SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
Resident Judge

SUSSEX COUNTY COURTHOUSE
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March 17, 2004

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Re: Sanchez v. Estate of Luciano Salem, et al.
C.A. No. 02C-08-002 (THG)

Dear Counsel:

Following the presentment of the Summary Judgment motion on December 29, 2003, I informed Mr. Boswell that I was strongly persuaded that granting Defendant Estate of Luciano Salem's Summary Judgment motion was appropriate. Nevertheless, I gave Abraham Ismael Sanchez-Caza's (Plaintiff's) counsel an additional opportunity to produce an expert witness, this extension being necessary because the discovery cutoff date had passed. No accident reconstruction expert has been retained. This is my decision granting the Summary Judgment motion.

This sad case involves an automobile accident which occurred on December 5, 2001. Susan Lloyd Whetstone was operating a motor vehicle on State Route 20 while under the influence of cocaine and alcohol. The police in Sussex County were already on the lookout for her vehicle as they had received three calls to SUSCOM concerning her reckless and aggressive driving.

At a point on State Route 20 where there is a long curve in the road, Ms. Whetstone attempted to pass three motor vehicles. As with most curves, there was a double yellow line indicating a no passing zone, which Ms. Whetstone ignored. Coming in the opposite direction was the vehicle in which the plaintiff was a passenger. Plaintiff was only a year old at the time, and was riding in a car seat in the back seat of the vehicle, a Toyota Camry. As Ms. Whetstone attempted to pass, she crashed head on into the Camry killing the driver Luciano Salem (Defendant) and Plaintiff's mother, Nancy Suarez, who was a passenger in the right front seat. Ms. Whetstone also was killed instantly.

The complaint alleges Ms. Whetstone was operating her vehicle recklessly and in violation of numerous rules of the road. The Plaintiff also alleges that Mr. Salem was also negligent. The allegations of negligence as to Mr. Salem are contained in paragraph nine of the complaint, namely:

> 9. This head-on motor vehicle collision was directly and proximately caused by the negligence of Luciano Salem, who failed to adequately slow or steer the motor vehicle in which the minor Plaintiff and his mother were traveling out of the way of the oncoming Whetstone vehicle, despite the availability of evasive actions, including, without limitation, driving onto the wide, improved asphalt shoulder to the right of the vehicle. Luciano Salem was negligent in that:
>
> (a) He failed to give full time and attention to the operation of his motor vehicle and failed to maintain a proper lookout while operating his vehicle, in violation of 21 *Del. C.* § 4176(b);
>
> (b) He operated his vehicle in a careless and imprudent manner without due regard for then existing road and traffic conditions, in violation of 21 *Del. C.* § 4176(a);
>
> (c) He operated his vehicle at a speed that was greater than reasonable and prudent under the then existing conditions and without having regard to the actual and potential hazards then existing, in violation of 21 *Del. C.* § 4168(a);

(d) He was negligent in that he failed to exercise and maintain proper control of his vehicle; and

(e) He was otherwise negligent in causing his vehicle to crash into Susan Lloyd Whetstone's vehicle.

Plaintiff offers no factual theory as to why Mr. Salem contributed to the causation of the accident, other than stating that Mr. Salem should have swerved out of the way or taken other evasive action to avoid the collision. Plaintiff states that it is possible that Mr. Salem was exceeding the speed limit of 50 miles per hour and that Mr. Salem *may have had* the last clear chance to avoid the accident, and was negligent in failing to do so. Plaintiff asserts that a reasonable person would have braked or moved onto the shoulder to avoid the accident. Plaintiff has not named any expert in accident reconstruction to testify as to Mr. Salem's opportunity to avoid the accident, despite the Court's giving him the opportunity to do so.

When considering a motion for summary judgment under Superior Court Civil Rule 56, the Court's function is to examine the record to determine whether genuine issues of material fact exist. *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.,* 312 A.2d 322, 325 (Del. Super. Ct. 1973). If, after viewing the record in a light most favorable to the non-moving party, the Court finds there are no genuine issues of material fact, summary judgment is appropriate. *Id.* The Court's decision must be based only on the record presented, including all pleadings, affidavits, depositions, admissions, and answers to interrogatories, not on what evidence is "potentially possible." *Rochester v. Katalan,* 320 A.2d 704 (Del. 1974). All reasonable inferences must be drawn in favor of the non-moving party. *Sweetman v. Strescon Indus.,* 389 A.2d 1319 (Del. Super. Ct. 1978). Summary judgment will not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances. *Ebersole v. Lowengrub,* 180 A.2d 467 (Del. 1962).

Rule 56(c) mandates the granting of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which

that party will bear the burden of proof at trial." *Manucci v. The Stop n'Shop Companies, Inc.*, 1989 Del. Super. LEXIS 191, at *10 (Del. Super. Ct. 1989); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). In addition, courts have held that "where the non-moving party bears the ultimate burden of proof on an issue at trial, the moving party may instead demonstrate that a complete failure of proof concerning an essential element renders all other facts immaterial." *Kanoy v. Crothall American, Inc.*, 1988 Del. Super. LEXIS 40 (Del. Super. Ct., 1988), *citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Handy v. American Reliance Insurance Company*,1987 Del. Super. LEXIS 1240 (Del. Super. Ct. 1987); *Steffen v. Colt Industries Operating Corporation*, 1987 Del. Super. LEXIS 1042 (Del. Super. Ct. 1987). In this case, for Plaintiff to survive Defendant's motion for summary judgment, he is "required to adequately establish all the elements essential to [his] case that [he] would have the burden of proving at trial." *Rayfield v. Power*, 2003 Del. LEXIS 586, at *2 (Del. 2003). Specifically, Plaintiff must prove by a preponderance of the evidence that Defendant's "action breached a duty of care in a way that proximately caused injury to the plaintiff." *Id.* at *2.

Generally, negligence cases are not susceptible to summary judgment. *Ebersole,* 180 A.2d at 469; *Orsini v. K-Mart*, 1997 Del. Super. LEXIS 80, at *5 (Del. Super. Ct. 1997). However, if Plaintiff cannot prove the essential elements of his case against Defendant, then summary judgment is appropriate.

Ms. Whetstone's erratic driving for miles during the period before the accident generated numerous calls to the police. The autopsy/toxicology report evidences she was intoxicated and under the influence of cocaine. Ms. Whetstone attempted to pass several cars in a no-passing zone. Disregarding the double yellow line, the curve in the road, and the oncoming traffic, Ms. Whetstone still attempted to pass. None of the witnesses who were occupants of the vehicles Ms. Whetstone was passing provided statements to support a finding that Mr. Salem acted negligently. Moreover, two witnesses stated in the police report that Mr. Salem appeared to swerve before the impact. Lastly,

following their investigation, the police concluded the Mr. Salem was not a contributing factor as to the accident's causation.

Negligence cannot be inferred on Mr. Salem's part from these facts. In fact, the only common sense inference is that Mr. Salem, who was hit head-on by a drunk driver attempting to pass three vehicles on a curve, was the unfortunate victim of a horrible accident occasioned by the reckless indifference of Ms. Whetstone.

In response to this evidence, Plaintiff argues that it is up to the jury to decide if Mr. Salem could have avoided the head-on collision. Plaintiff's argument is reduced to the following: Mr. Salem's vehicle did not get off the highway, brake or swerve out of the way; therefore, Mr. Salem was negligent. This argument is equivalent to arguing that since the accident occurred, that is proof Defendant was negligent.

Since Plaintiff was unable to make his case with the evidence on the record, the Court allowed Plaintiff the opportunity to obtain an accident reconstruction expert who might help develop inferences of negligence on Defendant's part. In the past, parties have used experts to provide relevant, reliable and helpful testimony in negligence cases when the facts themselves cannot be adequately presented to the jury or when the testimony will assist the jury in understanding or determining a fact at issue. *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. Ct. 2000); DEL. R. EVID. 702. *See Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 246 (Del. 1961). The courts regularly have allowed and encouraged the use of experts in accident reconstruction to testify about motor vehicle collisions. In Delaware, accident reconstruction expert witnesses have testified regarding traveling speed, failure to exercise due care, force of impact, position of vehicles prior to an accident, and the lack of evasive action due to a lack of skidmarks. *Hammond v. State*, 569 A.2d 81 (Del. 1989); *Barnes v. Toppin*, 482 A.2d 749 (Del. 1984); *State v. Drake R. McN.*, 1986 Del. Super. LEXIS 1183 (Del. Super. Ct. 1983); *Cox v. Turner*, 1994 Del.

Super. LEXIS 212 (Del. Super. Ct. 1994); *Dixon v. Reid*, 1991 Del. Super. LEXIS 270 (Del. Super. Ct., 1991).

There is no evidence of negligence. Plaintiff, apparently desiring to keep Mr. Salem's liability insurance in play, argues that the jury must decide if Mr. Salem could have avoided the head-on collision. However, with what is present, the jury would be guessing that Mr. Salem was somehow responsible. Because Plaintiff cannot establish Mr. Salem contributed, in any manner, to the accident, the Court must grant summary judgment against him.

Although not argued, the Court notes that under the facts, Mr. Salem's Estate would be entitled to the presumption of due care. That presumption states that a deceased party would have exercised due care for his own safety. That presumption may not be applicable in the face of evidence rebutting due care, but that is not the situation in this case. *Staats ex. rel. Staats v. Lawrence*, 576 A.2d 663 (Del. Super. Ct., 1990), *aff'd*, 582 A.2d 936 (Del. 1990).

Finally, the Court restates its position as to why it is placing significant weight in this case on the need for an accident reconstruction expert. What Mr. Salem could have seen, the time he had to react and whether or not anyone could have done anything to have gotten out of the way are all critical factors in Plaintiff's case in chief. Under the facts of this case, without an expert, the jury is left with guess work. Plaintiff declined to get an expert opinion to be able to establish that Mr. Salem had the opportunity to get out of the way, but did not.

Therefore, for the reasons stated above, Summary Judgment is granted and the Estate of Luciano Salem is dismissed from this litigation with prejudice.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

jfg

oc: Prothonotary