IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DANIELLE RACZKOWSKI,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N10C-04-108 JAP
v.	)	
	)	
BARBARA S. DEVLIN, and	)	
JOHN T. COLE, JR.	)	
	)	
Defendants.	)	

Upon Defendants' Motions for Summary Judgment
MOTION GRANTED IN PART AND DENIED IN PART

MEMORANDUM OPINION

Kyle Kemmer, Esquire, Newark, Delaware
Attorney for Plaintiff

David G. Culley, Esquire, Wilmington, Delaware
Attorney for Defendant Barbara S. Devlin

Christian G. Heesters, Esquire, Wilmington, Delaware
Attorney for Defendant John T. Cole, Jr.

JUDGE JOHN A. PARKINS, JR.

In this negligence action, Defendant, John T. Cole, Jr., ("Cole"), moves for summary judgment against Plaintiff, Danielle Raczkowski, ("Plaintiff"), on grounds that Plaintiff's own negligence per se exceeded any alleged negligence on Cole's part and that Plaintiff cannot establish a prima facie case of negligence against him. Defendant, Barbara S. Devlin, ("Devlin"), joins and relies in full upon Cole's motion.

The Court grants the motion as to Defendant Cole but denies the motion as to Defendant Devlin.

FACTUAL BACKGROUND

On a clear, sunny afternoon in April, Plaintiff was riding her bicycle against heavy traffic on Kirkwood Highway just east of the intersection of Kirkwood Highway and Newport Gap Pike near Elsmere, Delaware.[1] While riding, she saw that oncoming vehicles had to swerve to the left to avoid striking her.[2] Unfortunately, defendant Devlin, also operating an on-coming vehicle, was unable to avoid striking plaintiff.[3] As a result of the collision with Devlin, Plaintiff was pushed into the path of Cole's vehicle which struck her.[4] Plaintiff was cited for violating 21 *Del. C.* § 4196(a) which states that "[a]ny

[1] Deposition Transcript of Plaintiff, 26-32 (hereinafter "Pltf's Dep. Tr.").
[2] Pltf's Dep. Tr. at 36.
[3] Pltf's Dep. Tr. at 51.
[4] Pltf's Dep. Tr. at 50-51; Deposition Transcript of Defendant Cole, 21-22, 27 (hereinafter "Cole's Dep. Tr.").

person operating a bicycle upon a roadway . . . shall ride as close as practicable to the right-hand edge of the roadway . . . ." In her deposition, Plaintiff admits to the violation.[5]

CONTENTIONS OF THE PARTIES

In his motion for summary judgment, Cole contends that Plaintiff was negligent per se and that her conduct was the proximate cause of her injuries. Cole further argues that Plaintiff fails to bring a prima facie case against him because she presents no evidence to demonstrate that he was either negligent or could have done anything to avoid the collision.

Plaintiff asserts that this case is not one in which only one conclusion can be drawn or inferred from the evidence and that issues of fact remain. Plaintiff, while admitting she was negligent, has not conceded that her negligence was the proximate cause of her injuries. She argues that Cole failed in his duty to maintain a proper lookout and operate his vehicle in a safe manner. Plaintiff also contends that negligence per se does not in of itself bar recovery.

DISCUSSION

Standard of Review

[5] Pltf's Dep. Tr. at 96.

A moving party is entitled to summary judgment as a matter of law where there is no genuine issue of material fact.[6] In deciding a motion for summary judgment, the court shall view the facts in the light most favorable to the non-moving party.[7] In order for summary judgment to be granted, not only must a moving defendant show the absence of any contention of material fact but also must show that the only reasonable inferences that could be drawn from the facts are adverse to plaintiff.[8] Summary judgment is generally inappropriate in a negligence action because the moving party is often unable to show the absence of any genuine issue of material fact as to negligence or causation.[9]

[6] Del. Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).
[7] *Snyder*, 532 A.2d. at 625.
[8] *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. 1966).
[9] *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).

Negligence Per Se in the Context of a Contributory Negligence Defense

"It is settled Delaware law that the violation of a statute enacted for the safety of others is negligence in law or negligence per se."[10] Where, as here, a cyclist rides against traffic in violation of an ordinance to the contrary and an accident occurs, the cyclist is guilty of negligence per se.[11] This does not end the inquiry, however. In order for such a statutory violation to be actionable, however, a causal connection between the violation and the injury must be demonstrated.[12] Where the doctrine of negligence per se is proffered as a defense against a plaintiff who has violated a statute, the plaintiff's violation constitutes contributory negligence only to the extent that it was "a legally contributing cause of [the] harm."[13]

In this matter, Plaintiff admitted to a violation of a statute enacted for the safety of others, namely, the statute requiring bicyclists to operate their cycles on the right-hand side of the roadway. Thus, her admitted violation is deemed negligence per se. Yet, while admitting to the violation itself, Plaintiff has not conceded that the violation was the sole contributing cause of her injuries. She,

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[10] *Wright v. Moffitt*, 437 A.2d 554, 557 (Del. 1981) (citing *Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972) and *Nance v. Rees*, 161 A.2d 795 (Del. 1960)); *Blachowicz v. Pennington*, 1987 WL 8662, *3, O'Hara, J. (Del. Super. Feb. 17, 1987).

[11] *Travers v. Hartman*, 28 Del. 302, 92 A. 855, 858 (Del. Super. 1914) (citing Page 1023 of Charter Laws and Ordinances of the City of Wilmington, Del., 1910, quoting therefrom that "any person or persons riding a bicycle along any of the streets or highways within the limits of the city as they exist or may hereafter be extended shall, while so doing, keep to the right of said streets or highways" and charging the jury that if they found such an ordinance violation on the part of the cyclist, they must find the cyclist negligent per se).

[12] *Wright*, 437 A.2d at 557 (citing *Wealth v. Renai*, 114 A.2d 809, 811 (Del. 1954)); *Blachowicz*, 1987 WL 8662 at *3.

[13] *Blachowicz*, 1987 WL 8662 at *4 (quoting *Restatement (Second) of Torts § 469(1)*) (emphasis added).

in fact, avers the opposite—that the conduct of Cole and Devlin caused her injuries. Therefore, assuming but not deciding that Plaintiff's negligence was a proximate cause of the accident, the Court must consider the negligence of the defendants and any injuries proximately caused thereby for purposes of comparative negligence.

The Determination of Negligence in an Emergency

"In order to prevail in a negligence action, plaintiff must show, by a preponderance of the evidence, that defendant's allegedly negligent act or omission breached a duty of care owed to the plaintiff in a way that proximately caused the injury."[14]

Delaware law makes clear that a driver has a duty of care to operate a vehicle with full time and attention and that "whoever fails to maintain a proper lookout while operating the vehicle, shall be guilty of inattentive driving."[15] Furthermore, even where a driver proceeding on the right side of the street comes upon a traveler approaching from up ahead on the wrong side of the street, the driver is still under a duty to do "all that a reasonably prudent person under . . . the circumstances would do to avoid a collision." [16] If, *after doing all*

[14] *Orsini v. K-Mart Corp.*, 1997 WL 528034, *2, Quillen, J. (Del. Super. Feb. 25, 1997) (citing *Duphily v. Delaware Elec. Co-op., Inc.,* 662 A.2d 821, 828 (Del. 1995)).
[15] 21 *Del. C*. § 4176(b).
[16] *Travers*, 28 Del. 302, 92 A. at 857.

that a reasonable person could do, a collision still occurs, the driver on the correct side of the street is not responsible.[17]

When a driver, however, is suddenly faced with an emergency that is not of that driver's own making and that does not provide sufficient time for reflection, the driver is not required to exercise the same degree of care as would be required if enough time existed for full use of one's judgment and reasoning faculties.[18] The driver is not negligent under such circumstances if the course of action taken is one that a reasonably prudent person would choose even if, upon hindsight, his course of action turns out not to be the best means to avoid a collision.[19]

Defendant Cole had a duty, of course, to keep a proper lookout while driving his vehicle and to keep on alert for persons ahead. Cole testified he was looking to the left at the time his vehicle collided with Plaintiff. Assuming, but not deciding, this constitutes failure to keep a proper lookout, it does not follow that Plaintiff has made a prima facie case against Cole. Defendant Cole was faced with an emergency situation when Plaintiff was unexpectedly shoved into the path of his vehicle. This emergency changed the degree of care Cole would be expected to exercise. In this situation, Cole would be required to exercise

[17] *Travers*, 28 Del. 302, 92 A. at 857 (emphasis added); *see also Trievel*, 714 A.2d at 746 (granting judgment as a matter of law in favor of defendant driver in a negligence action involving a collision between automobile and bicycle where no evidence indicated that defendant driver acted negligently)).
[18] *Panaro v. Cullen*, 185 A.2d 889, 891 (1962).
[19] *Panaro*, 185 A.2d at 891; *see also Shum v. Minor*, 633 A.2d 371, *1-2 (TABLE) (Del. 1993).

the degree of care that a reasonable person would exercise faced with a similar emergency. The record does not contain evidence that any maneuvers were available to Cole that would have enabled him to avoid hitting Plaintiff. Even if such maneuvers were available, because of the exigency of the moment, Cole's conduct still does not amount to negligence. Since, unlike the other drivers, Plaintiff was shoved into the path of Cole due to the collision with Devlin, the Court finds that Cole's omission was not unreasonable. The Court, thus, finds that Cole did not breach a duty of care owed to Plaintiff and is entitled to summary judgment.

In contrast, Devlin was not placed in an emergency situation. Drivers in front of Devlin saw Plaintiff coming and were able to pull to the left to avoid a collision. This suggests the possibility that with the exercise of ordinary care Devlin could have done likewise. Thus, a genuine issue of fact remains as to whether Devlin was negligent.

Accordingly, Cole's motion for summary judgment is hereby ***GRANTED***, and Devlin's motion is ***DENIED.***

IT IS SO ORDERED.

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John A. Parkins, Jr.
Judge