

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Amelia Burse, as independent administrator of the)
estate of Brenda Burse, deceased,)

Plaintiff,)

v.)

No. 21 L 8613

SCR Medical Transportation, Inc., Joe McKee, and)
PACE Suburban Bus Service, a division of the)
Regional Transportation Authority,)
a municipal corporation,)

Defendants.)

MEMORANDUM OPINION AND ORDER

Causes of action for negligent entrustment and negligent retention are founded on a party's authority over persons and property. In this case, the record establishes that a defendant possessed and exercised its contractual authority to control the operation and use of a medical transit van in which the plaintiff's decedent was a passenger. For those reasons, the defendant's motion to dismiss must be denied.

Facts

Pace is the suburban bus division of the Regional Transportation Authority in the Chicago metropolitan area. In 2021, Pace had an agreement with SCR Medical Transportation, Inc. to operate Pace medical transport vehicles. That agreement provided, in part, that:

[SCR] [e]mployees must be selected on the basis of their qualifications, in accordance with Federal, State, and local laws and regulations, and the applicable provisions in the contract between Pace and the contractor.

* * *

Pace may require the removal of a particular employee from Pace-funded service, if with reasonable cause and in Pace's judgment, it would be in the best interest of Pace that the employee be removed. However, it should be noted that Pace has no interest in the manner in which the contractor performs its business, except

as such matters impact on the delivery of Pace mass transit service to the general public.

On August 15, 2021, Joe McKee was an SCR employee operating within the scope of his employment with SCR while driving a Pace medical transport bus with Brenda Burse as a passenger. While McKee drove on West Lexington Avenue in Chicago, the bus left the street, crashed through a fence, struck a tree, and headed down a hill toward Interstate 290. The incident seriously injured Brenda, who later died from her injuries.

On August 25, 2022, Amelia Burse, Brenda's daughter and the independent administrator of her estate, filed a fourth amended complaint against the defendants. The complaint alleges that the accident occurred because McKee fell asleep at the wheel. Count seven of the complaint is a negligent entrustment and negligent retention cause of action against Pace under the Wrongful Death Act. The count alleges that Pace knew of prior incidents involving negligent driving by SCR drivers, including McKee. Pace is also alleged to have known that McKee suffered from sleep apnea and in May 2021 had a prior incident of falling asleep behind the wheel of a Pace van. Pace also allegedly knew that McKee had been in drug and alcohol rehabilitation. Amelia claims that Pace, through McKee, breached its duty owed to Brenda by: (1) failing to exercise the highest duty of care required of a common carrier; (2) retaining SCR knowing of its past safety infractions; (3) allowing McKee to operate the Pace bus; (4) permitting McKee to return to driving a paratransit bus after he previously fell asleep at the wheel; (5) allowed McKee to operate and drive a Pace bus despite his history of drug and alcohol and substance abuse and driver's license suspensions; and (6) entrusted McKee to operate a Pace vehicle. Count eight is pleaded similarly to count seven, but the cause of action arises out of the Survival Act.

Pace filed a motion to dismiss counts seven and eight. In support of its motion, Pace attached the affidavit of Sally Ann Williams, Pace's division manager in charge of paratransit services. Williams averred that McKee was not a Pace employee or agent, and that SCR employed him. She also averred that Pace did not own or operate the van McKee was driving at the time he was driving Brenda. Williams also testified in a deposition that Pace had the authority to remove SCR drivers, either temporarily or permanently, from driving on Pace's behalf. It is undisputed that McKee was providing "Pace-funded service" under the Pace-SCR contact.

Analysis

Pace brings its motion to dismiss based on Code of Civil Procedure section 2-619(a)(9). 735 ILCS 5/2-619(a)(9). A section 2-619 motion to

dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). Section 2-619(a)(9) specifically authorizes a cause of action's dismissal if "affirmative matter" avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense negating the cause of action completely or refuting crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86.

A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarowski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarowski*, 227 Ill. 2d at 369.

Pace presents two arguments as to why counts seven and eight should be dismissed. The first argument is that the negligent entrustment cause of action cannot stand because Pace did not own the van McKee was driving. In support of its argument, Pace relies on the Supreme Court's opinion in *Zedella v. Gibson*. 165 Ill. 2d 181 (1995). According to Pace, the court in *Zedella* found that negligent entrustment claims in an vehicle collision case focus on a party's ownership interest in the vehicle and prohibit expanding the tort to include other persons who could have done something to prevent a driver from driving at the time of an accident. *Id.* at 187.

Zedella first sets out the parameters of a negligent entrustment cause of action. As framed by the court:

An action for negligent entrustment "consists of entrusting a dangerous article to another whom the lender knows, or should know, is likely to use it in a manner involving an unreasonable risk of harm to others." An automobile is not a dangerous article *per se* but may become one if it is operated by a person who is unskilled in its use. Thus, a person may be liable for negligently entrusting an automobile to one whom the person knows or should know is incompetent, inexperienced, or reckless.

Id. at 186 (citations omitted). The court notes that the general rule of

liability for negligent entrustment is set out in the Restatement (Second) of Torts, section 308. Section 308 provides that:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Id. (quoting Restatement (Second) of Torts § 308). The *Zedella* court also refers to a section 308 comment explaining the general rule's application:

The words "under the control of the actor" are used to indicate that the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

Id. at 186-87 (quoting Restatement (Second) of Torts § 308, comment *a*).

These fundamental propositions recognized by *Zedella* do not support Pace's argument. Indeed, the Restatement emphasizes that control, not ownership, is the touchstone of a negligent entrustment cause of action. True, *Zedella* specifically addresses ownership as it relates to negligent entrustment, but only because there was a question of control arising from the co-ownership of the vehicle by a father and son. *Id.* at 187-191. That is not the factual scenario in this case. Rather, Williams confirms in her deposition that Pace had the authority to remove any SCR driver either temporarily or permanently from driving on Pace's behalf and that Pace had done so before August 15, 2021. That admission dooms Pace's negligent entrustment argument because it shows that McKee was only entitled to possess the van with Pace's consent. *See id.* at 186-87.

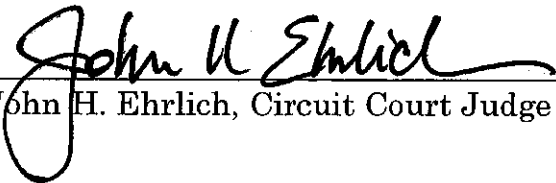
Pace's second argument in support of dismissing counts seven and eight is that Pace cannot be liable for negligently retaining McKee since he was not a Pace employee. Although McKee was unquestionably an SCR employee, it is also true that the record is replete with facts indicating Pace's authority to control McKee. For example, the Pace-SCR agreement provides that Pace had the authority to remove a contractor's employee from Pace-funded service if Pace thought it was in its best interest. Further, Williams, and Lacetti Fields each testified that a driver could drive a Pace vehicle only with Pace's consent and that Pace could prohibit any driver from driving a Pace vehicle. While further discovery might present additional evidence on the subject of McKee's retention, the current record supports Amelia's

argument that Pace had the authority over McKee as an SCR employee to determine whether he could or could not drive a Pace vehicle.

Conclusion

For the reasons presented above, it is ordered that:

1. Pace's motion to dismiss is denied; and
2. Pace is to answer counts seven and eight on or before April 4, 2023.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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