Neivert v Dileo
2024 NY Slip Op 35070(U)
September 9, 2024
Supreme Court, Westchester County
Docket Number: Index No. 53992/2021
Judge: David F. Everett

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

STACEY M. NEIVERT and MILES E. NEIVERT,

Plaintiffs,

-against-

VINCENT J. DILEO, JR., and FRIENDLY FUEL PETROLEUM, INC., d/b/a FRIENDLY FUEL, INC.,

Defendants.

----------X

INDEX NO. 53992/2021

DECISION/ORDER
Motion Seq. 1

EVERETT, J.

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 32-53, relative to the motion by plaintiffs for summary judgment (CPLR 3212) on the issues of liability and serious injury (Insurance Law § 5012 [d]), the Court determines as follows:

Background and Arguments

In the affirmation in support (NYSCEF Doc No. 33), plaintiffs' attorney sets forth the following preliminary statement:

> The instant action seeks recovery for serious and permanent injuries sustained by Plaintiff, STACEY V. (*sic*) NEIVERT, on February 6, 2021, when she was forcefully rear-ended by an oil delivery tanker truck owned and operated by Defendants while fully stopped at a stop light. Plaintiff's injuries include, but are not limited to, multiple, acute rib fractures, left hand/wrist injections, left thumb arthroplasty and significant pain and suffering.

Plaintiffs' attorney notes the following statement in the certified police report (NYSCEF Doc No. 39), which was generated after the accident:

> Driver of V1 [Defendants' vehicle] stated he was traveling south on Route 9A and was blinded by a glare and when he regain[ed] his view of the road, he was (*sic*) V2 [Plaintiff's vehicle] stopped in front of him. Driver of V1 further stated he attempted to stop but was unable to do so and struck the rear of V2. Driver of V2 stated she was stopped on Route 9A waiting to turn right onto N State Rd when she was struck from behind by V1 causing her to be pushed forward and collide with te (*sic*) rear of V3. Driver of V3 stated he was stopped on Route 9A SB waiting to turn right onto N State Rd when he was struck from behind by V2. V2 was towed by A&P Towing. Driver of V2 had complaints of chest pain and was transported to BMAC to Phelps.

Based on the deposition testimony of Stacey M. Neivert (Stacey) (NYSCEF Doc No. 35), plaintiffs' attorney adds that Stacey was the driver and sole passenger; that she was wearing her seat belt; that her motor vehicle was at a full stop at a traffic control device with her right turn signal on; that there was a car and a half length between her vehicle and the vehicle in front of her; that she had her foot on the brake at time of impact; and that she had chest pain and was unable to breathe.

Regarding the deposition of Vincent J. Dileo, Jr. (Dileo) (NYSCEF Doc No. 36), plaintiffs' attorney states that Dileo testified he was an employee of defendant Friendly Fuel Petroleum, Inc., d/b/a Friendly Fuel, Inc. (Friendly) and was in the course of his employment at the time of the collision; that he was familiar with the route; that traffic was stopped, and then started to move, prior to the collision; that he was blinded by sun glare; that he did not know how much distance he traveled between the time he first experienced sun glare to the moment of impact with Stacey's motor vehicle; and that he took no steps to mitigate sun glare - he did not utilize sunglasses in his truck, he did not stop his vehicle, nor does he remember using the sun-visor to shield the sun.

Regarding Stacey's injury, plaintiffs' attorney states that Stacey suffered multiple, acute fractures of the anterior left third, fourth, fifth, sixth, seventh, and eighth ribs, as stated in the medical record (NYSCEF Doc No. 38); that she had no prior medical history significant for rib fractures; that the multiple acute rib fractures, sustained as a result of the collision and diagnosed

within hours of the collision and are causally related; and that the injuries satisfy the "serious injury" threshold under Insurance Law § 5102 (d).

In opposition (NYSCEF Doc No. 46), with respect to the issue of serious injury, defendants' attorney states that while "defendants do not contest that the plaintiff Stacey Neivert's alleged fractured ribs qualify as serious injuries under Insurance Law § 5102 (d), it is respectfully submitted that none of the other injuries claimed by the plaintiffs are 'serious' in nature and/or causally related to the accident."

Requesting the Court limit the finding of "serious injury" to Stacey's fractured ribs, and not the other injuries, defendants' attorney argues that Stacey's injury to her left thumb is not causally related to the accident but is rather a result of her genetic and/or degenerative disease; that her shoulder pain and back pain do not constitute serious injuries within the meaning of Insurance Law § 5102(d); and that IME reports by Dr. Spencer and Dr. Ehrlich were generated (NYSCEF Doc No. 52), and Dr. Spencer's report states: "Dr. Appel's professional opinion is that the claimant did not injure her left hand during the car accident and subsequent complaints of pain were due to arthritis of the left thumb first CMC joint and not from the accident itself."

With respect to the issue of liability, defendants' attorney contends that Dileo's testimony provides a non-negligent explanation of the collision and raises genuine issues of material fact; that his truck was moving at a speed of 35-40 mph; that the traffic moved forward from a stop faster than his truck, so that he lost the sight of it; that as the roadway bent to the left, he experienced a sudden and extremely intense sun glare and applied the brakes to slow down to 20-25 mph; that he believed slamming the brakes more abruptly in the middle of a highway would cause a hazardous situation on the road; that after traveling for a few seconds, and having seen the traffic light ahead being green, he proceeded around the bend and observed Stacey's vehicle 25

feet ahead of him, approximately the eighth vehicle stopped before the intersection; that he applied the brakes, but his truck was unable to stop before pushing the back of Stacey's vehicle; that he started experiencing a sun glare seconds before the collision, which left him no time to put on sunglasses or do anything else; that the air bags did not deploy in Stacey's vehicle as a result of the impact; and that the rear-end collision was a result of a combination of external factors – the sun glare, the bent road, and the traffic stopped in the middle of the roadway despite the green light ahead.

In response to the facts, as stated by plaintiff's attorney, defendants' counter-statement of material facts (NYSCEF Doc No. 47) include that defendants specifically deny the statement that at the location of the accident the roadway is straight and level; that defendants' vehicle violently struck the rear of the plaintiff's vehicle; that defendants' "huge" fuel truck was moving ''very fast"; that the "horribly heavy" rear impact to the plaintiff's vehicle caused her body to "catapult" forward; that Stacey's vehicle was violently struck in the rear; and that the impact was characterized as "violent"; that at Westchester Medical Center, Stacey was treated for "other injuries" in addition to her rib fractures; that the police report is inadmissible hearsay; and that certain phrases used by plaintiffs' attorney are an inaccurate recitation of the facts.

In reply (NYSCEF Doc No. 53), plaintiffs' attorney argues that the sun glare, bend in the road, and stopped traffic do not constitute a non-negligent reason; that Dileo's temporary impairment due to sun glare is not an emergent situation; that Dileo should have anticipated the likelihood of sun glare before the collision occurred and failed to use his caution and his expertise to avoid the collision; that despite being aware that the traffic was congested, and that Stacey's vehicle was directly in front of him, Dileo failed to respond appropriately to the situation by bringing his vehicle to a complete stop after his vision was affected by sun glare; that Dileo did

not sound the horn to alert drivers ahead of him to a potential issue; and that Dileo could have avoided the collision but did not take the necessary actions.

Summary Judgment

Summary judgment is appropriate when there are no genuine triable issues of material fact between the parties and the movant is entitled to judgment as a matter of law (CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327 [1986]). The movant 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 at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A defendant's prima facie showing is governed by the allegations of liability made in the plaintiff's pleadings (*see Wald v City of New York*, 115 AD3d 939, 940 [2d Dept 2014]). To defeat a motion for summary judgment, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*Zuckerman v City of New York*, 49 NY2d at 562; *Moore v 3 Phase Equestrian Ctr., Inc.*, 83 AD3d 677, 679 [2d Dept 2011]).

On the motion for summary judgment, the facts appearing in the movant's papers are deemed to be admitted by an opposing party unless controverted by admissible proof (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *Lambos v Weintraub*, 256 AD2d 446, 447 [2d Dept 1998]). "A motion for summary judgment may not be defeated by the assertion of mere conclusory allegations, expressions of hope or unsubstantiated assertions (*see, Shapiro v Shorenstein*, 157 AD2d 833 [2d Dept 1990]; *Albert v Glick Developers*, 155 AD2d 569 [2d Dept 1989])." (*Jordan Mfg. Corp. v Zimmerman*, 169 AD2d 815, 816 [2d Dept 1991]; *see Caputo v Citimortgage, Inc.*, 165 AD3d 748 [2d Dept 2018]).

In *McBride v City of New York* (208 AD3d 578, 579 [2d Dept 2022]), the Court instructed: " 'A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries' (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2018]; *see Rodriguez v City of New York*, 31 NY3d 312 [2018])." In *Rodriguez v City of New York* (31 NY3d at 324-325), the Court stated: "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault."

The Court in *Yassin v Blackman* (188 AD3d 62, 68 [2d Dept 2020]), explained:

> A plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Buchanan v Keller*, 169 AD3d 989, 991 [2019]). " 'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle' " (*Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 939 [2016], quoting *Nsiah-Ababio v Hunter*, 78 AD3d 672, 672 [2010]; see Vehicle and Traffic Law § 1129 [a]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Tutrani v County of Suffolk*, 10 NY3d 906 [2008]; *Buchanan v Keller*, 169 AD3d at 991).

Vehicle and Traffic Law

Vehicle and Traffic Law § 388 (1) provides in part:

> 1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

Vehicle and Traffic Law § 388 imposes vicarious liability on a vehicle owner for the negligence of anyone who operates the vehicle with permission, express or implied, and carries a

rebuttable presumption that the driver of a vehicle has the implied permission of the owner to operate it (*see Matter of Allstate Ins. Co. v Jae Kan Shim*, 185 AD3d 919, 920 [2d Dept 2020]).

Vehicle and Traffic Law § 1129 (a) provides:

> (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

In *Ortiz v Fage USA Corp.* (69 AD3d 914 [2d Dept. 2010]), the Court stated: " 'A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident' (*Arias v Rosario*, 52 AD3d 551, 552 [(2d Dept) 2008])." (*See Genao v Cassetta*, 214 AD3d 626, 627 [2d Dept 2023]; *Balgobin v McKenzie*, 213 AD3d 893, 893-894 [2d Dept 2023]; *Toala v EAN Holdings, LLC*, 191 AD3d 724, 726 [2d Dept 2021]; Vehicle and Traffic Law § 1129 [a].)

In *Hearn v Manzolillo* (103 AD3d 689, 690 [2d Dept 2013]), the Court explained:

> ' 'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle' ' (*Fajardo v City of New York*, 95 AD3d 820, 820-821 [(2d Dept) 2012], quoting *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 726 [(2d Dept) 2011]; *see Taing v Drewery*, 100 AD3d 740 [(2d Dept) 2012]), and a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle (*see Ramos v TC Paratransit*, 96 AD3d 924, 925 [(2d Dept) 2012]; *Fajardo v City of New York*, 95 AD3d at 821). If the operator of the rear vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the lead vehicle is entitled to summary judgment on the issue of liability (*see Cortes v Whelan*, 83 AD3d 763 [2011]; *Staton v Ilic*, 69 AD3d 606 [(2d Dept) 2010]).

A claim by the rear driver that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence. As stated in *Raimondo v Plunkitt* (102 AD3d 851 [2d Dept 2012]): " 'A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the

inference of negligence by providing a non-negligent explanation for the collision' (*Hauser v Adamov*, 74 AD3d 1024, 1025 [[2d Dept] 2010])." (*See Montalvo v Cedeno*, 170 AD3d 1166, 1167 [2d Dept 2019]; *McLaughlin v Lunn*, 137 AD3d 757 [2d Dept 2016]; Volpe v Limoncelli, 74 AD3d 795, 795-796 [2d Dept 2010].)

Sun Glare

In *Lifson v City of Syracuse* (17 NY3d 492, 497 [2011]), the Court reviewed that emergency doctrine, and made the following determination:

> While Klink did not drive this particular route often, he was familiar with the general area since he worked in the MONY Towers. Klink was about to turn to the west at a time of day that the sun would be setting. It is well known, and therefore cannot be considered a sudden and unexpected circumstance, that the sun can interfere with one's vision as it nears the horizon at sunset, particularly when one is heading west. This is not to say that sun glare can never generate an emergency situation but, under the circumstances presented, there is no reasonable view of the evidence under which sun glare constitutes a qualifying emergency.

(*See E.B. v Gonzalez*, 206 AD3d 618, 619 [2d Dept 2022].)

Similarly, in *Rodriguez v Beal* (191 AD3d 617, 617-618 [1st Dept 2021]), the Court determined:

> Defendant's explanation, that he was suddenly blinded by the glare of the sun rising in the east as he was driving in that direction, was insufficient to raise a non-negligent explanation for the rear-end collision under the circumstances (*id.* at 76 [*Agramonte v City of New York*, 288 AD2d 75, 76 (1st Dept 2001)]; *see also Johnson v Phillips*, 261 AD2d 269, 269-272 [1st Dept 1999]). Although sun glare may contribute to an emergency situation, the ordinary circumstances of the sun rising while a driver is heading east do not "constitute[ ] a qualifying emergency" (*Lifson v City of Syracuse*, 17 NY3d 492, 498 [2011])[.]

In *Carter v Russo Fuel Inc*. (2019 NY Slip Op 34289[U], *4-5 [Ulster County 2019]), the Court noted the need to proceed with caution and determined:

> It is well settled that a driver traveling behind another vehicle has a duty to maintain a safe distance behind the front vehicle whether it is moving or stopped to avoid a rear end collision" (see VTL § 1129[a]). Even if defendant Drake's version of the facts are credited in its entirety, he acknowledges that he is a commercial and

> professional driver who utilizes this route on a daily basis. He further acknowledges that he was fully familiar with the nature of the roadway in that there is a crest of the hill, over which he is not able to observe any traffic conditions. As it is the driver's duty and legal obligation to "tak[e] into account the weather and road conditions" (*Rodriquez v City of New York*, 259 AD2d 280 [1999]), driving a tanker truck over the crest of the hill without any sight distance requires such driver to proceed with extreme caution; the fact that defendant Drake never saw a school bus stopped in the roadway at or near the accident site in the past is not a viable explanation considering the timing of the accident, the ability of all other cars traveling in front of him to stop and the obligation to maintain a safe distance between his vehicle and those traveling in front of him to avoid collisions with stopped vehicles. In this court's view, even an expert affidavit confirming defendant Drake's version of the speed he was traveling would not change the result; this simply was not an emergency situation (*see Renteria v Simakov*, 109 AD3d 749, 972 N.Y.S.2d 15 [Pt Dept 2013]).

Serious Injury – Insurance Law § 5012 (d)

> Insurance Law § 5102 (d) defines serious injury as follows:
>
> "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; *a fracture*; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. (emphasis added).

While serious injury is usually a jury question, a defendant may move for summary judgment on the ground that the plaintiff has not sustained a serious injury as defined in the statute. The plaintiff's opposition must consist of proof in evidentiary form, usually a doctor's affidavit, to raise an issue of fact as to serious injury (*see Brugaletta v Staten Is. Univ. Hosp.*, 295 AD2d 461, 462 [2d Dept 2002]). Medical reports not based on recent examinations of the plaintiff, however, may be insufficient for this purpose (*see Andrews v Nachman*, 258 AD2d 607 [2d Dept 1999]). Courts evaluate the serious injury issue on a case-by-case basis, with the decisions resting on the specific facts in each case. In seeking summary judgment, the defendant must establish as a matter

of law that the plaintiff did not suffer a serious injury and if the defendant does so, the plaintiff must present competent medical evidence based on objective medical findings and diagnostic tests to establish the existence of a serious injury (*see Perl v Meher,* 18 NY3d 208, 218-219 [2011]; *Toure v Avis Rent A Car Sys*., 98 NY2d at 350 [2002]; *Karademir v Mirando-Jelinek*, 153 AD3d 509, 510 [2d Dept 2017]; *Patisso v Brady*, 152 AD3d 782, 782-783 [2d Dept 2017]; *Meyers v Tarulli*, 152 AD3d 759, 760-761 [2d Dept 2017]).

A defendant's burden includes that a physician set forth the objective tests performed on the plaintiff; that there be a comparison of the findings of the plaintiff's ranges of motion to the normal ranges of motion; and that it is shown that the plaintiff's injuries were not causally related to the accident. The plaintiff's burden is to provide a personal affidavit detailing the physical limitations the injuries have caused, an affirmed medical report of an MRI, CT scan, or other objective evidence reflecting the existence of an injury that constitutes a serious injury, an affirmed medical report confirming the extent or degree of the physical limitation resulting from the injury through either an expert's designation of a numeric percentage of plaintiff's loss of range of motion, or through an expert's qualitative assessment of plaintiff's condition, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Cassagnol v Williamsburg Plaza Taxi*, 234 AD2d 208, 209 [1st Dept 1996]).

Conclusion

Here, Dileo was traveling on a route familiar to him at a time when sun glare could have been anticipated, especially by a professional truck driver like Dileo. Defendants do not show that the sun glare, the bent road, and the traffic stopped in the middle of the roadway, despite the green light ahead, were sufficient to create an emergency situation defense. It is demonstrated that there

was a large area where Dileo had an opportunity to stop his oil tanker delivery truck prior to the collision occurring, but despite time and/or distance to stop his vehicle, Dileo's tanker truck rear-ended Stacey's vehicle. Defendants do not offer a non-negligent explanation for the collision, or that there is a question a fact related to the sun glare and surrounding circumstances. No issue has been raised as to Friendly's vicarious liability.

Regarding serious injury, as Stacey suffered fractures, there were serious injuries as a matter of law. Defendants do create a question of fact regarding alleged related injuries.

The remaining contentions do not require a different result.

Accordingly, it is,

ORDERED that plaintiffs' motion for summary judgment on liability is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment as to "serious injury" is granted to the extent that Stacey suffered fractures.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 9 , 2024

ENTER:

HON. DAVID F. EVERETT, J.S.C.

Filed in NYSCEF