

Reese v Bouchard

2015 NY Slip Op 32653(U)

December 14, 2015

Supreme Court, Rensselaer County

Docket Number: 247337

Judge: Patrick J. McGrath

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At an IAS Term of the Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 30th day of November 2015

PRESENT: HON. PATRICK J. McGRATH, JSC

SUPREME COURT STATE OF NEW YORK
COUNTY OF RENSSELAER

Received
County Clerks Office
Dec 22, 2015 10:58A
Rensselaer County
Frank J Merola

**ANTWON P. REESE, an infant, by
CATHERAN CARTER, his mother and
CATHERAN CARTER, individually,**

Plaintiffs,

-against-

**DECISION AND ORDER
INDEX NO. 247337**

LISA A. BOUCHARD,

Defendant.

APPEARANCES: TABNER, RYAN AND KENIRY, LLP
Attorneys for the Plaintiff

KELLY & LEONARD, LLP
Attorneys for the Defendant

McGRATH, PATRICK J., J.S.C.

In this personal injury case, plaintiffs bring a motion *in limine* to preclude the introduction of surveillance video into evidence at trial. Plaintiffs seek damages as a result of injuries suffered by then nine year old Antwon P. Reese on August 1, 2013 when he was struck by a vehicle driven by the defendant while attempting to cross 5th Avenue in Troy, New York. Plaintiff was walking from his house to a Capital District Transportation Authority (CDTA) bus stop to receive a package from a family friend. During his deposition testimony, plaintiff stated that after obtaining the package, he proceeded in front of the stopped CDTA bus, checked for traffic, saw no cars, and began crossing the street. He states that he did not see the defendant's car before being struck. Defendant states that plaintiff ran into the side of her car and she had no time to avoid the collision. She claims that she was driving between 25 and 30 miles per hour, a reasonable speed for roadway and the traffic.

At the time of the accident, the CDTA bus on which plaintiff's family friend was riding came to a stop, and was recording both video images and audio recordings. The bus has multiple cameras showing various views. One camera shows the front door of the bus, from above the driver to the street outside. Another camera shows the street in front of the bus. The plaintiff is seen catching a

package tossed from someone on the bus once the bus pulls into the stop. Plaintiff is then seen proceeding in front of the bus. The view from the street in front of the bus shows the moment of impact, and plaintiff being thrown into the air. Plaintiff argues that the videos fail to resolve the "main question" at issue, namely, whether the plaintiff darted out into the street. As such, plaintiff argues that all of the videos are irrelevant and should be precluded at the trial.

In addition, plaintiff claims that the videos constitutes hearsay. Plaintiff notes that hearsay is not limited to the spoken word, but also includes non-verbal conduct. Plaintiff notes that the video includes not only imagery, but statements made by passengers, describing the accident after it occurred. Plaintiff argues that the statements made by passengers, if they can be identified, that occur while plaintiff is receiving medical attention are too far removed from the accident to constitute an "excited utterance" or a "present sense impression."

Finally, plaintiff argues that the probative value of the video is outweighed by its prejudicial effect. Plaintiff argues that Plaintiff is out of view until he is seen flying back from the defendant's car after impact. Plaintiff claims that it is "reasonable that a jury could see this footage and assume, without proper factual support, that [plaintiff], who continued in stride to cross in front of the bus, also did not stop and look before crossing the street. Because the video fails to show [plaintiff's] actions as he enters the roadway, this would...be an unreasonable assumption to make.." Plaintiff also notes that the video does not show the defendant's driving prior to the accident. Plaintiff argues that "because defendant's actions are important to the jury's determination of liability, and the video does not adequately show defendant's driving, unfavorable inferences cannot be made about defendant after watching this video."

Defendant opposes the motion, noting that plaintiff does not claim that the videos are not authentic, or that they do not provide a true and accurate representation of the events they portray. Defendant argues that the videos are relevant because they show plaintiff catching a bag thrown to him by a passenger on the bus, and that he is then seen "running in front of the bus." The next depiction of the plaintiff shows him "running into the front passenger corner panel" of the defendant's car. Defense counsel notes that the video can be played at real time or it can be stopped at any point. Counsel argues that the video shows the moment of impact with the vehicle, and "clearly shows the plaintiff in a running posture." Defense counsel argues that the video is uncontroverted evidence which will confirm the anticipated testimony of the bus driver that the boy "darted out in front of the bus," that he never made eye contact with the boy, nor did he signal for the boy to cross. Defense counsel also notes that the video contradicts certain aspects of the boy's deposition testimony, specifically, his claims that the person that he knew on the bus waived him in front of the bus. Additionally, plaintiff testified that he stopped at the front driver's corner of the bus and looked both ways. Counsel argues that the video contradicts both claims. Counsel also notes that the video is relevant because it shows contact between the plaintiff and defendant, as well as the color of the light at the moment of impact. Counsel argues that the actual video of an accident is the best evidence of what occurred, and the jury should see it.

Defense counsel concedes that some of the recorded audio statements made by unidentified

people on the bus may be inadmissible hearsay, but that the statements of the identified people are not hearsay. Counsel claims that the determination of what statements may need to be redacted should be addressed at the time of trial

In reply, plaintiff argues that there is “no way” to definitively state that plaintiff was running. Counsel also disputes defendant’s position that the video shows the moment of impact, and that plaintiff is only seen for “a split second” prior to impact. Counsel states that what defense counsel perceives as “clear” on the video is a function of his filling in the blanks, which the jury may do as well.

Hearsay

“Non-verbal conduct is subject to the hearsay rule when the surrounding circumstances demonstrate that the act was ‘intended to serve as expressive communication.’” Jerome Prince, Richardson on Evidence § 8-103 [Farrell 11th ed 2008] *quoting* People v. Salko, 47 NY2d 230, 238 (1979); *see also* People v. Caviness, 38 NY2d 227, 230 (1975) *quoting* Comment, Uniform Rules of Evidence, Rule 63 (hearsay is “not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.”); People v. Tryphina XX, 176 AD2d 1077 (3d Dept. 1991); People v. Egan, 78 AD2d 34 (4th Dept. 1980).

Plaintiff does not contend that any conduct captured by the surveillance video was intended as a verbal act or to serve as expressive communication. The Court finds that the visual component of the video is not an extrajudicial utterance, and thus does not implicate the hearsay rule.

With respect to the audio, neither party has stated whether the people on the bus can be identified or whether they will be called as witnesses. Any objections are best handled by the trial judge if and when they are made.

Relevance

Plaintiff contends that video of the incident in question is irrelevant because it does not definitively resolve the “main issue” of whether the plaintiff darted out into the street. “Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence.” People v. Scarola, 71 NY2d 769, 777 (1988) *citing* People v. Lewis, 69 NY2d 321, 325 (1987) and Richardson, Evidence § 4 [Prince 10th ed] and Proposed Code of Evidence for State of New York § 401. Plaintiff’s argument frames relevancy too narrowly. The fact that the main issue is not necessarily determined beyond all question does not make a video irrelevant. Defendant cites numerous material facts which are shown in the video, specifically, the plaintiff’s position as he catches the package, how he is moving as he proceeds in front of the bus, the color of the light of oncoming traffic, and plaintiff’s position as he is hit by the defendant’s car. Plaintiff’s credibility, concerning statements that he made during his deposition testimony, are also at issue. As noted by defense counsel, the video can be played at real time or it can be stopped at any point, further

enhancing the relevance and importance of this evidence.

Prejudice

Plaintiff argues that the video does not capture the full sequence of events, which misleads the jury and creates confusion. Relevant evidence may "be excluded where its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury." People v Caban, 14 NY3d 369, 374-75 (2010) quoting People v. Scarola, supra. While the jury may be left to decide what occurred in the moments that were not recorded, plaintiff has not established that the jury would be confused by this evidence or that it is unduly prejudicial. While plaintiff argues that the video is not as clear as defense counsel claims it to be on certain issues, plaintiff is essentially arguing that there are disputed factual issues. Such argument, however, does not seek an evidentiary ruling. Rather, it seeks to resolve disputed issues of fact. As such, this portion of plaintiff's motion is an "inappropriate substitute for a motion for [partial] summary judgment." Ofman v Ginsberg, 89 AD3d 908, 909 (2d Dept 2011), quoting Rondout Elec., Inc. v Dover Union Free School Dist., 304 AD2d 808 (2d Dept 2003); Downtown Art Co. v Zimmerman, 232 AD2d 270 (1st Dept 1996). The plaintiff is free to note these gaps during the trial, and to put witnesses on the stand to fill them in. The jury, as the finders of fact, will then ascribe whatever weight it chooses to the evidence.

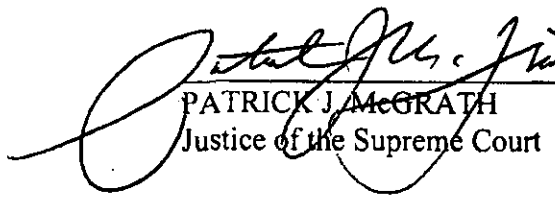
Therefore in accordance with the foregoing, it is hereby

ORDERED that the plaintiff's motion to preclude audio portions of the surveillance video is held in abeyance for the trial court, and it is further

ORDERED that the plaintiff's motion to preclude the visual components of the surveillance video is denied.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the attorneys for the defendant. All original supporting documentation is being returned to the County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

DATED: December 14, 2015
Troy, New York


PATRICK J. McGRATH
Justice of the Supreme Court

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Dec 22, 2015 11:58 AM
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