

IN THE COURT OF APPEALS OF IOWA

No. 7-344 / 96-0950

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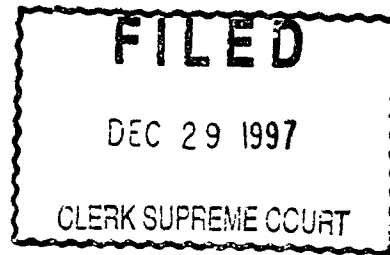
MARY A. CARR,

Appellant,

vs.

GERALD R. VAN DYKE, JR.,

Appellee.



Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Mary A. Carr appeals the district court's order granting Gerald R. VanDyke, Jr.'s motion for summary judgment. **AFFIRMED.**

Michael W. Fay, Cedar Rapids, for appellant.

James R. Snyder and Webb L. Wassmer of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellee.

Considered by Sackett, P.J., and Vogel, J., and Peterson, S.J.*

*Senior Judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

Mary A. Carr appeals the district court's order granting Gerald R. VanDyke, Jr.'s motion for summary judgment. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

A summary judgment is reviewed for errors at law. Iowa R. App. P. 4. Summary judgment is appropriate only if there exists no genuine issue of a material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has a burden to show the nonexistence of a material fact. *Id.* The evidence must be viewed in a light most favorable to the nonmoving party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). Every legitimate inference that reasonably can be deduced from the evidence should be afforded to the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Id.* If there is a conflict in the record that consists only of legal consequences flowing from the undisputed facts, entry of a summary judgment is proper. *Farm Bureau*, 424 N.W.2d at 423.

The following facts are undisputed. On February 12, 1994, there was an automobile accident in Cedar Rapids, Iowa. One of the vehicles involved in the accident was a 1983 Pontiac owned by Mary Ann VanDyke and was being operated by her son, William Arthur VanDyke. The other automobile involved in the accident was a 1993 Mitsubishi owned and being operated by Mary A. Carr.

On February 9, 1996, plaintiff Mary A. Carr filed a petition in the Iowa District Court for Linn County alleging that a vehicle owned and operated by defendant Gerald R. VanDyke, Jr. negligently struck her vehicle.

The defendant filed a motion for summary judgment supported by an affidavit that stated he was not the owner of the Pontiac automobile and was not operating it at the time of the accident, and that the vehicle was operated by his son and was owned by his wife, Mary Ann VanDyke. The motion was set for hearing on April 19, 1996, and on that date, the plaintiff filed a resistance to the motion for summary judgment. In her resistance she alleged she was led to believe through correspondence with defendant's insurer that he was the party responsible for her injuries and consequent damages. She also alleges defendant would be liable under parental liability for the torts of minor children.¹

The record contains copies of three letters from the field claim office of the Allstate Insurance Company. They are dated December 14, 1994; June 16, 1995; and July 24, 1995. The letters request the status of plaintiff's claim and, in the caption, make reference to a claim number, that defendant was their insured, and that the date of loss was February 13, 1994.

Plaintiff, in her brief, states the issue on appeal is that the trial court erred in sustaining the motion for summary judgment. In argument, she contends defendant's

¹ We note the resistance to the motion for summary judgment was not timely filed as required by Iowa Rule of Civil Procedure 237(c).

insurance company inferred in its correspondence that defendant was the real party in interest. She further alleges defendant would be responsible for the torts of his minor child who was operating the vehicle at the time of the accident.²

In order for plaintiff to defeat defendant's motion for summary judgment, based on the pre-suit negotiations with defendant's insurance company, she would have to establish that they made a reckless misrepresentation during the litigation that induced her to act or refrain from some act. *Beeck v. Aquashide 'N' Dive Corp.*, 350 N.W.2d 149, 155 (Iowa 1984). She would have to prove the following elements: (1) a material misrepresentation, (2) made knowingly, (3) with intent to induce a plaintiff to act or refrain from acting, (4) upon which the plaintiff justifiably relies, and (5) with damages. *Id.* The record in this case does not contain any information from defendant's insurance company that was a material misrepresentation. The only information in the file is an indication in the caption of their letters directed to plaintiff's attorney that defendant was their insured.

Defendant would be responsible under the common law for the tort of his son under very limited circumstances. He would be liable if the damages caused by his son were attributed to some action or inaction on his part. *Smuth v. Shaffer*, 395 N.W.2d 853, 856 (Iowa 1986). There is nothing in the record which would indicate

² Plaintiff does not cite any authority for her argument concerning the summary judgment as required by Iowa Rule of Appellate Procedure 14(a)(3). However, we have elected to consider the issues plaintiff has raised.

the damages, if any, sustained by plaintiff could be attributed to action or inaction on the part of defendant.

Section 613.16 of the Iowa Code provides that the parents of an unemancipated minor are liable for the actual damages to the person or property caused by the unlawful acts of the child. The section also requires the child to be named as defendant. The appellant failed to join the minor child as a defendant. By the time the matter was called to the attention of the court the statute of limitations had run and it was too late to join an indispensable party, the child, in accordance with Iowa Rule of Civil Procedure 25.

In conclusion, we find defendant's insurance company did not make any material misrepresentations which would render the defendant, liable in a civil suit for damages, and under the record as made in this case, section 613.16 is not applicable. The trial court was correct in sustaining defendant's motion for summary judgment.

AFFIRMED.