Hazard v Colabelli
2014 NY Slip Op 31926(U)
July 25, 2014
Supreme Court, Madison County
Docket Number: 2012-1923
Judge: Eugene Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the MADISON County Courthouse, WAMPSVILLE, New York, on the 27th day of June, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : MADISON COUNTY

HOLLY ELISABETH HAZARD as Executrix of the Estate of KRISTIN JANE HAZARD and as Legal Guardian of ELISABETH L. HOLMES, an Infant and as Legal Guardian of BLYTHE A. HOLMES, an Infant,

Plaintiffs,

-vs-

JOHN M. COLABELLI and ROBERT M. HAZARD, Executor of the ESTATE OF RICHARD L. HOLMES,

Defendants.

DECISION AND ORDER

Index No. 2012-1923
RJI No. 2013-0386-J

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on the motion of Defendant, John M. Colabelli ("Colabelli"), for Summary Judgment pursuant to CPLR §3212 with regard to all Plaintiffs or, in the alternative, Summary Judgment of the First and Second Causes of Action with regard to all Plaintiffs and Fourth Cause of Action with regard to Plaintiff Blythe Holmes. Defendant Estate of Richard Holmes ("Holmes") moves for Summary Judgment with regard to the Fourth Cause of Action of Plaintiff Blythe Holmes.

In reaching the determination herein, the Court has reviewed the following: Defendant Colabelli's motion for summary judgment dated December 19, 2013 with supporting affidavits and Exhibits, and Memorandum of Law dated December 19, 2013; Motion of Defendant Robert Hazard, as Executor of the Estate of Robert Holmes, dated December 20, 2013, with supporting attorney affidavit of Mitchell Lenczewski with annexed Exhibits and Memorandum of Law; Responding papers from Plaintiff in opposition, which include attorney affirmation of Jenna Klusic with Exhibits, affidavit of Thomas C. Onions, with Exhibits, affidavit of Lauren C. Keller, with Exhibits, and the Memorandum of Law in Opposition.

These claims arise from a motor vehicle accident occurring on December 28, 2010 on State Route 12 ("SR12") in the Town of Paris, County of Oneida. On that date, Holmes was driving north on SR12 with his wife (front seat passenger Kristin Jane Hazard) and two daughters (backseat passengers Elisabeth and Blythe Holmes) when he lost control of his vehicle on the slippery and snow covered roadway, spun and crossed into the southbound lane perpendicular to oncoming traffic. Holmes' vehicle was struck in the front passenger area by a vehicle driven by Colabelli who was driving southbound on SR12. Both Holmes and Kristin Hazard were pronounced dead shortly thereafter and Holmes' daughters were taken from the scene for medical care.

It is undisputed that in the area of the accident, the roadway was snow covered and slippery. Conditions were windy with snow blowing across SR12. Holmes' car veered to the right shoulder, was brought fully back to the northbound lane, then lost control and spun into the southbound lane and was struck on the passenger side by the front of Colabelli's vehicle.

Colabelli argues that he was proceeding lawfully within his own lane of traffic at a speed of 40-45 MPH in deference to road conditions[1]. He was confronted with an emergency situation not of his own making with little or no time to react. As such, no liability may lie with him. Plaintiffs

[1]The posted speed limit in this area of SR12 is 55MPH.

assert that there are significant and material factual disputes that prevent a Summary Judgment finding. Specifically, Colabelli testified that he was approximately 200 feet from Holmes when he first saw the vehicle swerve onto the shoulder and 2-3 seconds before he thought Holmes had regained control. He estimated that it was 3-4 seconds after he thought Holmes had recovered and regained his lane of traffic that he struck Holmes' the vehicle . However, Plaintiff's expert, Thomas Onions, opines that based upon the relative speeds of the vehicles[2], Colabelli's estimate of distance cannot be accurate and rather the distance between when he first noticed Holmes' car and the time of impact was 600-840 feet. This, according to Onions provided Colabelli with a 5-7 second window to react to Holmes' vehicle.

Plaintiffs also assert that there is a factual dispute as to whether Holmes' vehicle came to a stop in the southbound lane before being struck by Colabelli. Colabelli testified that the Holmes vehicle had spun into his lane and he struck it while it was spinning. In contrast, Elisabeth Holmes testified that the car had come to a stop before being struck and she saw it coming toward them in the rearview mirror.

Finally, Plaintiffs argues that Colabelli's testimony regarding Holmes regaining control prior to coming into his lane of traffic is contradicted by his statements at the time of the accident. In a supporting deposition given to the Oneida County Sheriff's Department, Colabelli "I saw the rear end go off the road and got (sic) into the snow, then the car shot right in front of me" (Plaintiff's exhibit "C").

Colabelli's Motion For Summary Judgment

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987);

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[2]The speed of Holmes' vehicle is unknown.

Bulger v. Tri-Town Agency, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mosely v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Ctr.*, 64 NY2d 851, 853 (1985).

In the present case, Colabelli testified that on December 28, 2010, he was traveling south on SR12 from Utica, New York. Although the posted sped limit was 55 MPH, he reduced his speed to 40-45 MPH due to snow drifts causing areas of snow cover on the road. When he approached the snow drift near the scene of the accident, he slowed to "below 40 MPH". (Colabelli EBT at P. 32). He believed his car was in control and had no problems navigating over the snow. (Colabelli EBT at P. 33). He estimated that he first saw the Holmes vehicle when it was "a couple of hundred feet ahead of me, maybe more...". (Colabelli EBT at P. 34). He noticed that there was "snow coming off of" Holmes' wheels on the right side and concluded that Holmes had "gone of the road a little bit and was trying to steer back on...". (Colabelli EBT at P. 36). He thought the Holmes vehicle had "recovered" because he no longer saw snow "coming off the wheels". Then "seconds after that, [Holmes] was coming right across and heading right toward [Colabelli]". (Colabelli EBT at P. 39). Colabelli tried to slow, turned slightly to the right and applied his brakes but struck the Holmes vehicle in the front passenger area. (Colabelli EBT at PP. 40, 42, 45).

A witness, Luis Pereira (Pereira), was traveling south on SR 12 directly behind Colabelli on the date of the accident. Approximately ½ mile from the scene of the accident, he noticed that snow had drifted across the road and slowed his speed to a little over 40 MPH. (Pereira EBT at PP. 11, 15). He also believed he was gaining on the car in front of him (Colabelli).[3] (Pereira EBT at P15). He looked away and when he looked back he saw the Holmes car in the southbound lane with its trunk near the yellow line. (Pereira EBT at 18). Pereira estimated that it was a "flash of a

[3]Pereira's testimony suggests that Colabelli's speed was closer to 40MPH.

second, a tenth of a second, a second" before Colabelli struck the Holmes car. (Pereira EBT at P. 19).

"The emergency doctrine relieves an automobile driver of liability when such driver is faced with an 'emergency situation, not of his or her own making, has little or no time to consider an alternative course of conduct and acts reasonably under the circumstances' " *Shetsky v Corbett*, 107 AD3d 1100, 1101 (3rd Dept. 2013), *quoting Warley v Grampp,* 103 AD3d 997, 999, 959 N.Y.S.2d 767 (3rd Dept. 2013), [internal quotation marks and citations omitted]; *see Caristo v Sanzone,* 96 NY2d 172, 174 (2001); *Rivera v New York City Tr. Auth.,* 77 NY2d 322, 322 (1991); *Copeland v Bolton,* 101 AD3d 1283, 1284 (3rd Dept. 2012); *Hubbard v County of Madison,* 93 AD3d 939, 940 (3rd Dept. 2012), *lv denied* 19 NY3d 805 (2012).

The Court finds that Colabelli has made a *prima facie* case for Summary Judgment. In light of the snow drifts on the road, Colabelli was traveling at 40-45 MPH in an area with a posted speed limit of 55 MPH. Although he noticed Holmes veer onto the shoulder, he took no immediate action believing that he had recovered control of the vehicle. By the time Holmes crossed into his southbound lane, he had only seconds to avoid a collision with Holmes. He testified that he braked and veered slightly to the right but there was insufficient time to avoid the collision. Nothing Colabelli did, or did not do, created the emergency situation. The Court concludes that based upon these factors, Colabelli has set forth a *prima facie* entitlement to Summary Judgment in that there are no material issues of fact, and that the Defendant did not cause or contribute to the emergency (which was Holmes' vehicle crossing into the southbound lane), and that he could not have done anything to avoid the collision.

Colabelli having made a prima facie case for Summary Judgment, the burden shifts to the Plaintiffs to demonstrate the existence of material issues of fact. *Dugan, supra.*

First, Plaintiffs argue that the accident could not have happened as described by Colabelli based upon the opinion of their Forensic Examiner, Thomas C. Onions. Based upon Collabelli's

estimate of 5-7 seconds from when he first saw Holmes on the road shoulder to impact, the vehicles must have been 600-840[4] feet apart at that time and not the 200 feet estimated by Colabelli. Onions concludes that with 5-7 seconds to stop, Colabelli could have either avoided or lessened the impact of the accident. However, the salient time frame is not from when he first saw Holmes on the shoulder but rather from when Holmes crossed into the southbound lane thereby creating the emergency situation. Colabelli testified that 3-4 seconds passed between the time he concluded that Holmes had recovered control of his vehicle until he crossed into the southbound lane. The only credible evidence[5] in the record regarding the amount of time between when Holmes crossed into the southbound lane is found in the testimony of Colabelli. At best, Colabelli had 3-4 seconds to react and likely less since it was 3-4 seconds between the time he concluded that Holmes had *regained control* of his car and the time of impact. Colabelli's conclusion that Holmes had "regained control" can most accurately be characterized as an error in judgment which does not give rise to liability. *Burnell v. Huneau,* 1 AD3d 758 (3rd Dept. 2003); *Lamey v. County of Cortland,* 285 AD2d 885 (3rd Dept. 2001); *Lamica v. Shatlaw,* 235 AD2d 809 (3rd Dept 1997). Further, "speculation regarding evasive action the defendant driver should have taken to avoid a collision, especially when the driver had at most a few seconds to react does not raise a triable issue of fact." *Cancellaro v Shults*, 68 AD3d 1234, 1237 (3rd Dept. 2009), *lv denied* 14 NY3d 706 (2010) (*citing Dearden v Tompkins County,* 6 AD3d 783, 785 (3rd Dept. 2004)); *see also Parastatidis v Holbrook Rent. Ctr.*, 95 AD3d 975 (2nd Dept. 2012); *Hubbard, supra.*

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[4]This estimate is speculative since there is no evidence in the record as to the speed Holmes was driving when he was on the shoulder or thereafter. Onions *assumed* Holmes was traveling at the same rate of speed as Colabelli. "[W]here an expert fail[s] to provide a factual or scientific basis for [his or her] opinion, [it is] render[ed] conclusory and insufficient to defeat summary judgment" *Stocklas v Auto Solutions of Glenville, Inc.*, 9 AD3d 622, 624 (3rd Dept. 2004), *app denied* 4 NY3d 738 (2004) (*citing Rockefeller v Albany Welding Supply Co.*, 3 A.D.3d 753, 756 (3rd Dept. 2004)).

[5]Elisabeth Holmes testified that the car came to a halt in the southbound lane facing south and she saw the Colabelli vehicle coming toward them in the rearview mirror. However, this testimony cannot be deemed credible since the point of impact was the passenger side door area.

The fact that the Holmes' vehicle may have been kicking up snow on the shoulder of the road did not create the emergency situation, nor did it require defendant to take any action at that time. Had Holmes actually regained control, there would have been no emergency, or action required. The emergency only came into existence at the time the vehicle crossed into Colabelli's lane. As pointed out in oral argument, at the time of kicking up snow on the shoulder, it would have been impossible to know if the vehicle would go back into its lane, go off on the shoulder again, or go into Colabelli's lane.

Finally, Plaintiffs argue that there is conflict in Colabelli's EBT testimony and the statement given to the Oneida County Sheriff's Department. In his written statement, Colabelli notes "I saw the rear end go off the road and got (sic) into the snow, then the car shot right in front of me" (Plaintiff's exhibit "C"). Plaintiffs argue that this differs substantially from his EBT testimony where 5-7 seconds pass between the time he sees Holmes on the shoulder of the road and the time of impact. However, the Court finds that since no time estimates were provided to the Sheriff's Department, these two statements can not be viewed as conflicting.

For the reasons set forth herein, Colabelli's motion for Summary Judgment is Granted.

Colabelli Partial Summary Judgment Motion Regarding First and Second Causes of Action

Although the Court has granted Summary Judgment with regard to all claims against Colabelli, a brief treatment of Colabelli's Motion for Partial Summary Judgment is warranted.

With regard to all motions for summary judgment, the moving party bears the initial burden of making a *prima facie* case that there are no material issues of fact. *Amedure, supra.* Mere conclusory statements of the lack of evidence are insufficient to sustain the moving party's burden. *See Weingrad, supra.*

With regard to the First Cause of Action, the Plaintiff seeks damages for conscious pain and

suffering including, but not limited to, pre-impact terror. Admittedly, the record contains little evidence of conscious pain and suffering. However, the mere absence of evidence in the record cannot sustain a moving party's motion for summary judgment. *Torres v Industrial Container*, 305 AD2d 136 (1st Dept. 2003).

Similarly, Colabelli seeks summary judgment with regard to the Second Cause of Action for Wrongful Death by pointing to the lack of evidence of any pecuniary loss. However, the movant bears the burden of making a *prima facie* case for the lack of a material issue of fact. As with the First Cause of Action, Colabelli merely points to the lack of proof on the issue and this is insufficient as a matter of law. *Torres supra.*

For the reasons set forth herein, and subject to the Court's ruling regarding complete Summary Judgment, Colabelli's motion for Partial Summary Judgment regarding the First and Second Causes of Action is denied.

Defendants' Motions for Partial Summary Judgment Regarding The Fourth Cause of Action

Colabelli and Holmes (collectively "Defendants") seek Summary Judgment of the Plaintiffs' Fourth Cause of Action to the extent that Blythe Holmes ("Blythe") seeks to recover for injuries sustained in the subject motor vehicle accident. Defendants argue that Blythe did not sustain a serious injury pursuant to New York Insurance Law §5102(d).

New York's "No-Fault Law" was enacted in 1973 "with the objective of promoting prompt resolution of injury claims, limiting cost to consumers and alleviating unnecessary burdens on the courts (*see* Governor's Mem approving L 1973, ch 13, 1973 McKinney's Session Laws of NY, at 2335)." *Pommells v. Perez,* 4 NY3d 566, 570 (2005). It was "adopted by the Legislature to correct certain infirmities recognized to exist under the common-law tort system of compensating automobile accident claimants." *Licari v Elliott*, 57 NY2d 230, 234 (1982). "Tacit in this

legislative enactment is that any injury not falling within the new definition of serious injury is minor and a trial by jury is not permitted under the no-fault system." *Id.* at 235. For a cause of action to lie under Insurance Law §5102, the plaintiff must sustain a "serious injury." *Licari supra.* A serious injury is:

> 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.

Ins §5102 (b)(3)(d). As §5102 of the Insurance Law is in derogation of the common law, "it is to be strictly construed to avoid abrogating the common law beyond the clear impact of the statutory language". *Maxwell v State Farm*, 92 AD2d 1049, 1050 (3rd Dept. 1983).

"Defendant [bears] the initial burden of demonstrating, by the proffer of competent medical evidence, that plaintiff did not sustain serious injuries within the meaning of *Insurance Law § 5102 (d)* as a result of the accident. *Raucci v Hester,* 2014 N.Y. App. Div. LEXIS 4919 (3rd Dept. 2014), (*see Cole v Roberts-Bonville,* 99 AD3d 1145, 1146 (3rd Dept. 2012); *Haddadnia v Saville,* 29 AD3d 1211, 1211 (3rd Dept. 2006).

In her pleadings and bill of particulars, Blythe alleges serious injury in the categories of permanent and total loss of use of a body organ, member, function or system, permanent consequential limitations of a body organ or member, significant limitation of use of a body function or system, and the so called 90/180 category. Defendants argue that the evidence does not support a finding of serious injury for any category alleged pursuant to Insurance Law §5102(d).

With regard to the 90/180 category, the Defendants correctly note that medical evidence and the testimonial evidence fails to support a claim that Blythe had a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities. At the time of the accident, Blythe was a middle school student. The testimonial record is clear that she did not miss school as a result of injuries from the accident for 90 days within the first 180 days of the accident. Despite attending a new school following the accident[6], she completed the 7th grade on schedule and without significant absences. Blythe received no special tutoring or assistance to complete her academic work in the 180 days following the accident. She completed the academic year with grades of "A's" and "B's".

The Court finds that the Defendants have satisfied their burden with regard to the 90/180 category. The Court further finds that the Plaintiff has offered no evidence to support the conclusion that there are material issues of fact regarding the 90/180 category of serious injury. As such, with regard the 90/180 category, the Defendants' motion for summary judgment is granted.

With regard to the remaining categories, the Defendants have failed to submit competent medical evidence to sustain its initial burden regarding the lack of a triable issue of fact. Defendants rely on the Plaintiffs' medical evidence but nothing therein opines the absence of a serious injury as defined by Insurance Law §5102(d). Defendants argue that the Court should find the absence of evidence of serious injury to support their burden. However, this ignores the fact that at this stage of the litigation, the burden is on the Defendants to submit evidence that there is no serious injury and therefor no triable issue of fact.[7]

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[6]Blythe relocated from Pennsylvania to Virginia to live with relatives and completed the 7th grade and 8th grade on schedule.

[7]Defendants could have obtained and submitted an IME or similar type review but have failed to do so.

The Court concludes that the Defendants have failed sustain their burden regarding the remaining categories of serious injury based upon the medical evidence in the record. Defendants motion regarding all but the 90/180 categories is denied.

Finally, with regard to the "zone of danger" claim, Plaintiffs correctly point out that neither Defendant sought dismissal of this claim other than to argue the lack of serious injury. However, since proof of serious injury is not required to maintain this cause of action, to the extent that Defendants seek Summary Judgment of this portion of the Fourth Cause of Action, the motion is denied. *Delosovic v City of New York*, 143 Misc2d 801 (New York County, Sup. Ct 1989), *affd* 174 AD2d 407 (1st Dept. 1991); *see, Graber v. Bachman,* 27 AD3d (3rd Dept. 2006).

Based upon the foregoing, it is hereby

ORDERED, Defendant Colabelli's motion for summary judgment to dismiss Plaintiff's complaint against him, in its entirety is **GRANTED,** and it is further

ORDERED, Defendant Hazard's motion for partial summary judgment dismissing the Fourth Cause of action is **DENIED,** and it is further

ORDERED, Defendant Colabelli's motion for partial summary judgment dismissing the Fourth Cause of action is **DENIED,** subject to the granting of complete Summary Judgment above.

This constitutes the Decision and Order of the Court.

Dated: Jul 25, 2014

HON. EUGENE D. FAUGHNAN
SUPREME COURT JUSTICE