

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ASHA VAIDYA and	:	CIVIL ACTION
DR. AROON VAIDYA,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
XEROX CORPORATION	:	
	:	
Defendant.	:	NO. 97-547

MEMORANDUM

Plaintiffs, Asha Vaidya and Dr. Aroon Vaidya, have filed a Motion for Reconsideration, pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1, of my order of October 14, 1997 granting summary judgment to defendant, Xerox Corporation. For the reasons set forth below, the motion will be denied.

I. INTRODUCTION

Plaintiffs brought this action for recovery of damages resulting from personal injuries allegedly received by plaintiff, Asha Vaidya, when the car she was driving was involved in a rear-end collision with a vehicle owned by defendant, Xerox Corporation ("Xerox"), and being driven by Xerox's employee Gary VonZech ("VonZech"). Defendant, Xerox, subsequently filed a Motion for Summary Judgment on the grounds that Xerox was not liable for VonZech's actions because VonZech was not in the course and scope of his employment with Xerox when the accident occurred.

On October 14, 1997, after consideration of the memoranda

submitted by the parties and hearing oral argument, I granted summary judgment in favor of defendant, Xerox, on the basis that Xerox was not liable for the claims asserted by plaintiffs under the theory of respondeat superior, in that its driver, VonZech, was not within the course and scope of his employment when the accident occurred. I also denied plaintiff's Motion to Amend the Complaint to add VonZech as a defendant on the grounds that the claim was time-barred because the applicable statute of limitations had expired and also denied all other outstanding motions as moot.

In the present motion, plaintiffs seek reconsideration of the order granting summary judgment in two respects. First, plaintiffs seek reinstatement of Count II of the complaint, which the plaintiffs contend states a claim for negligent entrustment against Xerox directly, in its supervisory capacity over VonZech. Plaintiffs argue that because the order of October 14, 1997 granting summary judgment does not encompass this allegation of negligent entrustment, as summary judgment was granted only as to defendant's liability under the doctrine of respondeat superior, Count II of the complaint must be reinstated.¹

Second, plaintiffs seek reconsideration of my ruling that Xerox was not liable for the claims asserted by plaintiffs under

¹ Plaintiffs also seek reinstatement of Count III of the complaint. Plaintiffs argue that, derivatively, Count III of the complaint, for loss of consortium brought by Dr. Aroon Vaidya, must also be reinstated, if Count II is reinstated, as Dr. Vaidya's damages arose in part from the alleged negligent entrustment of Xerox.

the theory of respondeat superior, in that its driver, VonZech, was not within the course and scope of his employment when the accident occurred and my denial of plaintiffs' claim of estoppel.

II. STANDARD OF REVIEW

The standards controlling a motion for reconsideration are set forth in Federal Rule of Civil Procedure 59(e) and Local Rule of Civil Procedure 7.1. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 799 F.2d 906, 909 (3d Cir. 1985). The moving party must establish one of three grounds: (1) the availability of new evidence not previously available; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or to prevent manifest injustice. Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994). A party may not submit evidence which was available to it prior to a court's grant of summary judgment. Id. at 97. A motion for reconsideration is also not properly grounded on a request that a court rethink a decision it has already made. Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993).

III. ANALYSIS

In the present motion, plaintiffs seek reconsideration of my order granting summary judgment in two respects.² First,

² As an initial matter, I must address the issue of jurisdiction. After the present motion was filed, I received notice that plaintiffs filed for appeal on November 14, 1997 to the United States Court of Appeals for the Third Circuit raising

plaintiffs seek reinstatement of Count II of the complaint, which the plaintiffs contend states a claim for negligent entrustment against Xerox directly, in its supervisory capacity over VonZech.³ Plaintiffs contend that because the order of October 14, 1997 granting defendant's Motion for Summary Judgment does not encompass this allegation of negligent entrustment, as summary judgment was granted only as to defendant's liability under the doctrine of respondeat superior, Count II of the complaint must be reinstated.

Specifically, plaintiffs cite paragraph 24 of the complaint which states in pertinent part: "Defendant Xerox exercised willful and reckless disregard for the safety of Plaintiff by permitting its driver to operate a large commercial vehicle at an

identical issues for appeal as those raised in the present motion. Generally, the filing of a notice of appeal immediately transfers jurisdiction of a case from the district court to the court of appeals. S.E.C. v. Investors Security Corp., 560 F.2d 561 (3d Cir. 1977). Filing of a notice of appeal divests the district court of its jurisdiction to determine the subject matter of the appeal. Id. However, an exception to this general rule exists when a notice of appeal is filed while a motion for reconsideration remains pending in the district court. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982). In that instance, the notice of appeal "shall have no effect." Id. Based on the Court's holding in Griggs, it is my conclusion that I have jurisdiction to rule on the present motion.

³ Plaintiffs, at no time prior to filing their Motion for Reconsideration, asserted this argument. Plaintiffs failed to raise this argument in either their memorandum in opposition to defendant's Motion for Summary Judgment or at oral argument. A motion for reconsideration may not advance new facts, issues, or arguments not previously presented to the court. Smith, 155 F.R.D. at 97. For this reason alone, this element of the Motion for Reconsideration could be denied. I will, however, exercise my discretion to deny plaintiff's argument on its merits.

excessive rate of speed under the circumstances." Plaintiffs contend that this language sets forth a cause of action against Xerox for negligent entrustment.

The State of Delaware recognizes a cause of action against the owner of an automobile resulting from the owner's negligent entrustment of the vehicle. Niemann v. Rogers, 802 F.Supp. 1154, 1157 (D. De. 1992). In order to establish the tort of negligent entrustment, a plaintiff must establish: (1) entrustment of an automobile by the owner; (2) to a reckless or incompetent driver such that the automobile becomes a dangerous instrumentality; (3) the owner knows or has reason to know that the driver is reckless or incompetent; and (4) the driver causes damage to the property or person of another.⁴ Id. at 1157.

⁴ It should be noted that plaintiffs, in the present motion, now cite Pennsylvania law in support of their argument, although plaintiffs relied on Delaware law in their briefing in opposition to defendant's Motion for Summary Judgment and at oral argument. A federal district court sitting in diversity must apply the choice of law rules of the state in which it sits to determine which state's law governs the controversy before it. Klaxon Co. V. Stentor Manufacturing Co., 313 U.S. 487 (1941). Therefore, I must apply the State of Pennsylvania's choice of law rules. Pennsylvania has abandoned the rule of *lex loci delicti* for determining choice of law in tort cases and has adopted a methodology which is a combination of the "government interest" test and the most "significant relationship" test of Section 145 of the Restatement (Second) of Conflicts. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). Under this approach I must evaluate "the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute a priority of interest in the application of its rule of law." Troxel v. A.I.duPont Institute, 431 Pa.Super. 464, 468, 636 A.2d 1179, 1881 (Pa. Super. 1994) quoting Normann v. Johns-Manville Corp., 373 Pa.Super. 103, 108, 593 A.2d 890, 893 (1991). Applying Pennsylvania's hybrid approach to facts of this case, I conclude that the State of Delaware has the greater interest in the

Plaintiffs allege that defendant, Xerox, exercised willful and reckless disregard for the safety of plaintiff by permitting its driver, VonZech, to operate what they describe as a "large commercial vehicle."⁵ Plaintiffs argue there are genuine issues of material fact for trial with respect to the second and third elements of the tort of negligent entrustment, that of VonZech's recklessness or incompetence, and that of Xerox's knowledge of VonZech's recklessness or incompetence. In support of this contention, plaintiffs argue that defendant negligently entrusted the vehicle to VonZech because Xerox knew or should of known that VonZech was a reckless and incompetent driver because his drivers license had been previously suspended, and he failed to take a defensive driving course required by Xerox for at least five years prior to the accident.

Plaintiffs also appear to suggest that VonZech may have been a reckless or incompetent driver because plaintiffs allege he procured his license from Pennsylvania illegally insomuch as he was living in either New Jersey or Delaware at the time. I do not agree. Plaintiffs fail to cite any licensing requirement that required VonZech to hold a Delaware driver's license. The

application of its law. The accident from which plaintiffs' causes of action arose occurred in the State of Delaware and plaintiffs are both citizens of the State of Delaware. I will, therefore, apply Delaware law in my analysis.

⁵ The Xerox vehicle involved in the accident was actually a Dodge Caravan, a vehicle commonly referred to a "mini" van and reportedly frequently used by so-called "soccer-moms." A Dodge Caravan can hardly be characterized as a "large commercial vehicle."

mere fact that VonZech held a Pennsylvania drivers license does not form a basis for liability unless having the Pennsylvania license, as opposed to a Delaware license, which VonZech may or may not have been required to hold, was a cause of plaintiff's harm. Adams v. Kline, 239 A.2d 230 233 (De. Super. 1968) citing Gulla v. Straus, 93 N.E.2d 662, 664 (1950). There is no evidence that VonZech's lack of a Delaware drivers license was in any way a cause of plaintiff's injury.

Defendant argues that VonZech's driving record and the fact he possessed a valid driver's license issued by the State of Pennsylvania at the time of the accident prevent a finding of recklessness or incompetence on his part.

Viewed in the light most favorable to plaintiff, there is no genuine issue of material fact for trial whether VonZech was a reckless or incompetent driver. VonZech's driving record, as submitted by plaintiffs, reflects that he held a valid driver's license for at least three years prior to the accident.⁶ In each

⁶ It is not entirely clear when VonZech's drivers license was last suspended as the result of motor vehicle violations. VonZech's driver's record indicates that his driving privileges were last suspended in December of 1990, five years before the accident, and subsequently restored in March of 1992. However, defendant asserts that this suspension and the suspensions in August, 1988, June, 1989, and July, 1989, were only as a result of an on-going bureaucratic mix-up on the part of the Pennsylvania Department of Motor Vehicles. (VonZech Affidavit at paragraph 2). Defendant contends that the last time VonZech's driving privileges were suspended as the result of a traffic violation was in 1986, almost ten years before the accident with plaintiff. VonZech's driving record, as submitted by plaintiffs, indicates that these four suspensions were for "failure to respond." The record indicates that the last time VonZech's license was suspended for a moving violation was in May of 1985,

of those years, VonZech drove between 15,000-20,000 miles for Xerox without a single traffic conviction or at-fault accident. (VonZech Affidavit at paragraph 1). The fact that a person's driving privileges were suspended in the past does not necessarily create a genuine issue of material fact for trial as to whether such person is a reckless or incompetent driver. In order to withstand a motion for summary judgment, plaintiffs must establish that a genuine issue of material fact exists for trial as to whether the defendant was a reckless or incompetent driver at the time of the accident and not merely at some point in the past. See generally Niemann v. Rogers, 802 F.Supp. 1154 (D. De. 1992). The fact that VonZech's driving privileges may have been suspended three years before the accident, and possibly as many as ten years, does not alone create a genuine issue of material fact for trial as to whether VonZech was a reckless or incompetent driver at the time of the accident.

The fact that VonZech did not take a defensive driving course, that may or may not have been required by Xerox, also does not create a genuine issue of material fact for trial as to whether VonZech was a reckless or incompetent driver.⁷ The fact

after which his driving privileges were restored in September of 1986. In any event, VonZech's driving record clearly indicates it had been at least five years prior to the accident that gave rise to this litigation that VonZech's driving privileges were last suspended for any reason and that VonZech's driving privileges were restored in March of 1992 more than three years before the accident.

⁷ Xerox maintains that its policies did not require VonZech to take a defensive driving course.

that an employer maintains an internal company policy that requires certain drivers to take a defensive driving course does not establish that such drivers are reckless or incompetent. This evidence merely demonstrates that Xerox had a business interest in having certain employees undergo additional driver training. It in no way suggests that VonZech was a reckless or incompetent driver, or constitutes some sort of concession on the part of Xerox that VonZech was a reckless or incompetent driver.

In sum, the evidence that VonZech's license was previously suspended and that VonZech may have failed to participate in a defensive driving course required by Xerox is not enough to withstand summary judgment. I am unable to conclude in light of this evidence, viewed in the light most favorable to plaintiff, a reasonable jury could conclude that VonZech was a reckless or incompetent driver at the time of the accident and that Xerox either knew or had reason to know this.⁸ Accordingly, that portion of plaintiffs' Motion for Reconsideration seeking reinstatement of Counts II and III of the complaint will be denied.

In the second part of their motion, plaintiffs seek reconsideration of my ruling that Xerox was not liable for the claims asserted by plaintiffs under the theory of respondeat

⁸ Because I have concluded that no genuine issue of material fact exists as to whether VonZech was a reckless or incompetent driver, there is no need for me to address the issue of Xerox's knowledge of VonZech's alleged recklessness or incompetence.

superior, in that its driver, VonZech, was not within the course and scope of his employment when the accident occurred and my denial of plaintiffs' claim of estoppel. Plaintiffs also request leave to conduct two additional depositions to supplement the record.

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 799 F.2d 906, 909 (3d Cir. 1985). A motion for reconsideration is not properly grounded on a request that a court reconsider repetitive arguments that have already been fully examined by the court or a request to raise arguments that could have previously been asserted. Id.

Plaintiffs have not come forward with any newly discovered evidence, do not cite an intervening change in controlling law and fail to point out any clear error of law or manifest injustice on these issues. Plaintiffs merely seek to rehash arguments and issues that I have already fully considered. Although plaintiffs seek to introduce several additional documents as a basis for their Motion for Reconsideration, these documents are not "newly discovered" evidence. Plaintiffs could have submitted these documents in opposition to defendant's Motion for Summary Judgment, but did not. These documents would not have altered the result, in any event.

Because plaintiffs have not come forward with any newly discovered evidence, do not cite an intervening change in controlling law and fail to point out any clear error of law or

manifest injustice, I will deny that part of plaintiff's motion

seeking reconsideration of their respondeat superior and estoppel arguments and plaintiffs' request for leave to conduct additional depositions.

An appropriate order follows.

