

**Boyle v Boyce**

2007 NY Slip Op 30581(U)

April 2, 2007

Supreme Court, Ulster County

Docket Number: 0043371/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

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JEFFREY S. BOYLE and KELLY A. BOYLE,

Plaintiffs,

-against-

Index No.: 04-3371

RJI No.: 55-06-01868

GERALD T. BOYCE, TOPHER CORPORATION  
and PEPSI COLA NEWBURGH BOTTLING CO., INC.,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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**DECISION/ORDER**

George B. Ceresia, Jr., Justice

Plaintiff has moved for summary judgment on the issue of liability in the instant action arising out of a chain reaction rear end collision. The tractor-trailer owned by defendant Topher Corporation and driven by defendant Boyce while in th employ of defendant Pepsi Cola rear ended a flat bed truck, which then struck a Ford Expedition, which in turn struck plaintiffs' vehicle.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

“A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision (see Niyazov v Bradford, 13 AD3d 501; Russ v Investech Sec., 6 AD3d 602; Vecchio v Hildebrand, 304 AD2d 749, 750; McGregor v Manzo, 295 AD2d 487).” (Rainford v Han, 18 AD3d 638 [2d Dept 2005]). Defendants do not offer any excuse

whatsoever for the initial collision. Indeed, the record shows that defendant driver did not see traffic stopped in front of him because he was bent over to pick up a piece of paper from the floor of his truck.

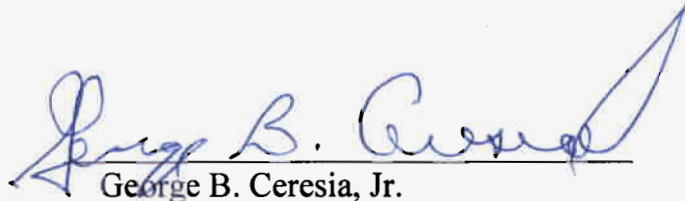
Instead, defendants seek to limit their liability on the ground that a non-party, the driver of the Ford Expedition, changed lanes in front of the flat bed truck, thereby reducing the amount of space between the flat bed truck and the plaintiffs' vehicle. The testimony of the driver of the flat bed truck indicates that the Ford Expedition changed lanes when the flat bed truck was almost at a complete stop. At the time there were approximately two full truck lengths between the flat bed and the plaintiffs' vehicle. The lane change did not require the flat bed truck driver to stop quickly. Moreover, the Ford Expedition and the flat bed truck had been at a full stop for a considerable period of time before the collision. It is thus clear that the lane change was not negligent and did not proximately cause the accident. Moreover, the claim that the plaintiffs' vehicle might not have been struck if there had been the additional space occupied by the Ford Expedition is entirely speculative and ignores the laws of physics, i.e. the Ford Expedition absorbed some of the energy of the impact. At a minimum, expert testimony would be required to create an issue of fact on such issue.

Accordingly it is

**ORDERED** that plaintiff's motion for partial summary judgment on the issue of liability is hereby granted.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiff, who are directed to enter this Decision/Order without notice and to serve defendant's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York  
April 2, 2007

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

Notice of Motion dated November 1, 2006; Affidavit of William N. Cloonan, Esq. sworn to November 1, 2006 with Exhibits A-G annexed; Affidavit of Jeffrey S. Boyle sworn to September 26, 2006;

Affirmation of Leonard Kessler, Esq. dated January 16, 2007 with Exhibit A annexed;

Reply Affidavit of William N. Cloonan, Esq. sworn to January 24, 2007 with Exhibits A-I annexed.