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IN THE COURT OF APPEALS OF INDIANA

Penny Chappey and
Gregory Chappey,
Appellants-Plaintiffs,

v.

Joseph Paul Storey and
Complete Auto & Tire, LLC,
Appellees-Defendants

February 13, 2023

Court of Appeals Case No.
22A-CT-979

Appeal from the
Carroll Circuit Court

The Honorable
Benjamin A. Diener, Judge

Trial Court Cause No.
08C01-1904-CT-2

Opinion by Judge Vaidik
Judges Riley and Bailey concur.

Vaidik, Judge.

Case Summary

[1] Penny Chappey was injured while her SUV was being prepared for towing. She and her husband sued the towing company and its employee for negligence, and the defendants moved for summary judgment. At the hearing and in its order, the trial-court judge cast doubt on the civil-litigation process in general and the plaintiffs' lawsuit in particular and entered summary judgment for the defendants. The plaintiffs now appeal, arguing summary judgment was improperly granted for the defendants because there is a genuine issue of material fact and the judge was biased and denied them due process of law. We agree with the plaintiffs that there is a genuine issue of material fact that precludes the entry of summary judgment. We also agree that the judge was biased. On remand, the plaintiffs are entitled to a new judge.

Facts and Procedural History

[2] In July 2018, Penny Chappey was at CVS in Delphi when her SUV didn't start. She had her dog, a bulldog puppy, with her. Penny called a towing company, Complete Auto & Tire. Joseph Paul "JP" Storey was an employee of Complete Auto & Tire and responded to the call in a flatbed tow truck. When he arrived, Penny's dog was in her SUV. Penny asked Storey if her dog could stay in her SUV, and he said yes. Storey then got in Penny's SUV to put it in neutral. The

dog was "extremely excited" and jumped "all over" Storey. Appellants' App. Vol. II pp. 46, 47. Storey put the SUV in neutral then got out.

[3] After the SUV was loaded, Penny walked to the back of the flatbed, "stepped on the bar" that was below the flatbed, and then "stepped up" onto the flatbed. *Id.* at 48. The parties dispute why Penny did so. Penny said Storey asked her to get on the flatbed to restrain her dog by holding its leash through an open window so that he could put the SUV in park. Storey, on the other hand, said he didn't ask Penny to get on the flatbed, didn't know she was on it, and believed industry standards didn't allow customers to get on flatbeds. In any event, after releasing the dog's leash through the SUV's window, Penny "pivot[ed]" so that she could walk to the back of the flatbed and get down. *Id.* at 51. As Penny turned, she fell off the flatbed several feet onto the ground, sustaining injuries. Penny didn't know exactly why she fell but said it was a "tight space" between the SUV and the edge of the flatbed and that she couldn't fit her feet "side by side" in that space. *Id.*

[4] In April 2019, Penny and her husband, Gregory, filed a complaint against Storey and Complete Auto & Tire (collectively, "the defendants"). The Chappeys alleged that Storey was negligent for:

> Requesting that Plaintiff, Penny L. Chappey, climb onto the flatbed of the tow truck, navigate the narrow passageway

> between Plaintiffs' vehicle and the side-rails,[1] open a vehicle door, and "occupy" her dog, when he knew, or in the exercise of reasonable care, should have known, that Plaintiff, Penny L. Chappey, had never been on the flatbed of a tow truck, thereby creating an unreasonable risk of harm to Plaintiff, Penny L. Chappey.

Id. at 18. The Chappeys alleged that Complete Auto & Tire was responsible for Storey's negligence under the doctrine of respondeat superior.

[5] The defendants moved for summary judgment. A summary-judgment hearing was held in January 2022. At the hearing, the trial-court judge expressed skepticism about the merits of the Chappeys' lawsuit, stating "frankly I wouldn't be suing in this situation, but I'm not a litigious person . . . ." Tr. p. 9. The judge didn't think the Chappeys' lawsuit was a "valuable use of limited judicial resources" given the fact that Penny couldn't explain why she fell off the flatbed. *Id.* at 13. When the Chappeys' attorney tried to respond, the judge interrupted:

> Okay, we understand that she's somehow on this flatbed. I live in Carroll County, I know JP Storey,[2] I don't know the Chappey's. I know CVS . . ., and so I know what happened without even hearing from anybody what happened. But there's a lot of questions of the legal system isn't built for Carroll County folks

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[1] The side rails on the flatbed were a "couple of inches" tall. Appellants' App. Vol. II p. 169; *see also id.* at 20-21 (photos).

[2] The judge later clarified that he didn't actually know "JP Storey" but he knew the "JP Storeys of our community." Tr. p. 27.

> with Carroll County tow truck operators. It's just not built that way . . . .

Id. at 14. When the Chappeys' attorney told the trial court that Penny got up on the flatbed at the request of Storey, the judge reiterated that he didn't need to be told why because he already knew: "she probably was showing him how to do the stuff. Farm pro here, this is how we do it in Carroll County." *Id.* at 18. The judge said "[a]ll reasonable people" would "say no" if a tow-truck operator asked them to get on a flatbed to help. *Id.* at 15. The judge again said that he didn't think the Chappeys should have sued:

> [J]ust because people file suits and a lot of them get resolved because it's so expensive to actually do doesn't mean that the Plaintiffs should be doing what they are doing, it[']s just how the law is set up presently. But as you're gathering I'm backed logged with murder trials and things that are really important. Not that this isn't important, but it's not really important, because we have a person who doesn't know how they were injured. Claiming it[']s somebody else's fault. And we've already kind of determined no reasonable person would put themselves in her position. At least I've determined that. Court of Appeals who knows what they will determine. It just seems so clear to me though . . . .

Id. at 20-21. When the judge started talking about things that were not in the record, the Chappeys' attorney told the judge that. This is how the judge responded:

> I understand, I understand it's outside the scope[] of the briefs, sir, but I'm also a Judge here in Circuit Court with real cases with real consequences and I'm a little bit offended by, we've got

> someone that doesn't say how they got injured, but they want to sue somebody.

Id. at 30. The judge then said that the lawsuit was "insulting" and that the Court of Appeals would probably "criticize[]" him for his "demeanor." *Id.* at 30-31. The judge ended the hearing by acknowledging that he had "improperly interjected at every turn" but asked the parties not to take his "unnecessary indulgences the wrong way." *Id.* at 36.

[6] Three months later, on April 5, 2022, the judge issued the following order entering summary judgment for the defendants:

> The civil litigation process in Indiana is broken. The source, cause, and only potential cure of the issue is dealing with how we allow insurance companies to participate in the legal process.
>
> The legal process was created as a civil way to resolve conflicts between people. It presupposes participation of rational actors.
>
> The easiest, oldest and best solution is to simply banish certain legal fictions (insurance companies) from the Courts. As too many people are part of the broken system we have created, this judicial officer is skeptical of that solution.
>
> However, the system is broken because a separate system of risk allocation (the insurance "industry") has allowed to also be, by any measurement, the near-lone participant in the civil system of conflict resolution (the judiciary and its civil litigation subset). This problem is exacerbated by the fact that our government itself mandates its citizens obtain and maintain insurance coverage in many areas of life. The number of civil cases actually being tried

to a jury gets lower and lower each year, which has been the canary in the coal mine for too long.

So, we all must have and pay for insurance and our civil legal process consists of almost only insurance litigation, and almost no civil cases are actually resolved by a jury trial…

So, the third branch of the government (the judiciary) has become the venue whereby for-profit-legal fictions (insurance companies) use the Courts as a potential revenue stream to extract funds from each other . . . in effort to positively affect their shareholder's profit (which is their sole legal objective, by definition, <maximizing shareholder profit>). It is disgusting and no citizens, civilians or voters in Indiana benefit, to any reasonable degree, to allow this to continue. So, banish?

If we are unwilling to banish the legal fiction (insurance companies), the other solution is to not simply allow, but to direct and encourage, the judiciary to ferret out this behavior by allocating costs regularly and aggressively for the prevailing party.

It simply cannot stand that we allow a system to exist where anybody can sue anyone at any time and the prevailing party does not regularly and customarily get awarded costs at the Court's discretion. Because, a non-culpable Defendant still has to navigate this system designed to solve conflicts between rational actors, not between legal fictions, while, almost always, being flooded by voluminous discovery requests (purportedly DUE in less than _ days] from Plaintiff (which is almost always an insurance company).

Yet, here we are in 2022, just now getting to a summary judgment order in a case filed in 2019 where there is no set of facts that could connect the Defendants to any breach of duty

that actually and proximately caused the damages to the Plaintiff(s).

To make matters worse, prevailing case law strongly and severely discourages summary judgment, ostensibly because, "people are entitled to their day in court." The people have long been banished from civil litigation, replaced by legal fictions (insurance companies) who comprise all of the volume and actually try almost none of their cases.

So, when do the people get their day in court?

Let it end today.

Costs, under Ind. Trial Rule 54(D) are assessed against Plaintiff.

Defendant is ORDERED and DIRECTED, within thirty (30) days of today's date to file a notice to the Court with an itemized statement of ALL COSTS associated with this action, whether attorney fees, office supplies, man/hours etc.

Separate order shall follow memorializing the costs as this summary judgment shall not be delayed.

Please, take this case to the Supreme Court. Let the people know how our system works and why it is broken and then see if this judicial officer is wrong. The broken system cannot be fixed unless people are willing to change it. It takes someone with an ability to effectuate a change to start that change. This officer fears not the ridicule or scrutiny. No rational person, on their own accord, would have pursued this claim. However, a legal fiction would and did. And the bill increases and the "controversy" though resolved, is subject to appeal and review.

> There may be other solutions; it only took this officer the time it took to type this document to devise these two solutions; which honestly took less than an hour.
>
> Three interesting things to watch:
>
> 1) How costly it has been (thus far) to defend this frivolous suit?
>
> 2) Will Defendants submit an artificially low tally of costs, which would be akin to tacit collusion?
>
> 3) Will Plaintiffs (insurance company)[3] appeal this finding and the Court's award of costs or will it tacitly collude (with the insurance "industry" as a collective) to eat the costs in fear that success at the Court of Appeals or the Supreme Court may just result in necessary and overdue analysis of how and why our civil litigation process has been and remains a farce overrun by legal fictions.

Appellants' App. Vol. II pp. 8-10. One month later, on May 12, the trial court "SUA SPONTE, and as permitted by T.R.12(F)," ordered "all dicta stricken" from the April 5 summary-judgment order.[4] *Id.* at 11. The trial court later ordered the Chappeys to pay costs to the defendants, but the defendants have since withdrawn any request for costs. *See* Appellees' Br. pp. 15-16.

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[3] The parties do not tell us why the trial court believes an insurance company is pursuing this action in the Chappeys' name.

[4] The Chappeys assert that Trial Rule 12(F) did not give the judge the authority to do what he did. We agree. Rule 12(F) allows certain material to be stricken from "pleadings." A summary-judgment order is not a pleading. *See* Ind. Trial Rule 7(A).

[7] The Chappeys now appeal.

Discussion and Decision

[8] The Chappeys contend the trial court erred in entering summary judgment for the defendants for two reasons. First, they argue there is a genuine issue of material fact that precludes the entry of summary judgment. Second, they argue the judge was biased against them and denied them due process.

I. Genuine Issue of Material Fact

[9] We review motions for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[10] "In order to prevail on a claim of negligence the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 484 (Ind. 2003), *reh'g denied*. The defendants argue summary judgment was properly granted on the element of proximate cause. Proximate cause is generally a question of fact to be determined by the jury. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 389 (Ind. 2016); *Rhodes v. Wright*, 805

N.E.2d 382, 388 (Ind. 2004). But "it becomes a question of law when the relevant facts are undisputed and lead to only a single inference or conclusion." *Gates v. O'Connor*, 111 N.E.3d 215, 224 (Ind. Ct. App. 2018), *trans. denied*.

[11] The defendants maintain that Storey didn't ask Penny to get on the flatbed. However, accepting that Penny's claim to the contrary must be treated as true for purposes of summary judgment, they argue that "there is no causal connection between that allegedly negligent act and [Penny's] fall" because "it is a mystery what actually caused [Penny] to fall." Appellees' Br. p. 15. In support, they cite cases in which summary judgment was found to be proper because the plaintiffs didn't know why they fell. *See Brown v. Buchmeier*, 994 N.E.2d 291 (Ind. Ct. App. 2013) (finding summary judgment was properly granted for clothing store because plaintiff didn't know why she fell off a step inside the store); *Hayden v. Paragon Steakhouse*, 731 N.E.2d 456 (Ind. Ct. App. 2000) (finding summary judgment was properly granted for restaurant because plaintiff didn't know what caused him to fall in the parking lot); *Hale v. Cmty. Hosp. of Indianapolis, Inc.*, 567 N.E.2d 842 (Ind. Ct. App. 1991) (finding summary judgment was properly granted for hospital because plaintiff didn't know why she fell as she stepped from a curb).

[12] Although Penny couldn't state the precise cause of her fall, she testified that she fell as she tried to get down off the flatbed, which Storey had asked her to get on. After releasing the dog's leash through the SUV's window, Penny turned so that she could walk to the back of the flatbed. However, the space between the SUV and the edge of the flatbed was "tight," and Penny couldn't fit her feet side

by side. The next thing Penny knew, she had fallen off the flatbed onto the ground. While one reasonable inference is that Penny fell because she wasn't careful, another reasonable inference is that navigating a tight space elevated several feet from the ground at the request of the tow-truck operator placed her in an unreasonable position of peril resulting in her fall. Because the facts don't lead to a single inference, proximate cause is a question of fact to be determined by a jury. Summary judgment for the defendants was therefore improper.

II. Due Process

[13] Although we just determined that summary judgment for the defendants was improper, we address whether the Chappeys were denied due process of law by the judge since the case is being remanded and a change of judge under Indiana Trial Rule 76(C)(3) is not permitted on remand. *See Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 556 (Ind. Ct. App. 2015) (holding that Trial Rule 76(C)(3) does not allow a new judge on remand from the reversal of the entry of summary judgment because the entry of summary judgment does not include an assessment of the weight of the evidence or the credibility of the witnesses).

[14] "A trial before an impartial judge is an essential element of due process." *Harris v. Lafayette LIHTC, LP*, 85 N.E.3d 871, 878 (Ind. Ct. App. 2017) (quotations omitted); *see also Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind. 1996) ("Due process requires a neutral, or unbiased, adjudicatory decisionmaker."). "A biased decision maker [is] constitutionally unacceptable [and] our system of law has always endeavored to prevent even the probability of unfairness."

Harris, 85 N.E.3d at 878 (quotations omitted). "We afford trial judges ample latitude to run the courtroom and maintain discipline and control of the trial"; however, "a judge has a duty to remain impartial and refrain from making unnecessary comments or remarks." *Id.* (quotations omitted). "At all times the trial court must maintain an impartial manner and refrain from acting as an advocate for either party." *Id.* (quotation omitted). "A violation of due process occurs where a trial judge combines the roles of judge and advocate." *Id.* (quotation omitted).

[15] The law presumes that a judge is unbiased. *Id.* "To overcome that presumption, the party asserting bias must establish that the trial judge has a personal prejudice for or against a party." *Id.* (quotation omitted). "Clear bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him or her." *Id.* (quotation omitted). "Adverse rulings and findings by the trial judge do not constitute bias per se." *Id.* (quotation omitted). "Instead, prejudice must be shown by the judge's trial conduct; it cannot be inferred from his [or her] subjective views." *Id.* (quotation omitted). "Said differently, a party must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced that party's case." *Id.* (quotation omitted).

[16] The Chappeys claim that the judge has "bias against plaintiffs who assert personal injury claims and the litigation process which allows them their day in court." Appellants' Br. p. 13. On this record, we agree. The judge made improper comments throughout the summary-judgment hearing and took

control of the hearing as if he were an advocate for the defendants. The judge thought the Chappeys' lawsuit was a waste of judicial resources, not important, and meritless. The judge was personally "offended" by the lawsuit and suspected that the Court of Appeals would criticize him for his demeanor. Although the judge ended the hearing by telling the parties not to take anything from his comments, the judge doubled down when he issued the summary-judgment order three months later. In that order, the judge declared that the "civil litigation process in Indiana is broken," proposed "banish[ing]" insurance companies from the courts and "allocating costs regularly and aggressively for the prevailing party," criticized summary-judgment law, and encouraged the case to be taken to the Supreme Court as he feared neither "ridicule" nor "scrutiny." The judge believed that "no rational person, on their own accord, would have pursued this claim" and that there was "no set of facts" showing that the defendants were negligent.

[17] The record shows that the judge's actions and demeanor crossed the barrier of impartiality and torpedoed the Chappeys' case. We therefore conclude that the judge failed to preside over the case as a neutral, impartial decision maker in violation of the Chappeys' due-process rights. On remand, the Chappeys are entitled to a new judge. *See B.M. v. A.J. ex rel R.J.*, 186 N.E.3d 1194, 1203 (Ind. Ct. App. 2022).

[18] Reversed and remanded.

Riley, J., and Bailey, J., concur.