SHORT FORM ORDER

INDEX No. 04-10325
CAL. No. 07-00359-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-28-07
ADJ. DATE 4-5-07
Mot. Seq. # 003 - MotD
004 - MotD

PEERLESS INSURANCE COMPANY a/s/o DAILY SCOOP OF MATTITUCK, Plaintiff, - against - BRITTANY PRIM, an infant under the age of eighteen, individually and STEPHANIE P. PRIM, individually and as mother and natural guardian of BRITTANY PRIM, Defendants.	METHFESSEL & WERBEL Attorneys for Plaintiff 450 7th Avenue, Suite 1400 New York, New York 10123 BREEN & CLANCY Attorneys for Defendant Stephanie Prim 1355 Motor Parkway, Suite 2 Hauppauge, New York 11749 KENNETH M. SEIDELL, ESQ. Attorney for Defendant Brittany Prim 811 West Jericho Turnpike, Suite 201W Smithtown, New York 11787

Upon the following papers numbered 1 to 18 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 15 ; Answering Affidavits and supporting papers 16; 17 ; Replying Affidavits and supporting papers 18 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiffs for summary judgment is granted to the extent that summary judgment is granted in favor of the plaintiffs on the first and fourth causes of action on the issue of liability, and the matter is set down for an assessment of damages; and it is further

ORDERED that the defendant Stephanie P. Prim's cross motion for summary judgment dismissing the complaint against her is granted to the extent that the second and third causes of action are dismissed.

This is an action to recover damages which Peerless Insurance Company had to pay its insured, Daily Scoop of Mattituck, when defendant Brittany Prim crashed a vehicle through the front of an ice-cream shop owned by Daily Scoop of Mattituck on October 12, 2003. Plaintiffs, Peerless Insurance Company A/S/O Daily Scoop of Mattituck, commenced this action against defendants Brittany Prim (hereinafter Brittany) and Stephanie P. Prim (hereinafter Stephanie), Brittany's mother and the owner of

the vehicle, claiming $21,472.13 in damages. The second verified amended complaint contains four causes of action: the first cause of action alleges negligence in the manner Brittany operated the vehicle; the second cause of action alleges that Stephanie is vicariously liable for the actions of Brittany; the third cause of action alleges negligence in the manner in which Stephanie secured the vehicle and the car keys; and the fourth cause of action is pursuant to General Obligations Law §3-112, and alleges that Stephanie, as the legal guardian of Brittany, is liable for her daughter's illegal actions.

The plaintiffs now move for summary judgment and submit in support thereof: the pleadings, a police report, a transcript of a recorded statement of Brittany, the deposition testimony of Brittany and Stephanie, photographs of the accident scene, and the affidavit of plaintiffs' insurance adjuster. The plaintiffs first point to the police report which indicates that at the time of the accident Brittany was fourteen years old and unlicenced. The police report further states that Brittany was driving through the parking lot of the Mattituck Plaza, lost control, accelerated, then drove through the ice-cream shop. In addition, the police report indicates that no summons was issued due to the fact that Brittany was a juvenile. The photographs show that the vehicle was entirely in the ice-cream shop and that the shop sustained considerable damage.

The plaintiffs also point to Stephanie's deposition testimony wherein she testified to the effect that she had two sets of keys for her vehicle, which she generally kept in her purse, but several weeks prior to the accident, one set of keys had been lost. She testified that she had looked for the missing keys, as did her fiancee and Brittany, and that Brittany had found the keys on a snack tray in the kitchen but did not return them to her. Stephanie stated that she even offered Brittany money if she found the keys because Brittany is very motivated by money, so she did not believe that Brittany had found them. Stephanie further testified that Brittany told her that the first time she ever took Stephanie's car was the night of the accident. Stephanie also stated that she had never told Brittany before the accident that she could use the car. When asked what Brittany told her about the incident, Stephanie testified in pertinent part: Brittany's friend Rob first drove the vehicle; Brittany then got behind the wheel to make the turn onto Factory Avenue, which runs alongside of the shopping center; Brittany turned into the Waldbaums' shopping center and drove around the parking lot; Brittany was heading toward the ice-cream parlor when her cell phone fell to the floor in front of her; Brittany bent down to pick up the cell phone, and when she looked up, she was aiming for the ice-cream shop; and Brittany thought that she slammed on the brakes, but she slammed on the gas. The plaintiffs also submit a transcript of a recorded conversation that Brittany had on October 20, 2003, with an apparent insurance agent, wherein Brittany gives a similar account of the incident as testified to by her mother.

In addition, the plaintiffs submit Brittany's deposition testimony wherein, when asked about details of the accident, Brittany, for the most part, refused to answer and asserted her Fifth Amendment right against self-incrimination. Finally, the plaintiffs point to the affidavit of Ann McArdell, an insurance adjustor, who states that the total amount paid by Peerless Insurance Company to The Daily Scoop of Mattituck, in connection with this incident is $20,472.13. Ms. McArdell also gives a detailed statement of each item repaired and replaced as well as the cost of business interruption.

The plaintiffs argue that based upon the undisputed facts, it is clear that Brittany, a 14 year-old minor, negligently caused the accident while unlawfully operating a vehicle owned by her mother Stephanie. They contend that by taking her eyes off the road to retrieve her cell phone from the floor

while the vehicle was in motion and by subsequently stepping on the accelerator rather than the brake, Brittany failed to exercise the level of reasonable care in the operation of the vehicle that a reasonably prudent person would use. Further, the plaintiffs argue, when evaluating the existence of genuine issues of material fact regarding Brittany's liability, the court should consider her refusal to answer questions related to the accident at her examination before trial. They assert that in obvious recognition that her actions were unlawful, Brittany elected to invoke her right against self-incrimination. The plaintiffs maintain that in light of Brittany's recorded statement wherein she admitted causing the accident as well as the police report documenting Brittany as the driver, Brittany's invocation of the Fifth Amendment should eliminate any doubt as to her liability for the accident. They allege that there is no triable issue of material fact, and thus, they are entitled to summary judgment on the first cause of action against Brittany as a matter of law.

Additionally, the plaintiffs claim that they are entitled to summary judgment on the fourth cause of action against Stephanie in the amount of $5000 pursuant to General Obligations Law §3-112. This statutory provision provides in pertinent part:

> The parent or legal guardian... of an infant over ten and less than eighteen years of age, shall be liable to any...private individual or organization having by law the care, custody and/or ownership of any private property, for damages caused by such infant, where such infant has wilfully, maliciously, or unlawfully damaged, defaced or destroyed such... private property, whether real or personal... Such...private individual or organization, as the case may be, may bring an action for civil damages in a court of competent jurisdiction for a judgment to recover damages from such parent or legal guardian ... In no event shall such damages portion of a judgment authorized by this section, as described in this subdivision, exceed the sum of five thousand dollars.

The plaintiffs allege that the undisputed facts of this case present a classic example of the type of unlawful conduct for which the statute was enacted. They argue that as a result of Brittany's unlawful conduct, Daily Scoop of Mattituck sustained substantial property damage in excess of $21,000, and therefore they are entitled to a judgment against her mother, Stephanie, for the maximum allowable amount of $5,000.

Stephanie opposes the plaintiffs' motion and cross-moves for summary judgment, incorporating by reference all the deposition testimony and exhibits submitted by the plaintiffs. Specifically, Stephanie points to her own deposition testimony wherein she testified to the effect that: she had no knowledge that her daughter's possession of the second set of keys; she had offered her daughter money to locate the second set of keys; and that she did not give her permission to drive the vehicle. Stephanie also points to Brittany's deposition testimony and recorded statement in support of her claim that she had no knowledge of Brittany's driving the vehicle and that this was the first time Brittany had attempted such an undertaking. In particular, Stephanie highlights that portion of Brittany's deposition testimony wherein, when Brittany was asked if her mother ever gave her permission to drive her Jeep Cherokee on October 12, 2003, Brittany answered, "No. She also said that I couldn't do it" (see plaintiffs' Exhibit H at 27). Stephanie argues that the facts are clear that without permissive use of the vehicle, liability does not attach to her. Further, Stephanie alleges that the evidence indicates that Brittany never engaged in this type of behavior prior to the date of the occurrence and there was no indication that Brittany would be or

had a propensity to become involved in this incident.

Stephanie additionally contends that while there is no question of fact as to the issue of liability of Brittany, without a willful, malicious, or unlawful act, there is no violation on her part, as Brittany's mother, of General Obligation Law §3-112. She argues that Brittany had no intention of harming anyone or anything when she proceeded to drive her vehicle to the ice-cream store. She claims that Brittany's testimony supports the conclusion that her daughter's actions were not wilful or malicious, but rather, were the result of an unintentional and negligent conduct. Stephanie concludes that based upon all the evidence, she has sufficiently proven that she cannot be held liable for the actions of her daughter.

Brittany opposes both the plaintiffs' motion and Stephanie's cross motion. Initially, she argues that her alleged recorded statement on October 20, 2003, which was submitted by the plaintiffs, is not sworn to and amounts to nothing more than an unsubstantiated telephone conversation transcript. She alleges that such "proof of negligence" in not evidentiary proof in admissible form which would provide a basis for granting summary judgment to the plaintiffs. Brittany claims that since Stephanie's cross motion relies on the exhibits attached to plaintiffs' motion, Stephanie's cross motion must be denied as well. In addition, Brittany contends that the plaintiffs have erroneously set forth the standard of care that should be applied herein as that applied to adults. She asserts that courts have consistently held that the standard of conduct to which a child must conform to avoid being negligent is that of a reasonable child of like age, intelligence and experience under the circumstances. Brittany argues that the movants have thus failed to sustain their initial burden warranting the granting of summary judgment. She concludes that it cannot be said as a matter of law based upon the facts of this case that she was negligent.

As to the plaintiffs' motion, even disregarding the unsworn telephone transcript, the court finds that the plaintiffs have met their prima facie burden as to the first cause of action which alleges that Brittany was negligent in the manner she operated the vehicle. It is well settled that summary judgment must be granted where the undisputed facts are consistent with only one conclusion, or with respect to circumstantial evidence, where the prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable (***Gerard v Inglese***, 11 AD2d 381, 206 NYS2d 879 [1960]). Here, the photographs show the vehicle was driven into the ice-cream store with such force that the vehicle ended up in the middle of the store. Moreover, there is no dispute herein as to how the accident happened or who was driving. All the parties (the plaintiffs, Stephanie, as well as Brittany), refer to information in the police accident report in support of or in opposition to the motions and such version of events is consistent with Stephanie's deposition testimony. Under the circumstances herein Brittany's conduct constitutes negligence as a matter of law (***Thy Tran v Avis Rent A Car***, Inc., 289 AD2d 731, 734 NYS2d 662 [2001]; ***Gerard v Inglese***, *supra*).

Brittany, in opposition to the plaintiffs' motion, has failed to raise an issue of fact on this cause of action. Although Brittany claims that she should be judged by that level of reasonable conduct to be expected from a child of like age, intelligence and experience, it is "the generally accepted rule that whenever a child, whether as plaintiff or as defendant, engages in an activity which is normally one for adults, such as driving an automobile... public interest and safety require that any consequences due to his [or her] incapacity shall fall upon him [or her] rather than the innocent victim, and that he [or she] must be held to the adult standard without any allowance for age (***Smedley v Piazzolla***, 59 AD2d 940, 399 NYS2d 460 [1977]). Thus, Brittany must be judged as an adult under a reasonable person standard, and

the undisputed evidence shows that she failed to exercise that standard of care that a reasonably prudent adult would have exercised. Furthermore, the court notes that an adverse inference may be drawn against a party in a civil action who invokes the Fifth Amendment right against self-incrimination (*see*, ***Searle v Cayuga Medical Center at Ithaca***, 28 AD3d 834, 813 NYS2d 552 [2006]). While a party may not be compelled to answer questions that might adversely affect his or her criminal interest, the privilege does not relieve such party of the ususal evidentiary burdens which accompany a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence (*see*, ***Access Capital, Inc. v DeCicco***, 302 AD2d 48, 752 NYS2d 658 [2002]). Here, Brittany has failed to set forth any evidence which rebuts the plaintiffs' evidence (*see*, ***Thy Tran v Avis Rent A Car. Inc.***, *supra*). Accordingly, the plaintiffs' are entitled to summary judgment on the first cause of action as against Brittany.

In addition, the court finds that the plaintiffs have met their prima facie burden as to the fourth cause of action against Stephanie. The facts of this case fall within the parameters of General Obligation Law §3-112. It is undisputed that Stephanie, is Brittany's mother and that Brittany was living with Stephanie at the time of this incident (*see*, ***60 Minute Man, Ltd. v Kossman***, 161 AD2d 574, 555 NYS2d 152 [1990]). It is also undisputed that Brittany's actions caused damage to Daily Scoop Of Mattituck's ice-cream store. Although Brittany's actions of driving her mother's vehicle without a license and crashing into the store may have been without malice and without the intent to do harm, her actions were clearly unlawful (*see*, Vehicle and Traffic Law §509).

In opposition to the plaintiffs' motion for summary judgment on this fourth cause of action, Stephanie has failed to raise an issue of fact. Additionally, in support of her cross motion to dismiss this fourth cause of action Stephanie has failed to meet her prima facie burden. The cases raised by Stephanie are distinguishable. ***Izzo v Gratton***, (86 Misc. 2d 233, 383 NYS2d 523 [1976]) deals with a prior version of the statute which had a "due diligence" defense. ***Leonard v O'Neil***, (159 Misc2d 1029, 608 NYS2d 618 [1994]) concerns a father who did not have physical custody of his daughter at the time the daughter took a vehicle and which vehicle was apparently vandalized by others. Finally, ***Deliso v Cangialosi*** (117 Misc2d 105, 457 NYS2d 396 [1982]) involves a child who threw keys while playing and hit a vehicle, and the court found the act of throwing keys was not per se unlawful, or with a wilful or malicious intent. Therefore, since Stephanie has failed to raise any issue in defense, plaintiffs' are entitled to summary judgment as to the fourth cause of action. For the reasons just stated, Stephanie's cross motion for summary judgement on the fourth cause of action is denied.

As to Stephanie's cross motion for summary judgment on the second cause of action for vicarious liability, the court finds that she has met her prima facie burden. Vehicle and Traffic Law §388 provides in pertinent part, "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle... by any person using or operating the same with the permission, express or implied, of such owner." Here, Stephanie, in her deposition testimony, testified that she never told Brittany that she could use the vehicle (*see*, plaintiffs' Exhibit I at 17). Further, Brittany, in her deposition testimony, testified that her mother never gave her permission to drive the vehicle and in fact said that Brittany "couldn't do it" (*see*, plaintiffs' Exhibit H at 27). The evidence presented thus establishes that at the time of the accident Brittany was using Stephanie's vehicle without Stephanie's express or implied permission. In opposition, the plaintiffs have failed to raise a triable issue of fact, and have proferred no evidence that

the vehicle was being used with Stephanie' consent (*see*, ***Padilla v Felson***, 28 AD3d 530, 813 NYS2d 744 [2006]). Therefore, Stephanie's cross motion for summary judgment is granted to the extent that the second cause of action is dismissed.

As to Stephanie's cross motion for summary judgment on the third cause of action which alleges that Stephanie was negligent in the manner in which she secured her keys and permitted Brittany access to the vehicle, the court finds that Stephanie has met her prima facie burden. While, in general, parental liability for the torts of a child does not arise simply from the parental relationship (*see*, ***Feinerman v Kaplan***, 290 AD2d 480, 736 NYS2d 680 [2002]), a parent may be held liable, where the parent's negligence consists entirely of his or her failure reasonably to restrain the child from vicious conduct that might endanger others, when the parent has knowledge of the child's propensity toward such conduct (***Rivers v Murray***, 29 AD3d 884, 815 NYS2d 708 [2006]). If the third cause of action is viewed as a claim for negligent supervision, Stephanie has established as a matter of law that she had no knowledge that her daughter had any propensity to utilize vehicles without permission, or to steal or borrow items which she was not authorized to use (***Gore v Mackie***, 278 AD2d 879, 718 NYS2d 762 [2000]). If the third cause of action is viewed as a claim for negligent entrustment, Stephanie has established as a matter of law that she did not entrust Brittany with her vehicle (***Gore v Mackie***, supra). In opposition, the plaintiffs have failed to establish that Stephanie gave her permission to drive the vehicle or that Stephanie was even aware that Brittany possessed the keys (*see*, ***Marino v Schoppmeyer***, 236 AD2d 450, 654 NYS2d 582 [1997]). Merely because Brittany had access to the keys is insufficient (*see*, ***Rivers v Murray***, *supra*). Nor is the fact that Brittany said, "Oh, I can't wait till I get big so I... [can] drive" enough to show a propensity to use vehicles without permission. Therefore, Stephanie's motion for summary judgment is granted to the extent that the third cause of action is dismissed.

Accordingly, the second and third causes of action are dismissed. Summary judgment is granted to the plaintiffs on the first and fourth causes of action. As to the amount of damages demanded on first and fourth causes of action, the court finds that this matter must be set down for an assessment of damages. Although the plaintiffs demand a judgment of $21,472.13, the affidavit of Ann McArdell only supports an amount $20,472.13, which includes a deductible of $1,000.00. Thus, it is unclear as to what amount is actually due the plaintiffs. Furthermore, at such assessment of damages, Stephanie may make an application pursuant to GOL §3-112 (2). The plaintiffs are directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the CCP calendar for the next available date.

Dated: JUL 17 2007

J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**