

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

ANGELA MURREY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07C-08-137 CLS
)	
TIM J. SHANK and S & W, INC.,)	
)	
Defendants.)	

Date Submitted: April 8, 2011

Date Decided: April 13, 2011

On Plaintiff's Motion for Summary Judgment. **DENIED.**

ORDER

Stephen B. Potter, Esq., 840 N. Union Street, P.O. Box 30409, Wilmington, DE 19805. Attorney for Plaintiff.

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Brett T. Norton, Esq., 300 Delaware Avenue, Wilmington, DE 19801. Attorneys for Defendants.

Scott, J.

Introduction

Before the Court is Plaintiff's motion for summary judgment. The Court has reviewed the parties' submissions. For the reasons that follow, Plaintiff's motion for summary judgment is **DENIED**.

Facts

On March 7, 2006, Plaintiff, William O. Murrey, Jr. ("Mr. Murrey"), was traveling eastbound on East 12th Street ("E. 12th St.") in the City of Wilmington, which is a four lane divided highway approaching the southbound I-495 entrance ramp. Tim J. Shank ("Defendant Shank"), was driving a garbage truck westbound on E. 12th St. and allegedly made a left turn into the path of Mr. Murrey's oncoming vehicle. Using skid marks, Officer Gerald J. Connor ("Officer Connor") of the Wilmington Police Department calculated Mr. Murrey was driving approximately 45 mph in a posted 25 mph zone. Officer Connor cited Mr. Murrey for driving at an unsafe speed in violation of 21 *Del. C.* § 4168(a).¹ Mr. Murrey pled guilty to the violation. Defendant Shank was cited for failing to yield the right of way in violation of 21 *Del. C.* § 4132. He pled guilty to the violation.

In his deposition, Officer Connor testified that it was a clear, lit day and the roadway was dry.² He also estimated Defendant Shank had visibility of about one-

¹ Def. Response Ex. 5.

² Pl. Motion for Summary Judgment Ex. A, Connor Dep. 18:18-19.

half mile.³ Daniel Southerland also indicated Defendant Shank had nothing obstructing his view.⁴ During his deposition, Defendant Shank testified he did not see Mr. Murrey's vehicle before the accident.⁵

Mr. Murrey accepted an offer of judgment on October 15, 2010. Only Angela Murrey's ("Plaintiff") loss of consortium claim remains. Plaintiff claims there are no issues of material fact as to liability alleging Defendant Shank was negligent in failing to yield the right of way, entitling her to judgment as a matter of law. The Defendants have raised the defense of comparative negligence alleging Mr. Murrey was negligent for driving at an unsafe speed.

Standard of Review

Superior Court Civil Rule 56 allows a defendant to file a motion for summary judgment. Summary judgment is appropriate when the moving party is able to show there are no genuine issues of material fact.⁶ Once met, the burden then shifts to the nonmoving party to demonstrate issues of genuine material fact exist.⁷ The facts are viewed in the light most favorable to the nonmoving party.⁸

³ Id. at 18:18-19.

⁴ Pl. Motion for Summary Judgment Ex. B, Southerland Dep. 14:21-24.

⁵ Def. Response Ex. 2, Shank Dep. 11:20-12:18.

⁶ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citation omitted).

⁷ *Id.* at 681.

⁸ *Grabowski v. Mangler*, 938 A.2d 637, 641 (Del. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, (1986)).

Discussion

Since there is an issue of material fact as to whether Mr. Murrey was more negligent than the Defendant Shank, summary judgment is inappropriate.

Comparative negligence is not a bar to recovery “where such negligence was not greater than the negligence of the defendant . . . but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.”⁹

When the defense of comparative negligence is raised, “[t]he apportionment of negligence is typically the province of the jury, unless no other reasonable inference can be drawn from the evidence produced than the fact that plaintiffs negligence exceeded the defendant's negligence by 51%.”¹⁰ When there is no testimony, such as this case, that a plaintiff’s car was within the sight of the defendant, then a jury could find that the plaintiff’s car was not in sight when the defendant started his turn.¹¹ The burden of proving plaintiff’s car was able to be seen is on the plaintiff¹² and remains a question of fact for the jury.

There is nothing in the record to suggest Defendant Shank saw Mr. Murrey’s vehicle prior to the accident, so the negligence of the two drivers is a question of fact to be decided by a jury. The depositions of Officer Connor and Daniel Southerland indicate there was nothing to obstruct Defendant Shank’s view at the

⁹ 10 Del. C. § 8132.

¹⁰ *Mosher v. Evans*, 1998 WL 278409 (Del. Super. Ct.).

¹¹ *Cornwell v. Ruhl*, 262 A.2d 252, 254 (Del. 1970).

¹² *Id.*

time of the accident. In his deposition, Officer Connor stated “[i]t was a clear, lit day, and dry roadway.”¹³ He also stated Defendant Shank had visibility of about one-half of a mile.¹⁴ Daniel Southerland also indicated there was nothing to obscure Defendant Shank’s view of oncoming traffic.¹⁵ In his deposition, Defendant Shank stated he did not see Mr. Murrey’s vehicle approaching the intersection.¹⁶ The record suggests Defendant Shank did not see Mr. Murrey’s car approaching the intersection despite the clear day and having visibility of at least one-half mile. Therefore, a jury could infer that Mr. Murrey was driving at least 45 mph in a posted 25 mph zone and that he was more negligent than Defendant Shank in causing the accident. The negligence of both drivers is a question of fact for a jury to decide and granting summary judgment would be inappropriate.

Conclusion

Based on the forgoing, the Plaintiff’s motion for summary judgment is

DENIED.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

¹³ Pl. Motion for Summary Judgment Ex. A, Connor Dep. 18:18-19.

¹⁴ *Id.* at 18:4-13.

¹⁵ Pl. Motion for Summary Judgment Ex. B, Southerland Dep. 14:21-24.

¹⁶ Def. Response Ex. 2, Shank Dep. 11:20-12:18.