IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

RANCEL C. EVANS, SR.	*	CIVIL ACTION NO.:99C-08-006
Plaintiff,	*	
v.	*	
DONALD RIGGS and The Estate of DONALD RIGGS and THE HARLEYSVILLE INSURANCE COMPANIES,	*	
	*	
Defendants	*	

MEMORANDUM OPINION

Date Submitted: May 18, 2001
Date Decided: July 5, 2001

Wayne N. Elliott, Esquire, Prickett, Jones & Elliott, 11 North State Street, Dover, Delaware 19901, attorney for Plaintiff, Rancel C. Evans, Sr.

Robert B. Young, Young & Young, 300 South State Street, P.O. Box 1191, Dover, Delaware 19903, attorney for Defendants Donald Riggs, and The Estate of Donald Riggs

Sherry Ruggiero Fallon, Esquire, Tybout, Redfearn & Pell, 300 Delaware Avenue, Suite 1100, P.O. Box 2092, Wilmington, Delaware 19899, attorney for Defendant Harleysville Insurance Company

STOKES, J.

Defendant, Harleysville Mutual Insurance Company ("Harleysville"), moves this Court to grant summary judgment in its favor on Plaintiff's uninsured motorist claim based on the absence in the record of any evidence of negligence on the part of a phantom vehicle. Furthermore, Harleysville argues that even if such negligence could be shown by the Plaintiff, Rancel C. Evans ("Plaintiff"), as a matter of law, it was not a proximate cause of the accident.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

This action arises out of a motor vehicle collision which occurred on August 8, 1997, at the intersection of New Castle Road 25 and U.S. Route 13, approximately two miles south of Odessa, New Castle, Delaware. Plaintiff was operating a 1990 Dodge Dakota pick-up truck southbound on Route 13 in the lefthand lane of travel when the traffic signal turned red for southbound traffic. Plaintiff claims that he saw smoke ahead, and that vehicles in front of him abruptly decelerated. Plaintiff reacted by moving his vehicle to the left into the median as a precaution against becoming involved in a potential collision. Plaintiff alleges that after he pulled into the median, the light changed to green, and traffic started moving again. He estimates that he sat in the median for fifteen to twenty seconds before he was struck from behind by Defendant Donald Riggs ("Riggs").

Both Plaintiff and Riggs left the scene after exchanging information. On his way

home, Plaintiff realized that he should report the accident, and he contacted the State Police. Officer Lowman of the Delaware State Police met Plaintiff back at the scene of the accident and took Plaintiff's statement. Her report reads in relevant part as follows:

> Vehicle 1 [Evans] was southbound U.S. 13 in left lane followed by Vehicle 2 [Riggs]. Vehicle 1 swerved off roadway into median to avoid a collision up ahead. Vehicle 2 to avoid a collision followed Vehicle 1 into median and struck Vehicle 1 in rear with Vehicle 2's front... [Operators] 1 and 2 exchanged info and left scene then responded to Troop 9 to make a report. No final resting point determined. Operator 1 stated he saw a cloud of smoke, so he pulled into the median to avoid a collision, and felt a bump of Vehicle 2 hitting him. Operator 2 stated he saw a cloud of smoke, so he followed Vehicle 1 into the median to avoid a collision, but slid on the grass and struck Vehicle 1 from the rear.

Plaintiff did not realize he had been injured until he headed home from his interview with the police. At the arbitration hearing he testified, "As I kept coming home, I kept getting to the point of where I was hurting more all the way home. And when I got home, I just could not get out of the pickup."

On August 5, 1999, Plaintiff filed a Complaint against Riggs, The Estate of Donald Riggs, and Harleysville. Plaintiff claims that as a result of the negligence of Riggs and/or

the unknown, uninsured motorist, Plaintiff has suffered serious, permanent, and potentially ongoing bodily injuries. He further claims that he has experienced, and is likely to continue to experience, pain and suffering, medical expenses, and that he may sustain a loss of earning capacity in the future.

On February 16, 2001, Harleysville filed a Motion for Summary Judgment arguing that the record contains no proof demonstrating the existence of negligence on the part of a phantom vehicle. Plaintiff opposes Harleysville's Motion and asserts that the argument could be made that a proximate cause of the collision was a negligent act committed by an unknown driver traveling in front of Plaintiff and Riggs. Plaintiff argues that the cause of the accident is a question of fact to be determined by the jury. Riggs concurs with Plaintiff's Response to Harleysville's Motion for Summary Judgment.

The Court is now called upon to decide the merits of Harleysville's Motion for Summary Judgment.

DISCUSSION

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680 (1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. Where the moving party produces an

affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991), cert. den., 112 S. Ct. 1946 (1992); Celotex Corp. v. Catrett, supra. If however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. Ebersole v. Lowengrub, Del. Supr., 180 A.2d 467, 470 (1962).

I. Does there exist a material question of fact concerning the negligence of a phantom vehicle, or may the Court decide the issue as a matter of law?

Harleysville argues that Plaintiff's uninsured motorist claim is not supported by evidence of negligence on the part of a phantom vehicle. Furthermore, Harleysville contends that even if such negligence could be shown by Plaintiff, as a matter of law, it was not a proximate cause of the accident. Harleysville points out that although Plaintiff claims to have seen smoke, he did not observe the source of the smoke, nor did he observe a collision between any of the vehicles ahead of him. Plaintiff also stated he did not hear tires screeching or horns blowing. In his testimony at the arbitration hearing,

Plaintiff explained that he was stopped for fifteen or twenty seconds, and that the traffic ahead of him began to move prior to his being struck by Riggs. Harleysville argues that Plaintiff's observation of smoke from an unknown source does not create the presumption of negligence on the part of a phantom vehicle.

Plaintiff opposes Harleysville's Motion, and maintains that the argument could be made that a proximate cause of the collision was a negligent act committed by an unknown driver traveling in front of Plaintiff and Riggs. Plaintiff further argues that the cause of the accident is a question of fact to be determined by the jury.

Generally, questions of the existence of negligence are reserved for the trier of fact. Eustice v. Rupert, Del. Supr., 460 A.2d 507, 509 (1983). Furthermore, "questions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury for decision." Ebersole v. Lowengrub, Del. Supr., 180 A.2d 467, 468 (1962).

In order for Harleysville to prevail, it must produce "evidence of necessary certitude demonstrating that there is no genuine issue of fact relating to the question of negligence and that the proven facts preclude the conclusion of negligence on its part." Howard v. Food Fair Stores, Del. Supr., 201 A.2d 638, (1964). Plaintiff testified at the arbitration hearing that:

> All of a sudden, someone in front of me slammed on the brakes to the point where I saw smoke. I just pulled off to the left and went into the center of the median between the two highways, and I just say there.

And then all of a sudden, I looked. The light changed. The traffic started moving. And I happened to glance in my mirror to see how much traffic there was. I looked, and when I looked in my mirror, there come [sic] a white car. That was when I was hit.

Plaintiff further said that:

Q: [By Mr. Young] So you are figuring you were about 10 or 12 car lengths behind the traffic light?

A: [By Plaintiff] The traffic light was in front of me, yes.

Q: And it was the car immediately in front of you that had the smoking brakes --

A: No.

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Q: -- that had the smoking tires?

A: No.

Q: Where was that car?

A: I would say it was in the middle of the group of cars, because it was a Friday afternoon, August 8th, which there was an awful lot of traffic.

In this regard, the Court does not weigh evidence and does not judge credibility. Issues of negligence and proximate cause are primarily factual and are generally

inappropriate for summary judgment. Here, although a close question, a rational factfinder could determine that a phantom vehicle negligently caused an emergency situation leading to the accident between Plaintiff and Riggs. There is a material factual dispute regarding the manner and cause of the collision. Consequently, Harleysville's Motion for Summary Judgment is denied, and a jury must resolve the conflicts in evidence. See Baeckel v. Baldino, Del. Super., C.A. No. 97C-06-131-CHT, Toliver, J. (March 18, 1999) (ORDER), amended (March 31, 1999).

IT IS SO ORDERED.