IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHERYL ROWE,	:	
	:	C.A. No. K12C-02-008 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
THE ESTATE OF KENNETH R. McGRORY, by and through its administrator, DENISE M. DEVARY, MELISSA MYERS and JOSEPH DEAN McGRORY,	:	
	:	
Defendants.	:	

Submitted: January 2, 2013
Decided: April 12, 2013

ORDER

Upon Defendants' Motion for Summary Judgment. *Denied.*

Jeffrey J. Clark, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorney for Plaintiff.

Susan List Hauske, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorney for the Defendants.

WITHAM, R.J.

ISSUE

Whether there are genuine issues of material fact as to the degree and extent of the parties' respective comparative fault that preclude summary judgment in this personal injury action.

FACTS AND CONTENTIONS

This is a personal injury action stemming from a motor vehicle accident that occurred on June 30, 2010. At approximately 9:12 p.m., Plaintiff Cheryl Rowe ("Plaintiff"), while driving west on Pencader Drive near Newark, Delaware, approached the intersection of Pencader Drive "Pencader" and Pleasant Valley Road ("Pleasant Valley"). The parties disagree sharply as to what happened next. Plaintiff testified that she made a complete stop at the stop sign at the intersection of Pencader and Pleasant Valley and looked both ways before turning left onto Pleasant Valley. Plaintiff testified that she then drove approximately 40 to 50 feet on Pleasant Valley before her vehicle was rear-ended by a vehicle operated by Kenneth McGrory ("McGrory"). Plaintiff testified that she did not see McGrory's vehicle, or its lights, until it was approximately 20 to 30 feet behind her vehicle. In her Complaint, filed on February 3, 2012 against McGrory's Estate and its administrator Denise M. DeVary ("Defendants"),[1] Plaintiff charges that McGrory exceeded the posted speed limit of 50 miles per hour; failed to slow his vehicle when he knew or should have

[1] McGrory, a minor, died of causes unrelated to the motor-vehicle accident prior to the commencement of this action. The Complaint was later amended to include Defendants Melissa Myers, the owner of the motor vehicle operated by McGrory at the time of the accident, and Joseph Dean McGrory, who signed the minor's license application. *See* Am. Compl. ¶¶ 11-12.

known the presence of other vehicles in the intersection of Pencader and Pleasant Valley; failed to keep a lookout for other vehicles; failed to maintain a safe distance between his vehicle and Plaintiff's; and that he ultimately failed to control his vehicle in such a manner as to avoid the collision in question.

In their Motion for Summary Judgment, filed on November 12, 2012, Defendants discount Plaintiff's version of the accident. They contend that the evidence in the record leads to the sole inference that Plaintiff failed to yield right of way to oncoming traffic as she made a left turn onto Pleasant Valley, and turned directly into the path of McGrory's vehicle, which Defendants contend was traveling south on Pleasant Valley at a lawful speed. Therefore, Defendants contend summary judgment is appropriate because, as a matter of law, Plaintiff's own's negligence exceeds any potential negligence of McGrory. Accordingly, Defendants argue that Delaware's comparative negligence statute bars Plaintiff's recovery.

Plaintiff claims that summary judgment is not appropriate because there are genuine issues of material fact. Specifically, Plaintiff denies that the record conclusively establishes that Plaintiff was more than 50 percent negligent. In fact, as Plaintiff contends, the record supports the opposite conclusion given that Plaintiff is the sole remaining eyewitness to the accident and that it cannot be established, solely by way of her deposition testimony, that she was comparatively negligent as a matter of law. Moreover, Plaintiffs argue that photographic evidence of the damage to Plaintiff's vehicle support an inference that Plaintiff was struck directly from behind at a high rate of speed. As such, Plaintiff contends that the relative negligence of the parties is an issue for the jury.

DISCUSSION

Superior Court Rule 56(c) provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] The moving party bears the burden of demonstrating both the absence of material fact and its entitlement to judgment as a matter of law.[3] Summary judgment is only appropriate when, after viewing all of the evidence in a light most favorable to the nonmoving party, the Court finds no genuine issue of material fact.[4] "[I]f a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary judgment is inappropriate.[5] Moreover, "if it appears [to the Court] that there is *any reasonable hypothesis* by which the non-moving party might recover," the motion will be denied.[6] Summary judgment is also inappropriate when there is a "dispute as to the

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[2] Super. Ct. Civ. R. 56c).

[3] Super. Ct. Civ. R. 56(e). *See also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[4] *Singletary v. Amer. Dept. Ins. Co.*, 2011 WL 607017, at *2 (Del. Super. Ct. Jan. 31, 2011) (*citing Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at *2 (Del. Super. Ct. Feb. 22, 1994)).

[5] *Ebersole v. Lowengrub,* 180 A.2d 467 (Del. 1962).

[6] *Nationwide Mut. Ins. Co. v. Flagg,* 789 A.2d 586, 591-92 (Del. Super. Ct. 2001) (citing *Vanaman v. Milford Memorial Hospital, Inc.,* 272 A.2d 718, 720 (Del. 1970)).

inferences which might be drawn from the facts of the case."[7]

Viewing the facts in the light most favorable to the Plaintiff, and accepting their well-pleaded allegations as true, the competing versions of the accident demonstrate the existence of material issues of fact precluding summary judgment in favor of Defendants. There are sufficient factual allegations in dispute here, including, but not limited to: whether McGrory was observing the posted speed limit at the time of the accident; whether Plaintiff yielded to oncoming traffic as she made a left-hand turn onto Pleasant Valley Road; and whether McGrory failed to keep a safe distance from Plaintiff's vehicle. The determination of these factual disputes is largely dependent on an assessment of Plaintiff's credibility, a task best left to the jury.[8] Therefore, because there are unresolved factual questions, some involving an assessment of credibility, this case is not suited for resolution on a motion for summary judgment.

Moreover, even if a jury were to accept Defendants' version of the facts as true, Plaintiff, as the non-moving party, could recover if a reasonable jury found that Plaintiff's negligence did not represent greater than 50 percent of the cause of the accident. Issues of "negligence, either on the part of a defendant or of contributory

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[7] *Schagrin v. Wilmington Med. Ctr., Inc.,* 304 A.2d 61, 63 (Del. Super. Ct. 1973) (citing *Vanaman,* 272 A.2d at 720)).

[8] *See Cereberus Int'l, Ltd. v. Apollo Mgmt, L.P.,* 794 A.2d 1141, 1149 (Del. 2002) ("If the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate"); *Nationwide Gen. Ins. Co. v. Mendes,* 2007 WL 1748651, at *3 (Del. Super. Ct. May 31, 2007) (denying summary judgment where the credibility of the witnesses involved in a sales transaction was at issue).

negligence on the part of a plaintiff, ... are, *except in rare cases*, questions of fact which ordinarily should be submitted to the jury" for resolution.[9] Summary judgment is appropriate only in those clear cases where the moving party "has demonstrated not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inferences to be drawn from the uncontested facts are adverse to the plaintiff."[10] In support of their contention that the present case falls within this limited exception, Defendants attempt to analogize the facts of this case to those in *Coale v. Rowlands*.[11] In *Coale*, a pedestrian was struck by a vehicle while he attempted to cross a six-lane highway at night at a location where there was no traffic light or crosswalk.[12] The trial court was tasked with apportioning the relative fault of the pedestrian and the driver at the summary judgment stage.[13] In granting the Defendants' motion for summary judgment, the court found no evidence of negligence by the driver.[14] After reviewing the record with respect to the driver's actions and reactions, the Supreme Court affirmed the grant of summary judgment in favor of the defendants.[15] The Supreme Court predicated its decision, on large part,

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[9] *Watson v. Shellhorn & Hill, Inc.,* 221 A.2d 506, 508 (Del. 1966) (emphasis added).

[10] *Id.*

[11] 723 A.2d 395 (Del. 1998) (unpublished table decision).

[12] *Id.* at *1.

[13] *Id.*

[14] *Id.*

[15] *Id.* at *1-*2.

upon the fact Rowlands had no duty to anticipate that a pedestrian would attempt to cross a six-lane highway at a place where there was no traffic signal.[16] The facts in the present case are not as conclusive in determining the relative fault of the parties. Consequently, this case does not seem to fall within the category of cases in which summary judgment in a negligence claim is appropriate. Accordingly, Defendants have not met their burden of showing that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Defendants' motion is therefore denied.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment must be **DENIED**. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[16] *Id.* at *2.