

DAVID A. BURKHART and
ELIZABETH J. BURKHART,
Plaintiffs

vs.

MONICA F. MIELE, DAVID M.
MIELE, INC. and THE HILLSIDE
CATERING BANQUET ROOM,

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA
: JURY TRIAL DEMANDED
:
: NO. 00-01,270
:
: CIVIL ACTION - LA W
:
: MOTION FOR SUMMARY JUDGMENT

DAVID A. BURKHART and
ELIZABETH J. BURKHART,
Plaintiffs

vs.

MONICA F. MIELE, DAVID M.
MIELE, individually and d/b/a DAVID M.
MIELE, INC. and THE HILLSIDE
CATERING BANQUET ROOM,
Defendants

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA
: JURY TRIAL DEMANDED
:
: NO. 00-01,335
:
: CIVIL ACTION - LAW
:
: MOTION FOR SUMMARY JUDGMENT

Date: November 21, 2001

OPINION and ORDER

Before the Court is the Defendants' Motion for Summary Judgment filed October 15, 2001. After briefs were filed this Court held argument on November 15, 2001.

History of the Case

Plaintiffs have filed two separate Complaints against Defendants, which have been consolidated. Plaintiff David A. Burkhardt asserts he was injured in an automobile accident which occurred on August 28, 1998, when it is asserted that Defendant Monica Miele backed into a car being operated by Mr. Burkhardt when it was stopped at a gas pump at a Texaco Service Station on East Third

Street in Williamsport. Additional named Defendants are Miele, Inc., David M. Miele, the husband of Monica F. Miele who is named individually and d/b/a David M. Miele, Inc. and the Hillside Catering Banquet Room. Plaintiffs' causes of action include an allegation of general negligence against Monica F. Miele as the driver of the automobile that struck Mr. Burkhardt's automobile and also theories of negligent entrustment and vicarious liability against the other Defendants. The vicarious liability claims assert that Monica F. Miele was an employee of the co-Defendants who also owned the vehicle that she was operating and further that the co-Defendants negligently entrusted their vehicle to Mrs. Miele the day in question.

The summary judgment motion asserts that there is no dispute that the specific automobile operated by Defendant Monica F. Miele, a 1998 green Mazda 626, was leased to her husband, David M. Miele. The summary judgment motion also asserts that Plaintiffs have failed to produce any evidence from which it could be determine that there was any negligent entrustment of the vehicle to Defendant Monica Miele and have also failed to produce any evidence that would in any way support Plaintiffs' theory that Monica Miele was employed or was furthering the business interest of any of the co-Defendants in the action.

Plaintiffs have essentially acknowledged that Miele, Inc. is not an appropriate Defendant. Plaintiffs also admit they have no evidence that would establish any facts upon which the theory of negligent entrustment can be pursued. Plaintiffs do assert however, that David M. Miele should be liable in individually and in his capacity in doing business as and owning David M. Miele, Inc. and the Hillside Catering Banquet Room under the vicarious liability theory of their Complaint.

When the summary judgment motion was filed on October 15th Defendants also filed a brief on that date which referenced and included in support of the motion for summary judgment as exhibits the following: Exhibit A, Plaintiffs' Complaint; Exhibit B, copy of Lease Agreement for the vehicle showing the name of Lessee as David M. Meile (sic); Exhibit C, Deposition of Monica Miele, April 3, 2001, pages 5 and 25; Exhibit D, Deposition of David M. Miele, April 3, 2001, page 6.

Plaintiffs have not filed an answer to the summary judgment motion but on November 9, 2001 did file in opposition thereto a brief containing as Exhibits opposing the motion the following: Exhibit A, Letter of September 21, 1998 from Traveler's Property and Casualty Insurance Company to Plaintiff David Burkhardt identifying that they were investigating the claim arising out of the accident of 8/98 and that the named insured was David M. Miele, Inc.; Exhibit B, Deposition of David Burkhardt, page 55; Exhibit C, copy of business card of Hillside Catering Banquet Room indicating that "David Miele Announces the Hillside Catering Banquet Room" which also indicates business name of the Hillside Caterer; Exhibit D, Deposition of Monica F. Miele, page 6; Exhibit E, Deposition of Monica F. Miele, page 7; Exhibit F, Deposition of Monica F. Miele, page 28; Exhibit G, Deposition of David M. Miele, page 4; Exhibit H, Deposition of David M. Miele, page 5; Exhibit I, Deposition of David M. Miele, page 7.

Based upon the argument of counsel, the Court understands that counsel have agreed that this Court should consider the brief filed by Plaintiffs as being the answer to Defendants' summary judgment motion and further the Court in determining the summary judgment motion should consider the exhibits attached to the briefs of each party.

From the foregoing the Court is able to ascertain that the uncontested facts relative to disposition of the motion for summary judgment include the following:

1. Miele, Inc. is not a corporate entity that is in any way connected to the Defendants.
2. David M. Miele conducts the catering business which is referred to as the Hillside Catering or the Hillside Catering Banquet Room through the corporate entity David M. Miele, Inc. and not individually.
3. Monica F. Miele was at the time of the accident employed in a non-related business but also was the secretary-treasurer of the corporation David M. Miele, Inc. She worked and assisted her husband in the catering business as a "gopher" and helped prepare food. The catering business includes catering for weddings. At the time of the accident, Defendant Monica Miele explained to Plaintiff David A. Burkhardt that she was "late for a wedding." The car involved in the accident being operated by Monica Miele was insured by the business David M. Miele, Inc. Monica F. Miele would help the catering business by running and picking up things needed at the last minute. In doing so, she would use the Mazda 626 automobile, which was involved at the time the accident in question occurred. Monica F. Miele is a 500% owner of the corporation David M. Miele, Inc. and David M. Miele is the other 50% owner thereof.

Discussion

Defendant claims to be entitled to motion for summary judgment as would relate to the liability of Defendant Monica Miele on the theory that all of Plaintiffs' evidence is such that if introduced

at trial would entitle the said Defendants to a non-suit. *Thompson Coal Company v. Pike Coal Company*, 488 Pa. 198, 412 A.2d 466 (1979). *See also, Musser v. Villsmeier Auction Company, Inc.*, 522 Pa. 267, 562 A.2d 279 (1989); *Britamco Underwriter, Inv. V. Weiner*, 636 A.2d 649 (Pa. Super. 1994). In addition Defendants cannot rely upon their own oral testimony to the effect that Monica F. Miele was not acting as an agent or employee of other Defendants at the time of the accident. *Barcia v. Savage*, 586 A.2d 1375 (Pa. Super. 1991).

The Court believes Plaintiffs have put forth sufficient evidence initially, from which an inference may be reasonably made that at the time of the accident Monica Miele was acting in furtherance of the catering business owned by she and her husband. In this regard the Court notes that Defendant Monica Miele has testified at deposition, page 25 deposition of April 3, 2001, that she does not remember whether she was or was not running an errand on the day and time of this accident. In fact, Defendants have failed to supply any discovery information in response to Plaintiffs' request as to whether or not the business did or did not have a wedding that day or weekend, although requested in April of 2001. They have not supplied any other information relating to what in fact Mrs. Miele was or was not doing at the time of the accident. Defendants assert that Monica Miele was merely a permissive user of the automobile that happened to be leased by Mr. Miele and insured by the business and used to further business purposes, at least in part, that she was not doing anything for the business at the date and time in question. This relies at best on Defendant David Miele and/or Defendant Monica Miele's own verbal statements. Such cannot be used to support a motion for summary judgment as the issue of their credibility is for the jury to determine. *Garcia v. Savage*, 586 A.2d 1375 (Pa. Super. 1991). In fact,

however, neither David Miele nor Monica Miele has actually stated what Mrs. Miele was doing in the way of the purpose of her driving the automobile at the date and time in question.

The Court believes there is sufficient disputed facts and facts not yet resolved by discovery which mandate that the Defendants' Motion for Summary Judgment as would relate to the vicarious liability of Defendants David M. Miele, Inc. and the Hillside Catering Banquet Room must be DENIED.

Accordingly, the following Order will be entered.

ORDER

The Motion of Defendants Miele, Inc. and David M. Miele are to be dismissed as Defendants in this action is GRANTED and they are hereby DISMISSED. Plaintiffs' theory of negligent entrustment is also DISMISSED as a cause of action in this matter. Otherwise, Defendants' Motion for Summary Judgement filed October 15, 2001, is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Sidney D. May, Esquire
309 Wyoming Avenue; Kingston, PA 18704
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Judges
Suzanne R. Lovecchio Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)
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