

Horton v Warden

2005 NY Slip Op 30308(U)

May 18, 2005

Supreme Court, Schuyler County

Docket Number: 01-237

Judge: Judith F. O'Shea

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At a Motion Term of The Supreme Court of
The State of New York held in and for the
Sixth Judicial District at the Hazlett
Building in Elmira, New York heard on the
1st day of April 2005.

PRESENT: HON. JUDITH F. O'SHEA
SUPREME COURT JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF SCHUYLER

Peggy L. Horton,

Plaintiff,

vs.

Randolph A. Warden,

Defendant.

DECISION & ORDER

INDEX # 01-237
RJI # 2002-0065-C

JUDITH F. O'SHEA, JSC

FINDINGS OF FACT

Plaintiff has moved for summary judgment on the issues of liability and serious injury concerning a motor vehicle accident that occurred on or about November 21, 2000 at the intersection of Perry City Road and Jacksonville Road in the Town of Ulysses, Schuyler County.

According to plaintiff's examination before trial testimony, she was operating her automobile in an easterly direction on Perry City Road while defendant was traveling northbound on Jacksonville Road. As she was approaching Jacksonville Road, she estimated that she was driving at approximately 50 miles per hour, which was 5 miles per hour less than the posted speed limit. Plaintiff stated that she first observed defendant's automobile, which was stopped at a stop sign, when she was approximately four car lengths from the intersection. When she began to enter the intersection, she states that defendant began to proceed through the crossing which required her move over into the left-hand lane to avoid a collision. However, she was unable to completely move her car into the left-hand lane and began to apply her brakes when defendant's vehicle struck the passenger's side of her car. It is undisputed that plaintiff did not have a stop sign in her direction of travel on Perry City Road that required her to yield the right of way to approaching traffic on Jacksonville Road. Likewise, both parties testified that the weather conditions that day were sunny and dry.

According to defendant's examination before trial testimony, he stated that as he approached the intersection of Perry City Road and Jacksonville Road, he stopped at the stop sign and looked to his right and did not observe oncoming traffic. As he looked to his left, he saw a vehicle coming to the crest of the road and he stopped his car. As he looked to see if any vehicles were coming out of the driveways on Perry City Road, he began to enter the intersection after the car had passed through the crossing. When doing so, he "saw something on [his] left, a motion, and [he] jammed on the brake." He then stated that he "saw the vehicle [that] struck me coming and it seemed to be coming very fast, but I didn't look at it, I can't estimate the speed on it." He stated that he had never seen plaintiff's vehicle before he came out of his stop and began proceeding through the intersection. Defendant was thereafter issued a ticket for failure to yield the right of way pursuant to Vehicle and Traffic Law § 1142(a) and subsequently pled guilty to a reduced charge of failure to obey a traffic control device pursuant to Vehicle and Traffic Law § 1110(a).

Based upon the foregoing, plaintiff maintains that the accident was caused solely by defendant's failure to yield the right of way and seeks summary judgment on the issue of negligence.

As far as the request for summary judgment on the issue of serious injury, plaintiff relies on the findings of defendant's examining physician, Neurosurgeon Dr. Anthony M. Avellanosa, who concluded that her injuries were causally related to the motor vehicle accident of November 21, 2000. Dr. Avellanosa examined plaintiff on December 18, 2003, in which she complained of low back and neck pain, persistent numbness involving the lateral aspect of her right thigh, and stiffness or spasms involving the lumbosacral region. He also noted the presence of degenerative disc disease. Dr. Avellanosa's diagnosis was that plaintiff sustained a myofascial strain/injury to her lumbar region as well as a herniated disc at L4-5 which were directly related to the motor vehicle accident. In arriving at this conclusion, Dr. Avellanosa reviewed and studied the emergency room records, medical records of plaintiff's treating physicians, numerous radiological tests, and surgical reports concerning procedures performed on October 11, 2001 and August 29, 2002. It appears from the report that plaintiff initially underwent surgery in October 2001 for anterior lumbar disc removal with the placement of titanium cages at L4-5, however, a subsequent surgical procedure (pedicle screw fixation at L4-5) was needed in August 2002 because she showed no signs of improvement.

Dr. Avellanosa opined that plaintiff sustained a herniated disc as a result of the accident and that as a result of her injuries and subsequent surgical procedures, she has sustained a significant permanent injury. Likewise, he concluded that the application and implantation of spinal instrumentation (titanium cages, pedicle screw and plates) will contribute to a significant permanency. However, he was unable to quantify the degree of the permanency until the bone fusion and stabilization of the spine was attained. He also opined that plaintiff is unable to return to work at the present time due to her injuries.

Therefore, plaintiff asserts that summary judgment is also warranted on the issue concerning the presence of a serious injury pursuant to Insurance Law § 5102(d).

Defendant has filed a cross-motion for dismissal pursuant to CPLR § 3216 as well as opposing papers to plaintiff's summary judgment motion. Defendant asserts that plaintiff has failed to comply with two Court Orders concerning the filing of a note of issue. Specifically, plaintiff was ordered to file a note of issue on or before April 15, 2004 after a preliminary conference was held on August 22, 2003. Thereafter, plaintiff was granted an extension of time until September 30, 2004 to file the note of issue after a conference was held on May 28, 2004. Defendant seeks dismissal due to the fact that plaintiff has yet to file a note of issue.

In opposition to summary judgment, defendant claims there are numerous issues of fact as to whether his actions were negligent. For instance, he claims that the record establishes that he stopped at the intersection, looked both ways before entering, and took appropriate precautions before proceeding. Moreover, defendant claims there is a question of fact concerning plaintiff's speed as she approached the intersection down the hill. Despite plaintiff's testimony that she was traveling at 50 miles per hour at the time of the accident, defendant points out that plaintiff signed a statement shortly after the accident that her speed was between 55 and 57 miles per hour. Therefore, defendant contends that there is an issue of fact as to whether plaintiff operated her vehicle at an excessive rate of speed given the hilly area of the intersection.

Defendant retained Paul Van Vorce, an accident reconstructionist, who filed an affidavit based on his inspection of the accident scene and after review of the parties' depositions. Mr. Van Vorce concluded that plaintiff's vehicle would have been traveling at a rate of 74.76 feet per second if she was driving at 51 miles per hour on Perry City Road. In relying on plaintiff's statement that she was approximately four car lengths from the intersection when she first observed defendant's stopped vehicle, Mr. Van Vorce calculated that it would have taken plaintiff .66 seconds to reach the intersection at 51 miles per hour. When the defendant then started through the intersection, Mr. Van Vorce opines that defendant's car would have only traveled 2 feet and would not have entered into the intersection. He claims that if plaintiff was in fact traveling at 55-57 miles per hour, no accident would have happened, since her vehicle would have safely passed through the intersection at an earlier time. In light of the fact that he applied a speed of 51 miles per hour, Mr. Van Vorce opined that plaintiff's distance from the intersection had to be farther than four car lengths (or 50 feet) when she first observed defendant's car. In estimating that it took defendant 2.5 seconds to reach the point of impact, he calculated that plaintiff would have first observed defendant moving when she was 186.9 feet away from the intersection. He then calculates that a vehicle traveling at 51 miles per hour that applies brakes has a stopping distance of 133 feet without taking into consideration reaction time.

Finally, defendant claims that there are issues of fact concerning the contributory negligence of the plaintiff in the operation of her automobile. In relying on Mr. Van Vorce's opinions, defendant claims there are questions as to whether plaintiff should have taken evasive action to avoid the accident.

As far as the existence of a serious injury, defendant asserts that plaintiff has failed to identify under which category of Insurance Law § 5102(d) that plaintiff is relying on. Additionally, defendant points out that the report of Dr. Avellanosa fails to state whether the serious injury threshold has been met. Defendant contends that plaintiff cannot rely on Dr. Avellanosa's finding of permanency because he could not draw a conclusion as to its degree or

existence until complete bone fusion and stabilization of the spine has been attained. Likewise, defendant points out that Dr. Avellanosa indicated that in his medical opinion, plaintiff as an overall good prognosis. Furthermore, defendant claims that there is an issue of fact concerning plaintiff's pre-existing degenerative condition and the injuries she sustained in the accident. Thus, defendant contends that a jury should determine the extent of plaintiff's current injuries related to the accident in conjunction with her pre-existing degenerative disease.

Plaintiff opposes defendant's cross-motion for dismissal, stating that the note of issue was sent for filing with the Schuyler County Clerk on March 30, 2005, thereby making defendant's request for relief moot. As far as the expert affidavit offered by defendant, plaintiff asserts that Mr. Van Vorce provides no foundation or basis for the calculations, measurements and formulas that he used to arrive at his opinion. Additionally, defendant takes issue with Mr. Van Vorce using a speed of 51 miles per hour when plaintiff testified that she was traveling at 50 miles per hour. Therefore, defendant claims that the affidavit offered by Mr. Van Vorce lacks probative value and is conclusory and speculative. Plaintiff also claims that the written statement she purportedly made after the accident is unsworn, not in her handwriting, and was authored by a representative of defendant's insurance carrier.

Plaintiff also exclaims that defendant's own physician acknowledged the presence of degenerative disc disease, but never stated that it was aggravated and/or caused or contributed to the injuries plaintiff sustained in the accident. Plaintiff maintains that Dr. Avellanosa's conclusions show that plaintiff has sustained a serious injury in terms of a significant limitation of use of a body function or system, a permanent consequential limitation of use of a body function or system, and the 90/180 day category. Finally, plaintiff contends that the damages phase of this action will adequately address defendant's arguments concerning plaintiff's pre-existing degenerative disease.

CONCLUSIONS OF LAW

Based upon the respective testimonies of the parties, plaintiff has established as a matter of law that defendant's negligence, i.e., his failure to yield to the right of way to oncoming traffic, was the sole proximate cause of the accident. See, Garnsey v. Bujanowski, 13 A.D.3d 857 (3rd Dept. 2004). It is well-settled that "an operator who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield" (Matt v. Tricil (N.Y.) Inc., 260 A.D.2d 811 [3rd Dept. 1999], quoting Namisnak v. Martin, 244 A.D.2d 258, 260 [1st Dept. 1997]). See, also O'Hara v. Tonner, 288 A.D.2d 513 (3rd Dept. 2001). The record establishes that it was a clear and sunny day in which plaintiff had the right of way while defendant was obligated to yield to oncoming traffic. Moreover, defendant admitted that he did not see plaintiff's vehicle before proceeding into the intersection. Defendant has failed to raise a triable issue of fact since he was obligated "to see what by the proper use of [his] senses [he] might have seen" (Rowe v. Harrison, 303 A.D.2d 863 [3rd Dept. 2003]; see, also Colaruotolo v. Crowley, 290 A.D.2d 863 [3rd Dept. 2002]; Jaycox v. Hardesty, 305 A.D.2d 720 [3rd Dept. 2003]). Moreover, there is nothing in the record to substantiate that plaintiff had the opportunity to take evasive action to avoid the collision or an obligation to reduce her speed even further. See, Mosch v. Hansen, 295 A.D.2d 717 (3rd Dept. 2002). Defendant's guilty plea, coupled with

his testimony, establishes that his negligence was the sole proximate cause of the accident. See, Jones v. Fraser, 265 A.D.2d 773 (3rd Dept. 1999). The affidavit of defendant's expert fails to raise a question of fact or adequately explain how plaintiff was negligent, contributed to the accident, or how evasive action by plaintiff could have avoided the collision. Moreover, the findings of Mr. Van Vorce are not supported by specific data that he relied on in arriving at his calculations, estimated speeds and distances, and formulas used in rendering his opinion.

As far as the issue of whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d), it is important to note that defendant's own physician concluded that plaintiff's injuries were causally related to the motor vehicle accident of November 21, 2000. Dr. Avellanosa's examination of plaintiff, coupled with his review of her medical records, diagnostic reports and surgical reports, led him to believe that plaintiff has sustained a permanent injury to her lumbosacral spine. Despite the fact that Dr. Avellanosa did not specifically declare that plaintiff's injuries met the serious injury threshold, a complete and thorough reading of his report shows that plaintiff sustained a significant permanent injury to warrant judgment as a matter of law.

In light of the fact that plaintiff has now filed the note of issue, defendant's cross-motion is denied.

It is therefore

ORDERED, that plaintiff's motion for summary judgment is hereby **granted** in its entirety; and it is further

ORDERED, that defendant's cross-motion for dismissal is **denied** in its entirety.

This shall constitute the Decision and Order of The Court.

ENTER

Dated: May 18, 2005.


Hon. Judith F. O'Shea
Supreme Court Justice