IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 19, 2015 Session

SARAH WARD, ET AL. v. SHELAENA WARD

Appeal from the Circuit Court for Macon County
No. 2012cv100 John D. Wootten, Jr., Judge

No. M2014-02237-COA-R3-CV – Filed October 30, 2015

After her daughter was injured in an ATV accident, Plaintiff filed suit against her daughter's step-grandmother, in whose home the daughter was staying on the night of the accident and who owned the ATV, alleging numerous causes of action sounding in negligence. The trial court granted Defendant's motion for summary judgment; Plaintiffs appeal as to the claims for negligent entrustment and negligent supervision. Finding no reversible error, we affirm the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and ANDY D. BENNETT, J., joined.

Benjamin E. Winters, Nashville, Tennessee, for the appellant, Sarah Ward.

Daniel P. Berexa and Thomas I. Carlton, Jr., Nashville, Tennessee, for the appellee, Shelaena Ward.

OPINION

I. FACTS AND PROCEDURAL HISTORY

This action arises out of personal injuries sustained by Kaitlin Ward in an ATV accident that occurred on January 27, 2012, while she was staying at the home of her step-grandmother, Shelaena Ward ("Defendant"). Kaitlin was 15 years old at the time. Defendant had granted permission for Kaitlin to drive Defendant's ATV to accompany Defendant's nephew Tyler Ward as he drove his friend Sasha Biggs to her home about a mile away on an ATV also owned by Defendant; Kaitlin's friend, Maykayla Gummo,

rode with her. Though it is not clear whether Defendant directed that Kaitlin was to drive the ATV at all times and that Maykayla should not drive, it is undisputed that Kaitilin drove, with Maykayla as passenger, on the way to Sasha's house and that the girls switched positions for the return trip. While Maykayla was driving, she failed to make a turn, and the ATV went off a cliff, causing serious injuries to both girls.

Kaitlin's mother, Sarah Ward ("Mother"), filed suit on behalf of Kaitlin and herself (collectively, "Plaintiffs") against Defendant; Robert Lee Ward, Kaitlin's grandfather; Ward Construction;[1] Robert Lee Ward d/b/a/ Ward Construction; and Shelaena Ward, d/b/a/ Ward Construction. The complaint asserted causes of action for negligent and reckless maintenance of the ATV, negligent and reckless supervision, negligent entrustment, negligence *per se*, breach of the duty of care, recklessness, and gross negligence.[2]

Upon his motion, the court granted summary judgment to Robert Ward. Thereafter, Plaintiffs amended the complaint a second time, naming Shelaena Ward as the only defendant and making the same allegations of negligence as the previous complaints. Defendant filed her answer, denying all allegations of negligence; asserting, *inter alia*, that Maykayla's acts and omissions were the legal cause and cause in fact of Plaintiffs' injuries; that Kaitlin negligently entrusted the ATV to Maykayla and that the negligence of Maykayla and/or Kaitlin constituted superseding causes; and pleading the affirmative defense of comparative fault.

Defendant moved for summary judgment on all claims and to exclude the opinion testimony of Plaintiffs' accident reconstruction expert, Joseph E. Stidham;[3] Plaintiffs responded to the motion.[4] A hearing on the motion was held on September 8. On

[1] The complaint alleged that Robert Ward and Shelaena Ward owned Ward Construction, an entity that "treated as property/equipment" the ATV driven on the night of the accident. Plaintiffs further alleged that the ATV was "serviced and maintained as an asset" of Ward Construction. At some point, Ward Construction was dismissed from the suit; the record, however, does not contain an order dismissing the claims. No issue pertaining to Ward Construction is raised in this appeal.

[2] The original complaint was amended shortly after being filed, though the record does not reveal the reason for the amendment; the parties to and the wording of the first amended complaint do not differ from the original complaint.

[3] In support of her motion, Defendant filed: a statement of undisputed facts, discovery responses of Mother, Defendant, and Robert Ward; excerpts from the depositions of Kaitlin, Defendant, Mother, Tyler, Maykayla, and Joseph Stidham; and the affidavit of Paul Webb, an ATV mechanic.

[4] In support of their response, Plaintiffs filed: a response to Defendant's statement of undisputed facts; photographs of ATV warning labels; maintenance invoice of Ward ATV; affidavits of Tyler Ward and Paul Webb; pages from the ATV owner's manual; maintenance schedule from the owner's manual; the report, curriculum vitae, and deposition of Joseph Stidham; two pages from the report of Mark Kittel,

September 18, 2014, the court entered an order, disposing of the motion as follows:

> 1) Summary judgment is hereby entered in favor of the defendant and against the plaintiffs as to all claims by the plaintiffs based on the Family Purpose doctrine;[5]
>
> 2) Summary judgment is hereby granted to the defendant as to all claims of the plaintiff, Sarah Ward, for negligent infliction of emotional distress;
>
> 3) Summary judgment is hereby granted as to all claims by the plaintiffs for negligent entrustment;
>
> 4) Summary judgment is hereby granted as to all claims by the plaintiffs for negligent supervision;
>
> 5) The motion for summary judgment is denied to the extent it seeks dismissal of any claims by the plaintiffs that at the time of the accident and prior thereto, the ATV was in a dangerous or defective condition, which was known or should have been known to the defendant;
>
> 6) The defendant's motion to exclude plaintiffs' expert's testimony that the rear brake cable was sticking prior to the accident, and thus the ATV was in a defective condition and improperly maintained, on the grounds there is no competent proof of a defect in the ATV which caused the accident, is denied.

The court also held a pretrial conference on September 18, and on October 2, entered an order memorializing that the claims of negligent maintenance and negligence *per se* had been voluntarily dismissed by the Plaintiff, thereby concluding all causes of action, and stating that the order constituted a final judgment.

Plaintiffs appeal the grant of summary judgment as to the claims for negligent entrustment and negligent supervision.

Defendant's ATV expert; and excerpts from the depositions of Defendant, Robert Ward, Kaitlin, Tyler, Maykayla, and Mother.

[5] Plaintiffs had moved to amend their complaint to assert a theory of vicarious liability pursuant to the Family Purpose doctrine shortly after Defendant moved for summary judgment. The court heard argument on Plaintiff's motion to amend the complaint on August 25, 2014, and took the matter under advisement until the September 8 hearing on the Defendant's original motion for summary judgment. In the September 18 order, the court noted that "the plaintiffs concede that the Family Purpose Doctrine is not applicable in this case."

II. STANDARD OF REVIEW

A party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. The party seeking summary judgment "bears the burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Armoneit v. Elliot Crane Service, Inc.*, 65 S.W.3d 623, 627 (Tenn. Ct. App. 2001). "When a motion for summary judgment is made and supported as provided in [Tenn. R. Civ. P. 56]," the burden shifts to the nonmoving party, who "may not rest upon the mere allegations or denials of [its] pleading," but, to survive summary judgment, must respond "by affidavits or as otherwise provided in [Tenn. R. Civ. P. 56] ... set[ting] forth specific facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. If there is no disputed factual issue, then the party who does not bear the burden of proof at trial is entitled to summary judgment if the party "[s]ubmits affirmative evidence that negates an essential element of the nonmoving party's claim" or "[d]emonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *See* Tenn. Code Ann. § 20-16-101.[6]

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *In re Estate of Davis*, 308 S.W.3d 832, 837 (Tenn. 2010); *Draper v. Westerfield*, 181 S.W.3d 283, 288 (Tenn. 2005). Rather, we review the trial court's decision *de novo* and make a fresh determination as to whether the requirements of Rule 56 have been met. *Eskin v. Bartee*, 262 S.W.3d 727, 732 (Tenn. 2008); *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Eadie v. Complete Co.*, 142 S.W.3d

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[6] Plaintiffs asserted in their response to the motion that "Defendant has failed to negate any of the essential elements of a negligent supervision claim or shown that the Plaintiffs cannot establish such a claim *at trial*…" (emphasis added). However, with the enactment of Tenn. Code Ann. §20-16-101, the non-moving party no longer has the opportunity to make a showing at a later stage in order to establish an essential element of his or her claim. As one commentator has noted:

> [T]he new statutory summary judgment standard requires the entry of summary judgment — after adequate time for discovery — against a party who cannot make a showing at the summary judgment stage sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. There should be no judicial kicking the can down the road to trial. The logic is this: if there is insufficient evidence on any one essential element of a party's claim, all the other facts become immaterial. No matter how many good facts there are on other elements, they just don't matter if proof on even just one element is lacking.

Andrée Sophia Blumstein, *Bye Bye* Hannan*? What A Difference Two Little Words, at Trial, Can Make in the Formulation of Tennessee's Summary Judgment Standard*, TENN. B.J., August 2011, at 17.

288, 291 (Tenn. 2004). We must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008).

III. NEGLIGENT ENTRUSTMENT

In *West v. E. Tennessee Pioneer Oil Co.*, our Supreme Court acknowledged that "Tennessee courts have long recognized the tort of negligent entrustment," explained at § 390 of The Restatement (Second) of Torts as follows:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

172 S.W.3d 545, 553-54 (Tenn. 2005) (citing *V.L. Nicholson Constr. Co. v. Lane*, 150 S.W.2d 1069, 1070 (1941) and quoting Restatement (Second) of Torts § 390 (1965)). To prevail on a claim of negligent entrustment, a plaintiff must demonstrate that (1) a chattel was entrusted, (2) to a person incompetent to use it, (3) with knowledge that the person is incompetent, and (4) that its use is the proximate cause of injury or damage to another. *West*, 172 S.W.3d at 554; *Strine v. Walton*, 323 S.W.3d 480, 491 (Tenn. Ct. App. 2010); *Nichols v. Atnip*, 844 S.W.2d 655, 659 (Tenn. Ct. App. 1992).

The complaint alleged that Plaintiffs' injuries were proximately caused by Defendant's "negligent entrustment to minors, including Plaintiff, by allowing children to operate four-wheelers at night, during inclement weather, on unpredictable terrain, and without wearing helmets." In her motion and on appeal, Defendant did not contest the fact that she entrusted the ATV to Kaitlin; she contends that she did not entrust the ATV to Maykayla, that neither girl was incompetent to use the ATV, that Defendant had no knowledge of either girls' incompetence, and that "proximate causation cannot be established, as a matter of law, since Kaitlin Ward, the person to whom the ATV was entrusted, was not operating the ATV at the time of the accident."

To negate element (1), Defendant relies on testimony of Kaitlin, given in her first deposition,[7] Maykayla, and Defendant. Kaitlin testified that Defendant granted permission to the girls to ride the ATV on the night of the accident and told Kaitlin to drive; Maykayla testified that she did not ask if she could drive the ATV and left the Ward home intending to ride the ATV as a passenger; Defendant testified that her

[7] Kaitlin gave two depositions, the first of which was on May 3, 2013.

"instructions to Kaitlin were that she was to drive." This testimony is evidence that Defendant entrusted the ATV to Kaitlin, as alleged in the complaint; it is also proof that Defendant did not entrust the ATV to Maykayla, thereby shifting the burden to the Plaintiffs to put forth evidence to establish the existence of a genuine issue of material fact as to whether Defendant entrusted the ATV to Maykayla.

To meet their burden, Plaintiffs relied upon testimony in Kaitlin's second deposition that Defendant did not specify who was to drive the ATV.[8] Plaintiffs also relied on Defendant's testimony that she told Kaitlin and Maykayla that "they" could accompany Tyler and Sasha on the night in question and on Maykayla's testimony that Defendant did not specify who was to drive the ATV. This evidence, construed in the light most favorable to the Plaintiffs as the non-moving party, shows that there is a disputed factual issue as to whether the ATV was also entrusted to Maykayla for purposes of proceeding with this claim.

With respect to the issue of incompetence of Maykayla and Kaitlin, which is invoked in elements (2) and (3), we adhere to the explanation of incompetence, in the context of a claim of negligent entrustment, set forth in *Harper v. Churn*:

> The liability of an owner . . . is generally imposed only where the owner entrusts the vehicle to one whose appearance or conduct is such as to indicate his incompetency or inability to operate the vehicle with care, and that to impose liability in other cases, where the incompetency of the entrustee is not apparent to the entruster of the vehicle at the time of the entrustment, it must be affirmatively shown that the entruster had at that time knowledge of such facts and circumstances relating to the incompetency of the entrustee to operate the motor vehicle as would charge the entruster with knowledge of such incompetency.

83 S.W.3d 142, 146 (Tenn. Ct. App. 2001) (citing *Rimer v. City of Collegedale, Tenn*., 835 S.W.2d 22, 24 (Tenn. Ct. App. 1992)).

[8] Exhibit B to Defendant's motion was Kaitlin's first deposition, in which she testified that Defendant told her to drive the ATV. In response to Defendant's motion, Plaintiffs filed Exhibit 12, ten pages of "Cited Excerpts of the Deposition of Kaitlin Ward." The "Cited Excerpts" do not include any identifying information such as the date of the deposition or the appearances of counsel attending. Information identifying the document as "Case 2L12-cv-00060 Document 74-7 Filed 08/05/14 Page 33 of 96 Page ID #2100" are present on the first three pages but are absent from the remaining seven; the font also varies from the first three pages to the last seven. The entire question and answer to which we are cited is not present, however, in the deposition excerpt, after Kaitlin testified that Defendant did not specify who was to drive, Defendant's attorney asked her about her previous deposition in which she testified that Defendant instructed her to drive. She agreed that she was truthful in her previous deposition and that her memory was "fresher" then.

To show that Kaitlin and Maykayla were not incompetent, Defendant relied on the testimony of Kaitlin, Mother, and Maykayla. Kaitlin testified that she and her family members rode ATVs "all our lives, basically. I mean, I know each and every single one of [Defendant's ATVs]. I can drive all of them"; that she had been driving four-wheelers since she "was little, like, seven probably" and had driven Defendant's ATV "countless times," sometimes with a passenger; that Maykayla had ridden ATVs "all her life, just like I have"; and that she considered Maykayla to be an experienced ATV operator. Mother testified that before the accident she considered Kaitlin responsible enough to operate an ATV. Maykayla testified that she grew up riding four-wheelers "all the time"; considered herself to be experienced in operating them; and that she had driven ATVs with passengers, including her siblings, cousins, and mother.

This testimony was evidence that both Kaitlin and Maykayla had been operating ATVs for many years and were experienced drivers, thereby negating element (2) and shifting the burden to Plaintiffs to put forth evidence to establish the existence of a genuine issue of material fact as to element (2). The evidence does not address element (3).

Plaintiffs did not allege in the complaint that either Kaitlin or Maykayla was incompetent to drive the ATV. In their brief on appeal, Plaintiffs state that they "do not dispute that both girls had operated the ATVs on prior occasions; they do not dispute that each thought the other was and [sic] experienced rider; they do not dispute that Kaitlin's own mother considered her daughter responsible enough to operate the ATV." Rather, Plaintiffs argue that the girls' experience "was limited to the operation of the ATVs while under adult supervision" and to driving ATVs "off-road."[9]

While the statement of facts section of Plaintiffs' brief contains some references to

[9] Plaintiffs argue that:

> … These girls' experience as it pertained to the operation of four-wheeled ATVs was limited to such operation off-road on Defendant's farm just as the manufacturer had intended. Their experience was limited to operation of the ATVs while under adult supervision. Defendant even testified that the only time Kaitlin was permitted to take the ATV onto a public road was when she was accompanied by Defendant or Defendant's husband.
>
> Further, Defendant was aware that Kaitlin operated the ATV without the use of a helmet; she knew Kaitlin operated the ATV with passengers; she knew Kaitlin operated the ATV while underage, according to the manufacturer; and she knew ATVs were not permitted on public roadways. Defendant was aware of all of these instances of incompetence before January 27, 2012, and she was most certainly aware of each when she permitted these girls to use the ATVs on public roads in inclement weather and poor conditions on January 27, 2012. She was aware of these factors because she witnessed it, she permitted it and she ratified it.

the record, the argument on this point does not contain citations to the record pointing to evidence establishing a genuine issue of fact on the incompetence of the girls; as a consequence, our ability to consider Plaintiffs' argument is somewhat compromised. *See* Tenn. R. App. P. 27(a)(7)(A); Tenn. R. Ct. App. 6(b).[10] Notwithstanding, we have considered the Plaintiff's arguments, the deposition testimony cited by Defendant in responding to Plaintiff's arguments on appeal, and the materials in the record.

Neither the testimony relied upon by Plaintiffs in the trial court nor their argument on appeal specifically address the factors which would indicate the girls' incompetence or inability to operate the vehicle with care; neither does the testimony or argument affirmatively show that Defendant had knowledge of any such factors or the circumstances which Plaintiffs contend made the girls incompetent to drive the ATV. *Harper*, 83 S.W.3d at 146; *see also* Restatement (Second) of Torts § 390. Plaintiffs' assertions — that operating the ATV in contravention of the manufacturer's recommendations[11] and without supervision rendered the girls incompetent — are allegations of negligence or negligence *per se* and do not establish a genuine issue of

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[10] Tenn. R. App. P. 27(a)(7)(A) reads as follows:

> (a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
> ***
> (7) An argument, which may be preceded by a summary of argument, setting forth:
> (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, *with citations to the authorities and appropriate references to the record* (which may be quoted verbatim) relied on[.]

(Emphasis added). Tenn. R. Ct. App. 6(b) reads as follows:

> No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

"As the appellant, the Plaintiffs had the burden to make citations in their brief to appropriate authorities and reference the record to support their argument on appeal." *Foster Bus. Park, LLC v. Winfree*, No. M2006-02340-COA-R3-CV, 2009 WL 113242, *9 (Tenn. Ct. App. Jan. 15, 2009) (citing Tenn. R. App. P. 27(a); *State v. Weaver*, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, *16 (Tenn. Crim. App. Apr. 15, 2003)).

[11] Plaintiffs included photographs of warning labels, allegedly from the ATV operated by Kaitlin and Maykayla, in an appendix to their brief, though Plaintiffs do not cite to them in their arguments relating to incompetence. The same photographs were filed with Plaintiffs' response to the motion for summary judgment but were not attached as exhibits to an affidavit or deposition, as required by Tenn. R. Civ. P. 56.06; we therefore cannot determine whether they "would be admissible in evidence."

material fact as to the girls' experience or competence to operate ATVs. Plaintiffs failed to establish the existence of a genuine issue of material fact as to the girls' incompetence.

In summary, a genuine issue of material fact exists as to element (1), whether the ATV was entrusted to Maykayla; we have also determined that Defendant negated element (2) as to both girls. In light of the latter determination, the existence of a disputed fact with respect to element (1) does not preclude the granting of summary judgment to Defendant in accordance with Tenn. Code Ann. § 20-16-101(a).

IV. NEGLIGENT SUPERVISION

We first determine whether a special relationship existed between Defendant and the minors present in her home that might result in liability for Defendant's alleged failure to supervise. In the trial court and on appeal, Defendant asserted that, in the absence of a parent-child relationship between Kaitlin or Maykayla and herself, no special relationship existed to form a basis for liability for negligent supervision. On appeal, Plaintiffs argue that Defendant was "the lone adult supervisor" and "clearly had the opportunity and ability to control the actions of both Kaitlin Ward and Maykayla Gummo on the evening of January 27, 2012, and was fully aware of their propensity to operate the ATVs in a manner inconsistent with manufacturer warnings and Tennessee state law."

In our analysis, we are guided by the following language from *Henneberry v. Simoneaux*:

> The courts of this state have adopted § 315 of the Restatement (Second) of Torts. Section 315 provides,
>
> > There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> >
> > (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> >
> > (b) a special relation exists between the actor and the other which gives to the other a right to protection.
>
> The special relations envisioned by Restatement (Second) of Torts § 315(a) include "those between parents and their minor children, masters and their servants, and persons having custody of persons with dangerous propensities."

> * * *
> The state's adoption of § 315 forms the basis for parental liability for the acts of a minor child which are neither intentional nor malicious.

Henneberry v. Simoneaux, No. M2005-02032-COA-R3-CV, 2006 WL 2450138, at *4 (Tenn. Ct. App. Aug. 22, 2006) (internal citations and footnotes omitted). In *Biscan v. Brown*, 160 S.W.3d 462, 481 (Tenn. 2005),[12] the Supreme Court discussed the duty imposed in the context of § 315(b) and cited with approval a Wisconsin case which held:

> [I]it [is] self-evident that an adult who takes on the supervision or custody of a child . . . with prior knowledge of the risk posed by such child, stands in a special relationship both to such child for purposes of a duty to control the child's conduct pursuant to § 315(a) of the Restatement and to others . . . for purposes of the protection afforded by § 315(b) of the Restatement.

Gritzner v. Michael R., 598 N.W.2d 282, 288 (Wis. Ct. App. 1999) (*rev'd on other grounds and remanded*, 611 N.W.2d 906, 919 (Wis. 2000)). Upon the record presented, Defendant's status as the only adult in the home on the evening in question established the relationship with Kaitlin and Maykayla which imposed a duty to supervise them, thereby creating a basis for liability for the alleged failure to supervise.[13]

In *Henneberry*, we determined that, regardless of whether the tort assertedly committed by the minor is intentional or non-intentional, "[Tenn. Code Ann.] § 37-10-103(a), *Bocock* [*v. Rose*[14]], and the Restatement (Second) of Torts § 316, recognize the

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[12] In *Biscan*, the Supreme Court held that a duty of care was imposed on an adult who hosted a party for minors where alcohol was consumed when one of the minors was injured in accident after leaving the party in an automobile being driven by another attendee at the party.

[13] Because the trial court determined that the ATV had been entrusted to only Kaitlin, it did not discuss Defendant's supervision of Maykayla. In our resolution of this issue, we consider the Defendant's duty of supervision as to both girls.

[14] In *Bocock v. Rose*, 373 S.W.2d 441 (Tenn. 1963), two minor brothers committed the intentional torts of assault and battery, giving rise to the cause of action against their parents for negligent supervision. The Supreme Court held that a plaintiff wishing to prevail on such a claim must prove that:

> (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.

Bocock, 373 S.W.2d at 445. The *Bocock* analysis has been superseded by statute in the context of a parent's failure to supervise when a minor commits an intentional tort. *See* Tenn. Code. Ann. § 37-10-103; *Lavin v. Jordon*, 16 S.W.3d 362, 363 (Tenn. 2000) (holding that "that the common law tort of

rule that parents cannot be held liable for negligent supervision and control *unless the child had a specific tendency to engage in conduct similar to that causing the injury at issue."* 2006 WL 2450138, at *4 (emphasis added). Consistent with *Henneberry*, we adopt the duty as defined at § 316 in Restatement (Second) of Torts in our analysis:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

In seeking summary judgment, Defendant asserted to the trial court and on appeal that "[t]here is no proof to establish that Shelaena Ward had knowledge that Kaitlin Ward, or for that matter, Maykayla Gummo, would disregard her instructions regarding who was to drive and the prescribed route." In support, Defendant cites the deposition testimony of Mother that she: considered Kaitlin to be responsible enough to operate an ATV; had not had any major issues with Kaitlin disobeying her instructions; considered Kaitlin to be a responsible student and person; and trusted Kaitlin. This was sufficient to negate an essential element of a claim for negligent supervision, thereby shifting the burden to Plaintiffs to put forth evidence to establish Kaitlin's specific tendency to engage in conduct similar to that which caused the injury at issue.

At the trial court, to meet their burden to establish a genuine issue of material fact, Plaintiffs relied upon the deposition testimony of Defendant, Tyler Ward, and Robert Ward, all of which focused on Tyler's juvenile record and discipline issues. On appeal, Plaintiffs fail to cite any testimony or other evidence relative to this issue; rather, they repeat the argument they made at the trial court. The evidence relative to Tyler does not relate to any propensity Kaitlin or Maykayla may have to disobey instructions; consequently, it was not evidence establishing the existence of a disputed material fact as to that issue. Analogous to our discussion of the claim of negligent entrustment,

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negligent control and supervision of children, as recognized by *Bocock v. Rose*, 213 Tenn. 195, 373 S.W.2d 441 (1963), has been superseded by section 37–10–103 when the damage caused by the child was intentional or malicious")). Despite both parties' assertions that the *Bocock* elements should guide our analysis, considering those elements in the context of a minor's non-intentional tort have given this court pause. *See Shorter v. McManus,* No. 03A01-9704-CV-00132, 1997 WL 718972, at *5 (Tenn. Ct. App. Nov. 13, 1997) (noting that "the *Bocock* analysis is better suited to cases involving parental liability for the intentional torts of their minor children"). As the actions in the case before us do not involve an intentional tort, we apply the *Henneberry* analysis.

Plaintiffs' argument relative to negligence or negligence *per se* in operation of the ATV does not establish a disputed material fact with respect to negligent supervision.

As to Maykayla, no factual basis exists in the record from which to conclude that a legal duty arose requiring Defendant to supervise Maykayla with respect to the operation of the ATV. There is no evidence from which to conclude that Maykayla had a specific tendency to disregard instructions, or if so, that Defendant knew of the same. *Henneberry*, 2006 WL 2450138, at *4. As noted earlier, Defendant testified that she instructed Kaitlin that she was to drive; likewise, Maykayla testified that she left the Ward home intending to ride as a passenger and did not begin driving until the return trip when Kaitlin asked her to drive because Kaitlin was too cold. This testimony shows that Defendant had no reason to know that Maykayla would be driving the ATV, and consequently, no duty to control her arose.

Plaintiffs did not satisfy their burden of putting forth evidence to establish a material issue of fact with respect to their claim of negligent supervision, and therefore Defendant successfully negated an essential element of Plaintiffs' claim. Pursuant to Tenn. Code Ann. §20-16-101(a), Defendant was entitled to judgment as a matter of law.

V. CONCLUSION

For the foregoing reasons, the grant of summary judgment to Defendant is affirmed.

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RICHARD H. DINKINS, JUDGE