

<b>Shoemaker v Salamone</b>
2012 NY Slip Op 31547(U)
June 12, 2012
Sup Ct, Wyoming County
Docket Number: 42626
Judge: Mark H. Dadd
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At a term of the Supreme Court held in and for the County of Wyoming, at the Court-house in Warsaw , New York, on the 12<sup>th</sup> day of June, 2012.

PRESENT: HONORABLE MARK H. DADD  
Acting Supreme Court Justice

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF WYOMING

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DENNIS SHOEMAKER and  
JUDY SHOEMAKER

*Plaintiffs*

v.

ELEANOR J. SALAMONE,  
CAREY J. BURCH, and  
ANDREW W. GORAS, JR.

*Defendants*

DECISION AND ORDER

Index No. 42626  
Action No. 1

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DALE W. CLIFFORD

*Plaintiff*

v.

DENNIS L. SHOEMAKER,  
ELEANOR J. SALAMONE,  
CAREY J. BURCH  
ANDREW W. GORAS, JR.

*Defendants*

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Action No. 2

In these consolidated actions, Dennis Shoemaker, plaintiff in action number one and defendant in action number two, having moved for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability in both actions and dismissing, as against him, the plaintiff's complaint in action number two; and Andrew W. Goras, Jr., defendant in both actions, having cross-moved for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issues of negligence and proximate cause; and Dale W.

Clifford, plaintiff in action number two, having moved for an order pursuant to CPLR 3212 granting partial summary judgment in his favor on the issue of negligence with respect to defendants, Carey J. Burch and Andrew W. Goras, Jr., in action number two, and the said motions and the cross-motion having duly come on to be heard.

NOW, on reading the complaints and answers herein, and on reading and filing the notice of motion dated November 16, 2011, supported by the affidavit of George W. Collins, Jr., Esq., attorney for Dennis Shoemaker, sworn to on November 16, 2011, together with the annexed exhibits and accompanying memorandum of law; the notice of cross-motion dated December 8, 2011, supported by the affirmation of Sean M. Spencer, Esq., attorney for Andrew W. Goras, Jr., dated December 8, 2011, together with annexed exhibits; the affirmation in opposition of Paul E. Richardson, Esq., attorney for Carey J. Burch, dated December 13, 2011, together with the annexed affidavit of Carey J. Burch, sworn to on December 12, 2011; the notice of motion dated February 9, 2012, supported by the affidavit of Laurie A. Baker, Esq., attorney for Dale W. Clifford, together with the annexed exhibits; the affirmations in opposition of Thomas P. Durkin, Esq., attorney for Carey J. Burch, dated February 9, 2012, and February 15, 2012; the reply affidavit and the affidavit in opposition of George W. Collins, Jr., Esq., sworn to on February 14, 2012; and the affirmation of Sean M. Spencer, Esq., dated February 21, 2012, together with the annexed exhibits; and upon hearing and considering the arguments of counsel to the parties, and due deliberation having been had, the following decision is rendered.

Both actions arise out of a car accident that occurred on Route 19 in the Town of Warsaw on September 21, 2008, at approximately 11:00 am. At the site of the accident, Route 19 consists of a single lane for northbound traffic and a single lane for southbound traffic separated by a double-yellow center line. The accident happened after Eleanor Salamone, driving her Honda Pilot SUV on her way to church, slowed to a stop in the southbound lane to wait for oncoming traffic to pass before executing a left-hand turn into the church parking lot. Andrew Goras, Jr., driving a green minivan, was following behind her. Close behind Goras was Carey J. Burch, driving a dark blue minivan. Also approaching Salamone from the opposite

direction was Dennis Shoemaker, driving in the northbound lane in a pickup truck with Dale W. Clifford in the passenger seat. Just as Shoemaker's pickup was passing by in the northbound lane, Goras successfully maneuvered his vehicle to the right around Salamone's vehicle, using the right-hand shoulder of the road to do so.

Although Burch, as she approached at over 40 miles per hour, could see Salamone's vehicle ahead of her, "parked" in her lane waiting to make a left-hand turn, she did not apply her brakes until after she observed Goras go around to the right. Then, suddenly realizing that less than two car lengths now separated her vehicle from the rear of Salamone's SUV, Burch "slammed on" her brakes. At which point, the front left portion of her minivan crossed over the centerline. Shoemaker, upon seeing Burch's minivan cross into his lane in front of him, warned his passenger to "look out" and steered his pickup to the right in an attempt to avoid the collision. The left front of Burch's vehicle then made contact with Shoemaker's pickup just behind the driver's side door. The impact forced Burch's vehicle into Salamone's, resulting in minor damage to Salamone's SUV. It also caused Shoemaker's pickup to spin and go airborne – smashing through a utility pole, rolling over 5 or 6 times and eventually coming to rest on its driver's side in front of the church. Shoemaker and Clifford claim to have sustained serious injuries in the crash.

In his motion, Shoemaker contends that he is entitled to summary judgment holding that the negligent actions of Burch and Goras were the sole proximate causes of the collision, and that no negligence on his part contributed to the accident. With respect to Burch, the Court finds that Mr. Shoemaker has sustained his burden of proof upon the motion. The deposition testimony submitted establishes that Shoemaker was operating his truck within the posted speed limit in a reasonable and prudent manner when he was suddenly confronted by Burch's vehicle moving into his lane of travel in front of him. The evidence further establishes that, despite taking the reasonable evasive action of steering his truck sharply to the right, Shoemaker was unable to avoid being struck by Burch. Thus, Shoemaker has made a prima facie showing that he did not act negligently when faced with an oncoming vehicle suddenly

entering his lane of travel. Furthermore, the evidence is sufficient to permit the Court to find, as a matter of law, that Burch's crossing of the centerline created for Shoemaker an emergency situation not of his own making which left him "with no more than seconds to react and virtually no opportunity to avoid a collision" (Parastatidis v. Holbrook Rental, Inc., 2012 N.Y. Slip Op. 03615, 943 N.Y.S.2d 625, 626 [2<sup>nd</sup> Dept., May 18, 2012]; Simmons-Kindron v. 1218770 Ontario, Inc., 93 A.D.3d 1215 [4<sup>th</sup> Dept., 2012]; Clough v Szymanski, 26 A.D.3d 894 [4<sup>th</sup> Dept., 2006]). On this basis, Shoemaker has sufficiently shown that the emergency doctrine precludes a finding that he was comparatively at fault in the happening of the accident.

In response to Shoemaker's motion, Burch has not raised a triable issue of fact. Contrary to her contention, she cannot claim the benefit of the emergency doctrine herself. Her deposition testimony confirms that, well in advance of the accident, she observed Salamone's stationary vehicle ahead of her in her lane of travel. Thus, the fact that Goras went around Salamone on the right in no way prevented Burch from safely stopping her vehicle behind Salamone in the southbound lane, had she chosen to do so. Therefore, the emergency that confronted Burch when she suddenly realized, after watching Goras pass by, that she was traveling at over 40 miles per hour with less than two car lengths left separating her from Salamone, was an emergency of her own creation. By failing to slow her vehicle sooner, Burch negligently placed herself in the situation which necessitated that she "slam" on her brakes. Consequently, she is liable for the ensuing accident that occurred after she lost control of her vehicle and crossed the centerline.

In addition, even if Burch's assertions are credited that her vehicle actually came to a halt only "six to 12 inches" into the northbound lane – according to her deposition testimony – and that it remained there at rest for "approximately 2-3 seconds" before the collision --according to her affidavit – these allegations are not sufficient in themselves to raise a factual question with regard to whether Shoemaker was comparatively at fault for failing to take effective evasive action. This is because Burch has not demonstrated by her submissions that Shoemaker could have avoided the accident even if her vehicle was positioned as she asserts

that it was (see, Simmons-Kindron, *supra*). Mere “speculation” that a “plaintiff might have done something to avoid the accident is insufficient to raise an issue of fact concerning plaintiff’s comparative fault” (Whitfield v. Toense, 273 A.D.2d 877 [4<sup>th</sup> Dept., 2000]). Thus, the Court will grant Shoemaker’s motion for summary judgment with respect to Burch. Also, upon the foregoing reasoning, the Court will grant Dale W. Clifford’s motion for partial summary judgment on the issue of negligence with respect to Burch in view of Burch’s failure to raise a triable issue of fact in response.

With respect to Goras, the Court finds that the record establishes that his driving was not a proximate cause of the accident. Shoemaker and Clifford argue in their motions that Goras acted negligently when he abruptly drove around Salamone’s SUV using the right-hand shoulder of the road, but they fail to show that this alleged negligence played any role in causing the accident. In fact, it is undisputed that Goras’s actions had no effect at all on Shoemaker or Salamone. Furthermore, as noted above, Burch admits that she saw Salamone’s SUV stopped ahead of her in her lane. She was obligated to adjust her speed in response, and to bring her minivan safely to a halt in her lane if necessary, regardless of any act or omission by Goras. She has not provided a non-negligent reason for failing to do so. On the contrary, the record establishes that it was solely Burch’s negligent failure to maintain a safe distance that caused Burch to have to “slam” on her brakes and veer across the centerline in front of Shoemaker in order to avoid a rear-end collision with Salamone. Nothing Goras is alleged to have done or not done prevented Burch from reacting appropriately to Salamone’s stationary vehicle – Burch’s testimony that she never saw Goras’s brake lights go on before passing Salamone on the right in no way excuses Burch of her failure to apply her own brakes sooner. In this regard, this case is distinguishable from the Sheffer case cited by the plaintiffs’ (Sheffer v. Cristoph, 13 A.D.3d 1185 [4<sup>th</sup> Dept., 2004]), in that in Sheffer the Court held that a factual question existed with regard to whether the erratic driving of one otherwise uninvolved defendant “caused” another defendant to have to stop his vehicle in the driving lane with no lights showing, leading to the rear-end collision involving the plaintiff’s vehicle. Here, Goras driving around Salamone in

front of the tailgating Burch was not the cause of Burch’s failure to maintain a safe distance. Rather, it “did nothing more than to furnish the condition or give rise to the occasion” by which Burch’s negligence led to the accident (Barnes v. Fix, 63 A.D.3d 1515 [4<sup>th</sup> Dept., 2009], leave to appeal denied by 13 N.Y.3d 716 [2010]; see also, Gralton v. Oliver, 277 A.D. 449 [3<sup>rd</sup> Dept., 1950]; Sheehan v. City of New York, 40 N.Y.2d 496 [1976]; McKee v. Plonsky, 74 A.D.3d 1779 [4<sup>th</sup> Dept., 2010]). Accordingly, the Court will deny the plaintiffs’s motions with respect to Goras and grant Goras’s motion for summary judgment.

NOW, THEREFORE, it is hereby

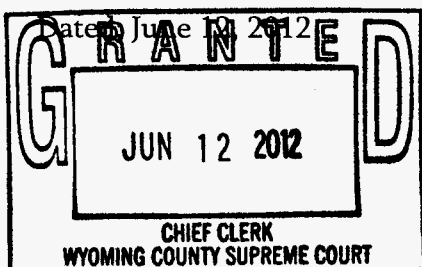
ORDERED that the motion of Dennis Shoemaker, plaintiff in action number 1 and defendant in action number 2, for summary judgment on the issues of negligence and proximate cause is granted to the extent that the Court finds, as a matter of law, that the negligence of defendant, Carey J. Burch, was the proximate cause of the accident and that negligence on the part of Dennis Shoemaker did not contribute to causing the accident; and it is further

ORDERED that the motion of Dennis Shoemaker is in other respects denied; and it is further

ORDERED that the motion of Dale W. Clifford, plaintiff in action number 2, for partial summary judgment on the issue of negligence is granted to the extent that the Court finds that defendant, Carey J. Burch, was negligent; and it is further

ORDERED that the motion of Dale W. Clifford is in other respects denied; and it is further

ORDERED that the cross-motion of defendant, Andrew W. Goras, for summary judgment on the issues of negligence and proximate cause is granted.



*Mark H. DeLoe*  
 Acting Supreme Court Justice