

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-13-534

TDW-CUM-01-2215

ARTHUR MURDOCK,

Plaintiff

v.

ORDER

ANGELO CASTIGLIOLA III,
et al

Defendants

Before the court are motions for summary judgment filed by defendants Martin Thorne and the Maine Department of Public Safety. Thorne and the Department of Public Safety (DPS) are two of the four defendants who have been sued in this action by plaintiff Arthur Murdock.

Murdock alleges in count I of the complaint that defendant Angelo Castigliola is liable as the driver of a vehicle that collided with Murdock's vehicle on Skyway Drive in Portland on January 26, 2010. At the time of the accident Murdock was a Lieutenant in the State Police driving a state police cruiser.

In count II of the complaint Murdock alleges that defendant Thorne is liable based on his alleged negligence in signaling that Murdock could make a left turn in front of Thorne's vehicle before the collision.

In count III of the complaint Murdock makes an under-insured motorist claim against DPS, alleging that the liability of Castigliola and Thorne is likely to exceed their coverage limits and that DPS, which self-insures its employees, is required to provide under-insured motorist coverage as part of its self-insurance.

In count IV of the complaint Murdock makes a second under-insured motorist claim against defendant Patrons Oxford Insurance Company, his own insurance carrier.

The motions before the court address only counts II and III of the complaint.¹

Summary Judgment

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In considering a motion for summary judgment, the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. E.g., Johnson v. McNeil, 2002 ME 99 ¶ 8, 800 A.2d 702. The facts must be considered in the light most favorable to the non-moving party. Id. Thus, for purposes of summary judgment, any factual disputes must be resolved against the movant. Nevertheless, when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for judgment as a matter of law, summary judgment should be granted. Rodrigue v. Rodrigue, 1997 ME 99 ¶ 8, 694 A.2d 924.

I. MOTION FOR SUMMARY JUDGMENT BY DEFENDANT THORNE

Undisputed Facts

1. The following facts are undisputed. *See* Thorne SMT dated September 24, 2014 ¶¶ 2-10 (admitted):

On January 26, 2010 Lt. Murdock was driving west on Skyway Drive. At the location where the accident occurred, Skyway Drive has two westbound lanes and two eastbound lanes.

¹ Defendant Castigliola has since filed a separate summary judgment motion, but that motion has not been fully briefed.

1.1. Murdock was in the inner westbound lane, intending to make a left turn across the two eastbound lanes into the entrance of the State Police Barracks. His lights and siren were not activated.

Coming in the other direction in the inner eastbound lane was Thorne, who saw that the traffic ahead of him was stopping. Thorne made eye contact with Murdock and stopped his vehicle, leaving enough space for Murdock to make a left turn in front of him. Thorne then waved Murdock across his lane of travel.

With Thorne stopped in the inner eastbound lane, Murdock inched forward to check for oncoming traffic in the outer eastbound lane, saw no vehicles, and proceeded across the outside lane. However, Castigliola's vehicle was approaching in the outer eastbound lane and collided with Murdock's vehicle.

2. In response to Thorne's SMF, Murdock submits the following additional facts, which the court accepts for purposes of summary judgment:

Thorne's vehicle obstructed Murdock's ability to have a good view of the outer eastbound lane. Plaintiff's SAMF dated October 15, 2014 ¶ 2. Before waving Murdock on, Thorne gestured with his finger to Murdock to communicate that Murdock should wait a moment before initiating a left turn, and Thorne then checked his side view mirror to ascertain whether the outer eastbound lane was clear. Plaintiff's October 15, 2014 SAMF ¶¶ 3-4. Construed in the light most favorable to Murdock, Thorne intended to communicate to Murdock that it was safe to execute a left turn across both lanes. Plaintiff's October 15, 2014 SAMF ¶ 6.

Murdock contends that when Thorne waved him on, he "immediately" began to execute a left turn, Plaintiff's October 15, 2014 SAMF ¶ 7, but the record does not support that assertion.

Instead Murdock consistently testified that after Thorne waved him on, Murdock initially “inched forward” to see if anyone was coming. Murdock Dep. 85-86. *Accord*, Murdock Dep. 16, 18.

It is undisputed that when Murdock began his turn, Thorne saw the Castigliola vehicle approaching in the outer eastbound lane and sounded his horn in a futile attempt to warn Murdock. Plaintiff’s October 15, 2014 SAMF ¶¶ 8-9.³

3. Although Murdock’s SMF qualifies and denies paragraphs 14-16 of Thorne’s statement of material facts, the court finds that those paragraphs are undisputed:

Specifically, Murdock unequivocally testified at his deposition that once he turned in front of Thorne, he stopped and inched forward to where he could see the outer eastbound lane “and then I pulled out.” He further testified that he did that because he knew he could not rely on someone who was letting him turn left in front of them and that he had to make his own determination of whether a lane was clear before he could cross that lane. Murdock Dep. 86-87, cited in Thorne SMF ¶¶ 14-16.

Discussion

The Law Court has not ruled on the issue of whether a driver who signals to another driver that the latter can make a left turn can be found negligent if a collision with a third vehicle results. Two Maine Superior Court decisions have concluded that while the signaling driver has yielded his own right of way, the signaling driver has not undertaken any duty to assure that it is

³ Murdock suggests that when Thorne saw the Castigliola vehicle, Thorne saw that he was “mistaken” in signaling to Murdock that the lane was clear. Plaintiff’s October 15, 2014 SAMF ¶ 8. To the extent that this suggests that Thorne acknowledged any mistake on his part, there is no support on the record for any such acknowledgment.

all clear to proceed. *Bolduc v. Haywood*, order dated July 18, 2001 in CV-000-18 (Superior Ct. Kennebec) (Marden, J.), reported at 2001 WL 1712679; *Dionne v. Progressive Insurance Co.*, order dated April 13, 2000 in CV-99-38 (Superior Ct. Androscoggin) (Cole, J.), reported at 2000 WL 33672928.

There is a split of authority in other jurisdictions on this issue. *See, e.g., Gilmer v. Ellington*, 70 Cal. Rptr. 3d 893, 900 n.6 (Cal. App. 2008). Another Maine Superior Court decision appears to have followed the New Hampshire Supreme Court in concluding that a signaling driver can be liable if the signaling driver knows or should know that special circumstances create a foreseeable risk of harm to third parties. *Frechette v. Cobb*, order dated January 9, 1997 in CV-96-86 (Superior Ct. Androscoggin) (Delahanty, J.), reported at 1997 Me. Super. LEXIS 9, citing *Williams v. O'Brien*, 669 A.2d 810, 811 (N.H. 1995).

Murdock argues that special circumstances exist here based on his assertion that Thorne's vehicle obstructed Murdock's view of the outer eastbound lane. Thorne disagrees that the special circumstances rule should be adopted in Maine and also disagrees that there any special circumstances in this case.

Ultimately the court does not need to decide whether New Hampshire's special circumstances rule should be adopted in Maine and whether this would result in a disputed issue of fact because the undisputed record establishes that Murdock did not rely on Thorne's signal. Murdock instead testified that after he turned in front of Thorne's vehicle, he inched forward to see if there was any traffic in the next lane, saw none, and then proceeded. Murdock Dep. 16, 18, 86-87.

Q. And the reason that you stopped and inched forward is because you know you can't rely on someone who's letting you turn left in front of them, correct?

A. That's correct.

Q. You have to make your own determination of whether or not a lane is clear before you can cross that lane. True?

A. That's true.

Murdock Dep. 87.

In order to recover against Thorne, Murdock would have to show not only that Thorne breached a duty of care but also that Thorne's conduct was a legal or proximate cause of the accident. *Crowe v. Shaw*, 2000 ME 136 ¶¶ 9-10, 755 A.2d 509. Based on Murdock's deposition testimony, Murdock cannot make that showing. Regardless of whether Thorne owed any duty to Murdock and if so, whether Thorne was negligent, Thorne is entitled to summary judgment due to the absence of any factual dispute as to causation.

II. MOTION FOR SUMMARY JUDGMENT BY DEFENDANT DPS

Undisputed Facts

The motion by DPS for summary judgment is based on two arguments. The first is that the State, as a self-insurer, is not subject to claims under the uninsured and underinsured motorist provisions in the State's insurance code. The second is that Murdock's claim against DPS is barred by the immunity and exclusivity provisions of the Workers Compensation Act, 39-A M.R.S. §§ 104 and 408.

Murdock did not dispute any of the assertions in the statement of material facts submitted by DPS, and the DPS's motion for summary judgment therefore turns on issues of law.

On the self-insurance issue, it is undisputed that the DPS had not procured any insurance that provided coverage for Murdock or for the claim asserted against DPS by Murdock. State departments and employees are self-insured by a fund administered by the State's Director of

Risk Management within the Department of Administrative and Financial Services pursuant to 5 M.R.S. § 1731. DPS SMF ¶¶ 51-54.

The applicable self-insurance policy states that the Risk Management Division will pay any sums that its insureds may be legally obligated to pay because of the exceptions to sovereign immunity contained in the Maine Tort Claims Act. Exhibit A to Pitts Affidavit.³

On the workers compensation issue, it is undisputed that the State has paid Murdock approximately \$ 165,000 in medical and indemnity workers compensation benefits. As of September 1, 2014 the State was continuing to pay Murdock \$ 479.72 per week in workers compensation indemnity benefits. DPS SMF ¶¶ 49-50.

Discussion

Murdock's argument that he is entitled to UM coverage from DPS is based on the straightforward proposition that the Insurance Code requires that all motor vehicle insurance policies delivered in Maine must include coverage for persons who are legally entitled to recover damages from operators of uninsured, under-insured, and hit-and-run vehicles. 24-A M.R.S. § 2902(1). This requirement to provide UM coverage, argues Murdock, applies to the State as self-insurer the same as it applies to any other entity.

The problem with Murdock's argument is that 5 M.R.S. ¶ 1728-A(1)(II) expressly provides that the State's self-insurance funds "are not subject to the provisions of Title 24-A." Accordingly, the court cannot find that 24-A M.R.S. § 2902(1) is applicable here and cannot find any other legal basis for the argument that DPS is obligated to provide UM coverage to Murdock.

³ Under the Tort Claims Act, a governmental entity may be liable for "its negligent acts or omissions" in the use of any motor vehicle. 14 M.R.S. § 8104-A(1)(A). The Tort Claims Act does not contain any provision for UM coverage when other parties are negligent.

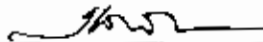
Accordingly, DPS is entitled to summary judgment on Murdock's UM claim against DPS. The court does not reach the State's alternative argument that Murdock's receipt of worker's compensation benefits bars his claim against DPS under the immunity and exclusivity provisions of the Workers Compensation Act.

The entry shall be:

The motions for summary judgment filed by defendants Martin Thorne and Maine Department of Public Service are granted and the complaint is dismissed as against those defendants. The case continues as against defendants Castigliola and Patrons Oxford Insurance Co.

The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: January 22, 2015



Thomas D. Warren
Justice, Superior Court

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