



## STATEMENT OF THE CASE

Douglas Manuel appeals the trial court's grant of Thomas Kestler's motion to correct error, thereby vacating summary judgment in favor of Manuel.

We affirm.

### ISSUE

Whether the trial court abused its discretion in granting Kestler's motion to correct error.

### FACTS

On or about May 22, 2004, Kestler was driving northbound on East Street in Indianapolis. As Kestler entered the intersection of East Street and National Avenue, the driver of a Ford Taurus turned left in front of him, causing a collision. Kestler did not see who was driving Manuel's vehicle as the driver fled the scene. Manuel, however, was the registered owner of the Taurus. Kestler suffered injuries as a result of the collision. At the time of the collision, Kestler and his wife maintained automobile insurance coverage through a policy issued by Progressive Northwestern Insurance Company ("Progressive").

On May 19, 2006, Kestler filed a complaint against Manuel, alleging negligence. Kestler also brought a claim for underinsured or uninsured benefits against Progressive. Manuel filed his answer on August 17, 2006. He also filed a non-party defense, alleging that Kestler's damages were "caused in whole, or in part, by Matthew McQuade[.]" (App. 162).

On May 31, 2007, Manuel filed a motion for summary judgment and memorandum thereon. In his motion for summary judgment, Manuel argued that there was no material issue of fact “as to the proof of the identity of the driver of [his] vehicle” and that as “Indiana does not recognize vicarious liability for owners of vehicles,” he did not owe a duty to Kestler. (App. 171).

Manuel designated his affidavit as evidence, averring that he had loaned his vehicle to McQuade on May 22, 2004, and therefore was not in possession or control of his vehicle when it was involved in the accident. He further averred that McQuade had borrowed the vehicle “to run some errands for himself” and that he “had no reason to believe that [McQuade] was an unsafe driver.” (App. 189). Manuel also designated Kestler’s deposition in which Kestler stated that he did not see the driver of the Taurus.

Kestler filed his opposition to Manuel’s motion for summary judgment on October 25, 2007. He argued that the identity of the driver was a genuine issue of material fact as the driver of Manuel’s vehicle fled the accident scene and a reasonable inference could be drawn from Manuel’s affidavit that he was the driver. He further argued that “a genuine issue of material fact exists as to whether [Manuel] negligently entrusted his vehicle to [McQuade].” (App. 222). Kestler designated as evidence the Indiana Officer’s Standard Crash Report, indicating that the driver of Manuel’s vehicle had fled the scene of the accident. He also designated as evidence his deposition, during which he testified that he had discovered empty beer cans in Manuel’s vehicle following the accident. The trial court granted summary judgment in favor of Manuel on January 3, 2008.

On February 1, 2008, Kestler filed a motion to correct, asserting that “[a] genuine issue of material fact exists as to whether [Manuel] negligently entrusted his vehicle to the man he identifies as Matthew McQuade, where McQuade committed a criminal act in fleeing the scene of the accident in question.” (App. 282). He argued that

[t]he only evidence Defendant Manuel has presented is a self-serving statement that he had no reason to believe Matthew McQuade was an unsafe driver. [Manuel] does not state how long he knew Mr. McQuade, how well he knew Mr. McQuade, whether he had ridden as a passenger in a vehicle driven by Mr. McQuade, whether McQuade was impaired or had been consuming alcohol or drugs at the time, whether Mr. McQuade was licensed to operate a motor vehicle, or the circumstances surrounding the situation in which [Manuel] allegedly loaned his vehicle to Mr. McQuade.

(App. 283). On February 12, 2008, the trial court granted Kestler’s motion to correct error and denied Manuel’s motion for summary judgment.

#### DECISION

Manuel asserts that the trial court abused its discretion in granting Kestler’s motion to correct error. We review a trial court’s ruling on a motion to correct error for an abuse of discretion. *Indiana Dep’t of Transp. v. Howard*, 879 N.E.2d 1119, 1121 (Ind. Ct. App. 2008). “An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before it or if the trial court misapplied the law.” *Id.* Where the granting of a motion to correct error results in setting aside summary judgment in favor of a party, we must determine whether that party was entitled to summary judgment. *See id.*

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Landmark Health Care Assocs., L.P. v. Bradbury*, 671 N.E.2d 113, 116 (Ind. 1996). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Ind. T.R. 56(C); *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167, 169 (Ind. 1996). “A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). “In negligence cases, summary judgment is rarely appropriate because they are particularly fact sensitive and are governed by a standard of the objective reasonable person—one best applied by a jury after hearing all of the evidence.” *Winchell v. Guy*, 857 N.E.2d 1024, 1026-27 (Ind. Ct. App. 2006).

Kestler asserts that Manuel beached his duty by negligently entrusting his vehicle to McQuade. A claim of negligent entrustment requires a showing that: (1) the defendant entrusted his car; (2) to an incapacitated person or one who is incapable of using due care; (3) with actual and specific knowledge that the person is incapacitated or incapable

of using due care at the time of the entrustment; (4) the entrustment proximately caused an injury; and (5) damages resulted from the entrustment. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 881 N.E.2d 996, 1001 (Ind. Ct. App. 2008).

Regarding incapacitation, Indiana requires that the defendant have actual knowledge that the driver was intoxicated when he entrusted the vehicle to him. *Id.* at 1003. “[E]vidence which reveals that the owner could have known or should have known of the driver’s unfitness to drive is not sufficient under present law to impose liability.” *Id.* (quoting *Stocker v. Cataldi*, 489 N.E.2d 144, 145 (Ind. Ct. App. 1986), *trans. denied*).

Regarding the negligent entrustment claim, Manuel designated and relied on his affidavit in support of his motion for summary judgment.

“[S]ummary judgment is inappropriate if a reasonable trier of fact could choose to disbelieve the movant’s account of the facts.” “[I]t is error to base summary judgment solely on a party’s self-serving affidavit, when evidence before the court raises a genuine issue as to the affiant’s credibility.” Inconsistencies and evasive language within the movant’s designated evidence may form a basis for denying summary judgment.

*Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008) (citations omitted), *trans. denied*.

Regarding the entrustment of his vehicle to McQuade, Manuel stated that McQuade had borrowed his vehicle on May 22, 2004. Although he claimed to have loaned his vehicle to McQuade on this date, he also claimed that he “was never in control of [his] vehicle on that date when it was involved in an accident.” (App. 190).

Moreover, Manuel referred to McQuade as his “friend,” someone he apparently knew well enough that he “had no reason to believe that he was an unsafe driver.” (App. 189). Despite his friendship with McQuade, however, Manuel apparently had not been in contact with McQuade since the accident as he had “no knowledge of what occurred or caused the alleged accident to occur.” (App. 190).

Here, Manuel only presented his self-serving affidavit as evidence in support of his motion for summary judgment on the negligent entrustment claim. Inconsistencies within the affidavit, however, raise issues as to Manuel’s credibility. The trial court therefore properly denied Manuel’s motion for summary judgment.

Furthermore, Manuel’s affidavit does not address McQuade’s fitness to drive—particularly whether McQuade was incapacitated—at the time of the entrustment. Thus, there remains a material issue of fact concerning Manuel’s knowledge of McQuade’s competency to drive when Manuel loaned his vehicle to him. Accordingly, denial of Manuel’s motion for summary judgment was proper. As denial of summary judgment was proper, we find no abuse of discretion in granting Kestler’s motion to correct error.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.