 N.Y.S. 859, 324 N.E.2d 338 (1974)). This principle is applicable to the present case.

The General Assembly has also spoken on the subject of parental liability for acts of their children. T.C.A. § 37-10-103 provides as follows:

> (a) A parent or guardian shall be liable for the tortious activities of a minor child that cause injuries to persons or property where the parent or guardian knows, or should know, of the child's tendency to commit wrongful acts which can be expected to cause injury to persons or property and where the parent or guardian has an opportunity to control the child but fails to exercise reasonable means to restrain the tortious conduct.
>
> (b) A parent or guardian shall be presumed to know of a child's tendency to commit wrongful acts, if the child

has previously been charged and found responsible for such actions.

There is nothing in the record to suggest that the requirements necessary to create a presumption in accordance with paragraph (b) above have been met. Further, the uncontroverted evidence in the record establishes that the defendants did not have the requisite knowledge required in paragraph (a) to establish statutory liability.

We resolve all issues relating to negligent supervision in favor of the defendants.

The remaining issue is whether the defendants were guilty of negligence per se. In their complaint, the plaintiffs charge the defendants with violation of T.C.A. §§ 55-50-301, (licensing requirement), 55-4-101 (motor vehicle registration), and 55-12-101, (financial responsibility). Evidence that a driver is unlicensed or a vehicle is unregistered is relevent and material on the issue of negligent entrustment. See Bowers v. Thompson, 688 S.W.2d 827 (Tenn. App. 1984). The mere fact that the borrower is unlicensed, however, does not automatically make the owner liable for negligence absent the establishment of a causal connection to the injuries or damages sustained. Smith v. Henson, 214 Tenn. 541, 381 S.W.2d 892 (Tenn. 1964) It would seem incomprehensible that a violation of any of the above statutes could have been a proximate or legal cause of the accident in question here.

In their brief, the plaintiffs assert that the defendants were guilty of violation of T.C.A. § 55-50-504(c) and (d) which provide as follows:

> (c) No person shall cause or knowingly permit such person's child or ward under eighteen (18) years of age to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this chapter.
>
> (d) No person shall authorize or knowingly permit a vehicle owned by such person or under such person's control to be driven upon any highway by any person who is not authorized hereunder or in violation of any provisions of this chapter.

The undisputed evidence in the record clearly demonstrates that, while Dusty, age 13, did in fact ride his scooter on a public way, the defendants were unaware of the transgressions until after the fact. Therefore, they cannot be chargeable as having knowingly allowed Dusty to ride on the public roads. We find no merit in this issue.

We affirm the judgment of the trial court in all respects. Costs of this appeal are taxed to the appellants and this case is remanded to the trial court.

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Don T. McMurray, J.

CONCUR:

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Herschel P. Franks, Judge

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William H. Inman, Senior Judge