

<b>Bayard v Cunningham</b>
2018 NY Slip Op 34185(U)
February 8, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 602903/17
Judge: Arthur G. Pitts
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**Supreme Court of the State of New York  
IAS Part 43 - County of Suffolk**

**PRESENT: Hon. ARTHUR G. PITTS**

**JACK BAYARD and FABIOLA  
CARRION, as Co-Administrators of the  
Estate of Alfred Wayne Bayard, Deceased  
August 10, 2016,**

**Plaintiff(s),**

**- against-**

**COREY T. CUNNINGHAM and  
NICOLE M. LIMBACH,**

**Defendant(s).**

**ORIG. RETURN DATE: 11/2/17  
ADJOURNED DATE: 11/2/17  
MOTION SEQ. NO.: 001 - MotD  
002 - MotD**

**PLTF'S/PET'S ATTY:  
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**DEFT'S/RESP'S ATTY:  
DAVID J. SOBEL, P.C.  
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Upon the following papers numbered 1 to 23 read on this motion to dismiss; and this cross motion for summary judgment Notice of Motion and supporting papers 1-14 Notice of Cross-Motion and supporting papers 15-16 Affirmation/affidavit in opposition and supporting papers 17-21 Affirmation/affidavit in reply and supporting papers 22-23 Other   ; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that defendants Corey T. Cunningham and Nicole M. Limbach’s motion for an order dismissing the plaintiffs’ causes of action for punitive damages and Marie Shannon’s claims as the common law wife of the plaintiffs’ decedent Alfred Wayne Bayard, as well as for an order directing plaintiff Fabiola Carrion and Marie Shannon to appear for an examination before trial at a day certain, and to comply with their Notice for Discovery and Inspection dated June 22, 2017, and plaintiffs Jack Bayard and Fabiola Carrion, as co-administrators of the Estate of Alfred Wayne Bayard, deceased’s cross motion for summary judgment is determined as follows:

The matter at bar is one for wrongful death arising from a motor vehicle accident that occurred between the plaintiffs’ decedent. Alfred Wayne Bayard and a vehicle owned by defendant Corey T. Cunningham and operated by defendant Nicole M. Limbach on August 10, 2016 in the eastbound lane of Sunrise Highway, Babylon, Suffolk County, New York. As a result of said accident, the plaintiffs’ decedent sustained serious personal injuries and died. The within action was commenced by his parents, plaintiffs Jack Bayard and Fabiola A. Carrion, as co-administrators of his estate. The defendants now move for summary judgment as to two of the causes of action in plaintiffs’ complaint; for punitive damages and for derivative claims by the decedent’s common law wife, Marie Shannon.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851,853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y. 2d 557,562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action.” (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986])

It is well settled that “punitive damages are recoverable in a negligence action only where the conduct in question evidences ‘a high degree of moral culpability,’ or ‘conduct is so flagrant as to transcend mere carelessness’ and ‘constitutes willful or wanton negligence or recklessness.’ (*Lee v. Health Force*, 268 A.D.2d 564, 702 N.Y.S.2d 108 [2000] [citation omitted]; *Rey v. Park View Nursing Home*, 262 A.D.2d 624, 692 N.Y.S.2d 686 [1999]” (*Kraycar v. Monahan*, 49 A.D.3d 507, 856 N.Y.S.2d 123 [2<sup>nd</sup> Dept 2008])

Both the plaintiffs’ bill of particulars and their counsel’s affirmation in opposition to the instant motion allege that defendant Limbach’s actions meet the criteria of “willful or wanton negligence or recklessness” because she exceeded the speed limit by driving 75 m.p.h in a 50 m.p.h. zone on a wet road and lost control of her vehicle striking the plaintiffs’ decedent’s vehicle. However, it has been held that a defendant driver who was intoxicated and exceeded the speed limit prior to an accident causing injuries to his plaintiff passenger, did not reach the standard to entitle a plaintiff to punitive damages. (see i.e. *Trudeau v. Cook*, 2 A.D.3d 1133, 769 N.Y.S.2d 322 [3<sup>rd</sup> Dept 2003]) Clearly, the alleged conduct on defendant Limbach’s part do not reach what is required to sustain a claim for punitive damages and the defendants’ motion as to such claims is granted. It is further noted that a punitive damage claim against a non-negligent owner of a vehicle involved in a motor vehicle accident whose liability is strictly based on vicarious liability, cannot stand and the defendants’ motion as to defendant Cunningham is also granted. (*O’Connor v. Kuzmicki*, 14 A.D.3d 498, 788 N.Y.S.2d 414 [2<sup>nd</sup> Dept 2005])

The defendants have further moved for summary judgment regarding the claims set forth on behalf of Marie Shannon, alleged to be the decedent’s common law wife. Although it is well settled that New York State does not recognize common law marriage, it will recognize one if it was validly established in another state. (*Mott v. Duncan Petroleum Transportation*, 51 N.Y.2d 289, 434 N.Y.S.2d 155 [1980]) Herein, the defendants allege that, through the testimony at his examination before trial of plaintiff Jack Bayard, it was established that the decedent and Marie Shannon co-habited only in New York and, as such, cannot establish a common law marriage. However, discovery is not complete and the deposition of Ms. Shannon has not yet been conducted. Accordingly, the defendants’ motion to strike her claims is denied as being premature with leave to renew upon the completion of discovery.

The defendants have further moved for an order compelling plaintiff Fabiola Carrion and Marie Shannon to appear for an examination before trial as well as directing the plaintiffs to comply with their Notice for Discovery and Inspection dated June 22, 2017. A person has 20 days from service of notice or subpoena duces tecum to produce documents or things for inspection or to object to disclosure. (CPLR 3122 (a)) A failure to object to a subpoena “forecloses inquiry into the propriety of the information sought” (*Woo v. Shimunov*, 273 A.D.2d 303, 710 N.Y.S.2d 547 [2<sup>nd</sup> Dept 2000]) and waives any claims of privilege for the documents sought. (*Anonymous v. H.S. for Environmental Studies*, 32 A.D.3d 353, 820 N.Y.S.2d 573 [1<sup>st</sup> Dept 2006]) Herein the plaintiffs have failed to comply with the defendants’ notice nor have they moved for a protective order. Accordingly, the plaintiffs are directed to comply with the defendants’ outstanding Notice of Discovery and Inspection within thirty (30) days of service of the within order with Notice of Entry.

As to the defendants’ motion to compel Fabiola Carrion and Marie Shannon to appear for an examination before trial, CPLR 3101(a) requires the “full disclosure of all information that is material and necessary to the defense or prosecution of an action.” The “material and necessary” requirement directed in CPLR 3101(a) is to be liberally construed to requires disclosure where the matter sought will assist in trial preparation by clarifying the issues and reducing any possible delay. (*Andon v. 302-304 Mott Street Associates*, 94 N.Y.2d 740, 709 N.Y.S.2d 873 [2000] citing *Allen v. Crowell - Collier Publishing Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449) Clearly the testimony sought by the defendants is material and necessary to the defense in this action. Therefor, both Carrion and Shannon are directed to be available for depositions within sixty (60) days of service of the within order with Notice of Entry.


The plaintiffs have cross moved for summary judgment. In support of the motion the plaintiffs have proffered their attorney’s affirmation, a police accident report and the Suffolk County Medical Examiner’s Autopsy report. As previously stated a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, supra; *Zuckerman v. City of New York*, supra). In support of their cross motion, plaintiffs’ counsel submits that the doctrine of *res ipsa loquitur* is applicable herein. “The doctrine of *res ipsa loquitur* permits an inference of negligence to be drawn solely from the happening of an accident ‘upon the theory that certain occurrences contain within themselves a sufficient basis for an inference of negligence.’” (*Dermatossian v. New York City Tr. Auth.*, 67 NY2d 219, 226 [1986], quoting *Foltis, Inc. v. City of New York*, 287 NY 108, 116 [1941]. To invoke the doctrine, a plaintiff must demonstrate the following elements: ‘(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.’ (*Corcoran v. Banner Super Mkt.*, 19 NY2d 425, 430 [1967], quoting Prosser, Torts 39, at 218 [3d ed]; see *Dermatossian v. New York City Tr. Auth.*, supra at 226)” (*Scott v. First Stop, Inc.*, 3 A.D.2d 528, 770 N.Y.S.2d 733 [2<sup>nd</sup> Dept. 2004]) However, *res ipsa loquitur* is only applicable either in support or in opposition to a motion for summary judgment “where

the possibility that the event was caused by the negligence of someone other than the defendant 'is so remote that it is fair to permit an inference that the defendant is the negligent party. (*Feblot v. New York Times Co.*, 32 N.Y.2d 486, 496)" (*Fernandez v. Ramos*, 300 A.D.2d 348, 349, 751 N.Y.S.2d 510 [2<sup>nd</sup> Dept 2002]) As defendants' counsel avers in his opposition to the cross motion, there has not been an adequate showing that there may have been comparative negligence on the plaintiff's decedent's part. Furthermore, the proffering of an attorney's affirmation, not based upon personal knowledge, is of no probative or evidentiary value in supporting a motion for summary judgment, (*Warrington v. Ryder Truck Rental*, 35 A.D.3d 455, 826 N.Y.S.2d 152 [2<sup>nd</sup> Dept 2006]) nor can one rely upon a police accident report containing hearsay in support thereof. (*Gomez v. Sammy's Transport, Inc.*, 19 A.D.3d 544, 798 N.Y.S.2d 84 [2<sup>nd</sup> Dept 2005]) As such, the plaintiffs' have failed to meet their burden and the cross motion for summary judgment is denied.

This shall constitute the decision and order of the Court.

So ordered.

Dated: Riverhead, New York  
February 8, 2018



ARTHUR G. PITTS, J.S.C.

CHECK ONE:  FINAL DISPOSITION  NON-FINAL DISPOSITION