

**Craft v Herold**

2006 NY Slip Op 30134(U)

September 26, 2006

Supreme Court, Cayuga County

Docket Number: 0006272/0051

Judge: Mark H. Fandrich

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FILED

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF CAYUGA

2006 SEP 28 AM 11:50

CAYUGA COUNTY CLERK

ANDREA L. CRAFT,

Plaintiff,

-vs-

RICHARD J. HEROLD, EMPIRE STATE  
MOTOR EXPRESS, INC., TONY L. SCHLEY,  
KNIGHT TRANSPORTATION MIDWEST, INC.,  
"JOHN DOE" (the name "JOHN DOE" being  
fictitious, the real name of the Defendant being  
unknown to Plaintiff, said fictitious name being  
intended to designate the individual(s)/company(ies)  
that owned the trailer bearing New York State  
registration number AE82950), and "JANE DOE"  
(the name "JANE DOE" being fictitious, the  
real name of the Defendant being unknown to  
Plaintiff, said fictitious name being  
intended to designate the individual(s)/company(ies)  
that owned the trailer bearing Indiana State  
registration 574851),

DECISION

Index No. 05-627

HON. MARK H. FANDRICH  
ACTING SUPREME COURT JUSTICE

Defendants.

*Appearances:*

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Fandrich, Mark H., Acting Justice

Plaintiff, Andrea L. Craft, commenced this action for damages allegedly sustained in a motor vehicle accident that occurred on NYS Rt. 34 in the Town of Sennett. Plaintiff was driving her vehicle in the southbound lane of NYS Rt. 34, and passed a tractor trailer to her right that was also traveling south on NYS Rt. 34. The passing occurred at a place where the southbound lane opens into two lanes, one on the left for passing and the other on the right for slower vehicles. The tractor trailer was driven by defendant, Richard J. Herold, and owned by defendant, Empire State Motor Express, Inc. According to defendant Herold, plaintiff's vehicle was behind his tractor trailer and as they went over the hill, and that plaintiff actually passed his vehicle as they went down the hill at a point when the southbound lanes began to merge into one lane. After passing the tractor trailer, plaintiff's vehicle pulled into the now single southbound lane. Defendant Herold testified that as plaintiff's vehicle passed him, he pulled his truck to the right and straddled the fog line. He also testified that plaintiff's vehicle entered the northbound lane of traffic before it pulled back into the southbound lane in front of his vehicle; that plaintiff then lost control of her vehicle; and that plaintiff's vehicle fishtailed and swerved into the northbound lane of traffic, thereby hitting and bouncing off of the guardrail on the right side of the northbound lane. Defendant Herold also testified that at no time did any part of his vehicle come into contact with plaintiff's vehicle.

Another tractor trailer was traveling in the northbound lane at the time that plaintiff's vehicle crossed into the northbound lane. The northbound tractor trailer was driven by defendant, Tony L. Schley, and owned by defendant, Knight Transportation Midwest, Inc. Defendant Schley testified that he first saw plaintiff's vehicle when plaintiff's vehicle and defendant Herold's

vehicle were nearing the crest of the hill in the southbound lane of traffic. Defendant Schley testified that at that point in time, plaintiff's vehicle and defendant Herold's vehicle were nose to nose, and that he then saw plaintiff's vehicle pull in front of defendant Herold's vehicle but that he does not recall seeing plaintiff's vehicle cross over into the northbound lane as she was passing defendant Herold's vehicle. Defendant Schley further testified that he saw plaintiff's vehicle pull in front of defendant Herold's vehicle after she passed defendant Herold's vehicle; that plaintiff's vehicle then began to fishtail and immediately crossed into defendant Schley's northbound lane of traffic where plaintiff's vehicle hit the guardrail located on the right side of the northbound lane; and that plaintiff's vehicle spun in front of defendant Schley's vehicle. Defendant Schley testified that perhaps a "couple of seconds" elapsed between the time he saw plaintiff's vehicle fishtail and when his vehicle came in contact with plaintiff's vehicle. Defendant Schley also testified that when he saw plaintiff's vehicle fishtail, he took his foot off the accelerator and when the Plaintiff lost control of her vehicle, he applied his brakes – he assumed that his brakes locked up. Prior to the impact, he was traveling between 50 and 55 mph. Defendant Schley also testified that he could not have swerved to the right due to the guardrail, or to the left due to on-coming traffic.

Defendant Schley and Knight Transportation Midwest , Inc., bring this motion for summary judgment. They request dismissal of plaintiff's action against them on the basis that plaintiff's vehicle crossed into defendant Schley's lane of travel and that defendant Schley committed no negligence since he had but a few seconds to react to plaintiff's vehicle and could not have avoided the impact.

In opposition, plaintiff and defendants Herold and Empire Motor Express, Inc., contend

that there is a question of fact as to whether defendant Schley had sufficient time to take emergency measures to avoid the accident. They allege that defendant Schley's vehicle was 200 to 300 yards from plaintiff's vehicle and defendant Herold's vehicle when defendant Schley first viewed plaintiff's vehicle and defendant Herold's vehicle at the crest of the hill. They further allege that the only remedial measure taken by defendant Schley was to ease up on the gas and not brake. In addition, defendant Herold testified that he believes that after plaintiff's vehicle hit the guardrail, it came across into the southbound lane and impacted with the rear of defendant Herold's vehicle before crossing a second time into the northbound lane and impacting with Defendant Schley's vehicle. Although defendant Herold did not see the impact to his vehicle, he supports his theory of the accident with the fact that the rear wheels tandems of his vehicle were broken with taillights inside the hub. Plaintiff and defendants Herold and Empire Motor Express, Inc., conclude that all of this evidence presents a question of fact as to whether defendant Schley had sufficient time to avoid the collision.

Defendants Schley and Knight Transportation Midwest, Inc., have established a complete defense to plaintiff's action by submitting proof in admissible form that the collision between plaintiff's vehicle and defendant Schley's vehicle was caused by plaintiff's presence in defendant Schley's lane of travel. (Kozak v. Hyjek, 221 A.D.2d 999, 4th Dept., 1999; Moshier v. Phoenix Central School District, 199 A.D.2d 1019, 4th Dept., 1993, *aff'd*, 83 N.Y.2d 947). Plaintiff and defendants Herold and Empire Motor Express, Inc., have failed to respond by offering proof in admissible form that defendant Schley could have avoided the accident, or that defendant Schley's actions contributed to the accident. (Gouchie v. Gill, 198 A.D.2d 862, 4th Dept., 1993, Wasson v. Szafarski, 6 AD3d 1182, 4<sup>th</sup> Dept., 2004; Clough v. Szymanski, UPS Inc., 26 AD3d

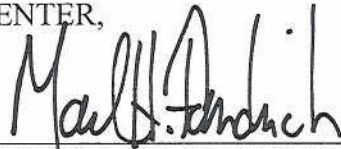
894, 4<sup>th</sup> Dept., 2006). It is pure speculation that plaintiff's vehicle crossed into the northbound lane two times before the impact thereby giving defendant Schley adequate time to avoid the collision. (Tran v. Nowak, 245 A.D.2d 1083, 4th Dept., 1997). Defendant Herold did not see, hear or feel an impact to his vehicle at any time during this episode. He only saw that his rear tandem wheels were bent with taillights inside a hub. Yet, there is not evidence in admissible form or otherwise, to support the argument that the rear tandem wheels were bent by plaintiff's vehicle before the impact with defendant Schley or that the taillights belonged to plaintiff's vehicle. Therefore, a question of fact does not exist as to whether defendant Schley had sufficient time to avoid the collision or otherwise contributed to the collision with plaintiff's vehicle.

By reason of the foregoing, the motion for summary judgment brought by defendants Schley and Knight Transportation Midwest, Inc., is hereby granted, without costs.

SUBMIT ORDER.

Dated: September 26, 2006  
At Auburn, New York

ENTER,



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HON. MARK H. FANDRICH  
Acting Supreme Court Justice