

Ward v Press

2008 NY Slip Op 30949(U)

March 27, 2008

Supreme Court, Nassau County

Docket Number: 8532-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

THOMAS P. WARD, As Father and Natural
Guardian of the Infant, NICOLE WARD, and
THOMAS P. WARD, Individually,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 18532/05

Plaintiffs,

- against -

Motion Sequence No. 001

SCOTT J. PRESS,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves for an order granting summary judgment in favor of the defendant pursuant to CPLR 3212, and dismissing the plaintiff's complaint. The plaintiffs oppose the motion. The underlying personal injury action arises from the alleged collision on August 20, 2005, at approximately 7:20 p.m., between the then 15 year old high school plaintiff infant student operating a bicycle, and the adult locksmith defendant operating a 2002 Infinity QX4, four door automatic transmission SUV.

The defense counsel notes, in a supporting affirmation dated September 28, 2007, the defendant motorist testified at an examination before trial on January 4, 2007. The

defendant testified he drove down Oceanside Road southbound for approximately three blocks on the day of the accident. The defendant testified he drove within the posted speed limit, and there were cars to his right when suddenly the plaintiff bicyclist appeared on his right side. The defendant testified he took evasive action by braking and swerving into the oncoming lane as to avoid contact with the oncoming plaintiff bicyclist, but despite his efforts, the plaintiff continued to come toward the vehicle, and collided with the front passenger side of the vehicle operated by the defendant less than a second from the moment the defendant observed the bicyclist. The defense counsel points to photographs, Exhibits E and F, in the supporting papers, showing the dent located on the passenger side of the defendant's vehicle just above the front wheel well as illustrating the bicycle's point of contact with the vehicle. He asserts the evidence clearly supports the plaintiff bicyclist rode her bicycle into the side of the defendant's vehicle. Counsel also notes the infant plaintiff bicyclist testified at an examination on November 7, 2006. He states the plaintiff bicyclist testified, while unsure of many details surrounding the happening of the accident, the plaintiff was riding her bicycle with her father. The infant plaintiff bicyclist testified she recalled her father crossed the street and the infant plaintiff bicyclist attempted to follow him.. He avers the evidence is clear the infant plaintiff bicyclist entered the roadway without stopping, and the infant plaintiff bicyclist failed to yield the right of way to the motorist defendant. He contends the accident occurred within a matter of seconds, and there was insufficient time for the defendant to take evasive

action. The defense counsel maintains it is well settled that bicyclists are subjected to the same traffic laws as motorists, therefore a bicyclist has a duty to yield the right of way to another vehicle when approaching an intersection. He further argues the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party, so summary judgment is appropriate.

The plaintiffs' attorney states, in an opposing affirmation dated November 26, 2007, the plaintiff's traumatic brain injury and resulting memory loss is not in dispute, so the plaintiff's burden of proof here must be measured by the lesser *Noseworthy* standard. Counsel contends the plaintiffs are not held to as high a degree of proof here as a plaintiff in a regular personal injury action, and they are entitled to benefit from every reasonable inference which can reasonably be drawn from the evidence in determining whether a prima facie case has been made out. He argues the Court has greater latitude in inferring negligence on the part of the defendant from all of the evidence in the case, and the plaintiff is entitled to prevail on a lighter burden of persuasion by simply making some showing of the defendant's negligence, even if weak. The plaintiffs' attorney claims, due to the infant plaintiff's traumatic brain injury and resulting memory loss, the plaintiff is entitled to a relaxed burden of proof which also requires the defense motion be denied.

He counters the defendant has failed to meet the initial burden of establishing the absence of a triable issue of fact. The plaintiffs' attorney points out defense motion papers are devoid of any evidence to support the plaintiffs' claims that the infant plaintiff

rode her bicycle into the side of the defendant's vehicle, entered the roadway without stopping, and failed to yield the right of way.

The defendant has established a prima facie entitlement to summary judgment by tendering evidence demonstrating that the plaintiff was negligent as a matter of law in failing to yield the right of way at the intersection, there was insufficient time for the defendant to take evasive action. (see Vehicle and Traffic Law § 1140; *Odumbo v. Perera*, 27 A.D.3d 709, 813 N.Y.S.2d 462; *Willis v. Fink*, 7 A.D.3d 519, 520, 775 N.Y.S.2d 587) and the bicyclist failed to see the automobile which by proper use of her senses she should have seen (see *Breslin v. Rudden*, 291 A.D.2d 471, 738 N.Y.S.2d 674; *Botero v. Erraez*, 289 A.D.2d 274, 734 N.Y.S.2d 565). Moreover, the defendant motorist, who had the right of way, was entitled to anticipate that the infant plaintiff bicyclist would obey traffic laws requiring bicyclist to yield. In opposition to the motion, the plaintiff submitted only an attorney's affirmation arguing that defendant had enough time to avoid the accident, and speculating that defendant should have taken evasive action to avoid the bicyclist entering the roadway. The question becomes whether that affirmation is insufficient to raise a triable issue of fact.

The plaintiffs claim, as a result of the injuries sustained by the infant plaintiff bicyclist in the accident, the youngster suffers from a loss of memory which makes it impossible for the youth to recall events at or about the time of the accident. The plaintiffs have the burden of showing the youth is suffering from a loss of memory caused

by the accident. This claim must be supported by the nature and extent of the injuries to the plaintiff, and that the plaintiff's loss of memory was caused by the accident. (*see, Miceli v GEICO Properties, Inc.*, 215 AD2d 461, 626 NYS2d 266 and *Jarrett v Madifari*, 67 AD2d 396, 415 NYS2d 644), Where the parties are similarly situated insofar as accessibility to the facts of the accident, the Noseworthy rule has no application, *Gayle v New York*, 256 AD2d 541, 682 NYS2d 426; *Ether v State*, 235 AD2d 685, 651 NYS2d 752.

The plaintiff must establish, by clear and convincing evidence, that plaintiff suffers from amnesia caused by the accident, (*Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812; *Nahvi v Urban*, 259 AD2d 740.) In light of that limitation, plaintiff must be permitted to present medical testimony concerning the relationship between the retrograde amnesia condition and the incident and concerning its effect, (*see Mahon v Giordano*, 30 AD2d 792). Since amnesia is easily feigned, the Schechter case, although approving application of the Noseworthy principle to amnesiacs, imposed the requirement of clear and convincing evidence set forth in the second paragraph of the pattern charge. Absent any medical evidence of amnesia and causation, plaintiff will not be entitled to the more lenient standard of proof, *McGuire v Laier*, 281 AD2d 40; *Nahvi v Urban, supra*; *Costa v Hicks*, 98 AD2d 137 Only the amnesiac plaintiff could testify that he or she saw the danger and sought to avoid it, *Schechter v Klanfer*, 28 NY2d 2282.

The burden of proof remains on the amnesiac plaintiff, however, to present prima

facie evidence of defendant's negligence before the Noseworthy rule can be applied, *Smith v Stark*, 67 NY2d 693, because the Noseworthy rule describes "a method of, or approach to, weighing evidence," . This permits greater latitude in drawing an inference of negligence, but does not shift the burden of proof. Nevertheless, a plaintiff must make some showing of defendant's negligence to invoke the rule . Unless there is some evidence, even if weak, upon which a jury could find defendant negligent, the complaint must be dismissed. Plaintiff, in order to prove amnesia by clear and convincing evidence, must produce expert testimony establishing a loss of memory. Absent expert testimony, a jury "is not capable of evaluating the effects of a trauma or the symptoms which may verify the loss of memory and indicate that it is real and not feigned.

Accordingly, the motion is granted and the complaint is dismissed.

So ordered.

Dated: **March 27, 2008**

ENTER:

J. S. C.

HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

APR 01 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**