Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-090916 12/16/2020

HONORABLE DAVID J. PALMER

CLERK OF THE COURT
K. Tiero
Deputy

DAVID ERICKSON, et al.

PAUL J SACCO

v.

ESTATE OF HUNTER ZACHARY VOTAW, THE, et al.

ESTATE OF HUNTER ZACHARY VOTAW, THE
NO ADDRESS ON RECORD

CHELSEY M GOLIGHTLY
JUDGE PALMER

UNDER ADVISEMENT RULING
MINUTE ENTRY

The Court heard oral argument on October 19, 2020 on Defendant Rick Votaw's Motion for Summary Judgment. Plaintiff David Erickson filed a Response to that Motion. Defendant Votaw and Plaintiff each filed a supporting Statement of Facts in conjunction with their Motion and Response. Defendant Votaw filed a Reply to Plaintiff Erickson's Response.

FACTUAL BACKGROUND

The sad event that gives rise to this action is an accident that occurred on April 30, 2016 at approximately 6:30 a.m. Early that morning Hunter Zachary Votaw and his friend, Christopher Erickson were on a Honda ATV which crashed after its driver approached and failed to negotiate a 90 degree turn, going at a rate of speed that caused the vehicle to turn over, and both Votaw and

Erickson to be thrown from it and killed instantly. There were no witnesses to the accident, and it is not known for certain who of the two victims was driving the ATV.[1]

Previous to the accident, the two victims had been at a bonfire party, not far from the accident scene. They and others had been up all night, and unquestionably had as a group consumed considerable amounts of alcohol.

The Plaintiff in this action is David Erickson, the father of Chris Erickson, who filed the action on behalf of the statutory beneficiaries. The Defendant, as it pertains to the instant Motion for Summary Judgment, is Rick Allen Votaw, Hunter's father.

Erickson alleges that Hunter negligently operated the vehicle while intoxicated, with his son Chris as a passenger. He also alleges that the circumstances surrounding the accident, Hunter's living situation, and how he came to own and possess the ATV generally and in particular on April 30, 2016, satisfy the requirements of the "Family Purpose Doctrine," thus subjecting Rick Allen Votaw to liability for any of Hunter's negligent actions.

Rick Votaw disagrees. In his Motion for Summary Judgment he argues the evidence more accurately points to Chris as the driver. He also argues that undisputed facts demonstrate that the elements of the Family Purpose Doctrine are clearly not satisfied, and that as a matter of law, he is entitled to summary judgment in his favor.

The Court finds the following facts to be undisputed as they pertain to the issues determining whether the elements of the Family Purpose Doctrine are established:

Hunter Votaw was the son of Defendant Rick Alan Votaw, and his ex-wife, Michelle McDougall. Rick and Michelle divorced when Hunter was approximately 6 years of age. Ms. McDougall initially had full custody of Hunter, although approximately 2 years later, they reached an informal agreement to alternate physical custody of Hunter each week.

At all times relevant to this matter, Rick Votaw lived at 6730 E. Windstone Trail, in Cave Creek, AZ.

During the years he was 16-20 years of age, Hunter exclusively lived with his mother and 4254 E. Desert Marigold Drive, Cave Creek, AZ.

[1] Though not critical to this analysis, the Officer who investigated the scene opined that Christopher Erickson was driving, given where the victims' bodies landed, and the position of the ATV. Experts retained by Defendant Rick Votaw, and Plaintiff, issued conflicting reports concluding that the vehicle was driven by Erickson, and Hunter Votaw, in their respective reports.

After he turned 20, and for approximately 1.5 years before the accident, Hunter lived with his girlfriend, Celia Gurgose in a separate home owned by Mr. Votaw, at 6005 E. Montgomery Road. Mr. Votaw did not live at that address at any time, and certainly not at the time of the accident. Hunter paid for rent, utilities and living expenses at that residence. Mr. Votaw's residence was approximately a mile from the residence where Hunter lived on Montgomery Road.

At the time of the accident, there was no room for Hunter at Rick's house. He did not stay there and nor did he keep any of his possessions there.

Mr. Votaw provided no financial assistance to Hunter at that time, and Hunter paid rent and utilities to stay at the house on Montgomery Rd.

Mr. Votaw did co-sign on the loan for the purchase of the ATV, to help Hunter establish his credit. The vehicle was purchased, primarily financed, titled and insured in Hunter's name. The vehicle was not "street licensed," but was licensed to drive "off road." Hunter garaged the vehicle at his residence. He controlled and maintained the ATV. Mr. Votaw for all practical purposes never drove or rode on the ATV.

Hunter was legally blind and did not have a driver's license.

FAMILY PURPOSE DOCTRINE

In general terms, the Family Purpose Doctrine provides that the head of a household is liable to a plaintiff, when the head of household furnishes or provides a vehicle for use by a family member for a family purpose, and during that use is at fault for causing an accident, which injures or damages that plaintiff.

> Liability under the family purpose doctrine arises when: (1) there is a "family with sufficient unity so that there is a head of the family"; (2) the "vehicle responsible for the injury must have been one 'furnished' by the head of the family to a member of the family"; and (3) the "vehicle must have been used on the occasion in question by the family member with the implied or express consent of the head of the family for a family purpose.

Young v. Beck, 224 Ariz. 408, 411, 231 P.3d 940, 943 (App. 2010).

Defendant Votaw argues that the facts of the instant case do not satisfy any, much less all of the above-stated, required elements.

The Court agrees.

The Court notes the holding in *Blocher v. Thompson*, 169 Ariz. 182, 8148 P.2d 167 (App. 1991), finding it applicable and persuasive in issuing this ruling.

In *Blocher*, the Defendants/Appellees' 17 year-old daughter Susan lived with them and drove a car that she purchased for $1000.00. She paid $400.00 of that with money she had earned doing part-time jobs, and $600.00 she received from her parents as reimbursement for modeling school expenses she had paid. Her father had promised to reimburse her for modeling school tuition once she completed the course.

Susan admitted that she could not have afforded the car without that $600.00.

Unlike Hunter in the instant case, Susan actually lived in her parents' home and did NOT pay her parents for room and board. However, her mother did place restrictions on Susan's use of the car, namely that she and the car had to be home by 1:00 a.m., and that she could not allow anyone else to drive the car. Her father placed no restrictions on her use of the car.

Susan's parents did not use her car, did not a have a set of keys for it, and did not contribute financially for gas or maintenance on the car. The only time that Susan's parents ever drove the car, was one occasion where Susan drove her mother home, after the mother had dropped her car off at a gas station for repairs.

Susan got into an accident on one occasion, accidentally striking a pedestrian while she was driving the car in the rain. Susan's mother was concerned about the weather and road conditions and asked her not to go out that night. Susan got mad and stormed out, and the accident occurred shortly thereafter.

The Court finds that the *Blocher* case is compelling against the invocation of the Family Purpose Doctrine in the instant case.

The *Blocher* court found the Family Purpose Doctrine did not apply, in spite of the fact that Susan was clearly a 17-year old member of her Father's household. This court finds the Plaintiff's case in *Blocher* was more compelling than the instant case regarding the Family Purpose Doctrine, yet that Court did not find the case to fit within that Doctrine.

Defendant's motion for summary judgment here should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim. . . ." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990); Ariz. R. Civ. P. 56(c)(1).

The party moving for summary judgment must produce evidence that it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment is warranted. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 (App. 2008); If the nonmoving party has the burden of proof of the claim or defense at trial, the moving party need not disprove the nonmoving party's claim or defense, but need only point out the lack of evidence on an essential element of the claim or defense. *Thruston,* 218 Ariz. at 117; *see also Vig v. Nix Project II P'ship*, 221 Ariz. 393, 396 (App. 2009). If the moving party meets its burden, the burden shifts to the nonmoving party to present sufficient evidence demonstrating the existence of a disputed fact. *Thruston,* 218 Ariz. at 119. The nonmoving party cannot then rest on its pleadings, but must call to the court's attention evidence to explain why the motion should be denied. *Id*. "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990).

"If the moving party on a motion has made a prima facie showing that no genuine issue of material fact exists, the opponent of the motion has the burden to produce sufficient evidence that there is indeed an issue." *W.J. Kroeger Co. v. Travelers Indem. Co.,* 112 Ariz. 285, 286 (1975).

A motion for summary judgment should not be denied simply on the speculation that some doubt, scintilla of evidence, or dispute over irrelevant or immaterial facts might blossom into a controversy in the middle of trial. *Shaw v. Petersen*, 169 Ariz. 559, 560-61 (App. 1991) *quoting Orme Sch.,* 166 Ariz. at 309. "The court does not try issues of fact, but only whether the same are genuine and in good faith disputed. The mere general statement in a pleading, when attacked by such motion supported by proof of specific facts in the form of affidavit or deposition, places on the author of the statement the obligation to present something which will show that when the date of trial arrives, he will have some proof to support the allegation in the pleading." *Stevens v. Anderson,* 75 Ariz. 331, 334 (1953).

"[A] party opposing a motion for summary judgment may not rest on the pleadings; it must respond with specific facts showing a genuine issue for trial." *Kelly v. NationsBanc Mortg. Corp*., 199 Ariz. 284, 287 (App. 2000), *citing Doe v. Roe*, 191 Ariz. 313, 323 (1998).

The opponents of a motion for summary judgment do not raise a genuine issue of fact by merely stating in the record that such an issue exists. Rather, they must show that competent evidence is available which will justify a trial on the issue." *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499 (App. 1980).

THE COURT FINDS that the Plaintiff has failed to show genuine issues of material fact on the issues of:

(1) Whether at the time of the accident or before, that Hunter was part of the "family unit" of Rick Votaw, as legally defined for the purposes of the Family Purpose Doctrine. Under the uncontested facts presented. He clearly was not. Hunter lived in a separate residence with his girlfriend, and between the two, they paid rent and utilities. He had not lived with Rick Votaw for over 5 years;
(2) Whether Rick Votaw was the "head of household" at the residence where Hunter lived, whether Hunter was financially dependent on Rick Votaw, and whether Rick Votaw controlled the ATV that Hunter rode when he was killed. None of those factors apply to Rick;
(3) Whether Rick Votaw furnished Hunter with the Honda ATV at issue. He did not. Rick Votaw's co-signing on the purchase financing of the vehicle that Hunter purchased and owned outright by title, controlled, and maintained is not furnishment by Rick Votaw;
(4) Whether Rick had to give consent in order for Hunter to use the vehicle on the day of the accident. He did not;
(5) Even assuming *arguendo* only, that Hunter was driving the vehicle at the time of the crash, (which is clearly not established), whether the driving of the vehicle, as stated by Plaintiff, with his vision limitations, with a BAC of .35%, over 4 times the legal limit, without the knowledge or consent of Rick Votaw, was fulfilling a family purpose. Clearly, it was not.

Given the foregoing,

THE COURT FINDS that there are no genuine issues of material fact on the issues of whether the Family Purpose Doctrine applies to this case. It clearly does not.

THE COURT FURTHER FINDS that Defendant Rick Votaw is entitled to summary judgment as a matter of law. Therefore,

IT IS ORDERED granting Defendant Rick Votaw's Motion for Summary Judgment, and dismissing Plaintiff's Complaint as to the issue of the Family Purpose Doctrine.

NEGLIGENT ENTRUSTMENT

Defendant Rick Votaw argues that since, as stated above, he did not control the vehicle, and was not in a position to give permission for Hunter Votaw to use his own ATV, that he could not legally be determined to be liable for damages from the unfortunate accident.

Given the Court's findings of fact made above, and finding that Defendant Rick Votaw is entitled to judgment as a matter of law on the issue of Negligent Entrustment to his adult son,

IT IS ORDERED dismissing, with prejudice Plaintiff's Negligent Entrustment claim against Rick Votaw.

ATTORNEYS FEES

Defendant Rick Votaw asks the Court for an award of attorney's fees relative to the litigation of the above-stated issues.

Based upon the foregoing and the Court's consideration of the above stated issues, the Court declines to order Plaintiff to pay an award of attorney's fees and costs.

IT IS ORDERED denying Defendant Rick Votaw's request for an award of attorney's fees and costs.