ORIGINAL

SUPREME COURT
STATE OF NEW YORK COUNTY OF SARATOGA

JAMES H. LAMBERT and RAYDEAN LAMBERT,

Plaintiffs,

- against -

DECISION and ORDER
RJI # 45-1-2013-0222
Index #2011-1262

TIMOTHY J. GRENNON,

Defendant.

APPEARANCES:

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ANN C. CROWELL, J

The plaintiffs, James H. Lambert and Raydean Lambert, request an Order pursuant to CPLR 3212 granting partial summary judgment on the grounds that the defendant, Timothy J. Grennon, is liable as a matter of law for plaintiff James H. Lambert's (hereinafter "plaintiff") injuries. Defendant opposes the motion and has cross-moved for an Order pursuant to CPLR 3212 dismissing plaintiffs' complaint arguing that defendant was not negligent and plaintiff caused his own injuries through his own negligence when he intentionally crashed his motorcycle.

This action arises out of a motor vehicle accident that occurred on the morning of June 2, 2010, in the town of Ballston. Plaintiff was traveling alone on his motorcycle eastbound on NYS Route 67 just west of the intersection with Eastline Road. The portion of Route 67 in question has a single lane of traffic in each direction. Defendant was operating a pick-up truck that was towing a fourteen (14) foot "dump box" trailer, resulting in 33.5 feet of vehicle. Defendant was exiting a Stewart's convenience store ("Stewarts") parking lot on the south side of Route 67 when he entered the eastbound lane of Route 67 and took a right hand turn immediately in front of plaintiff.

Defendant admitted, at his examination before trial, that he did not see plaintiff prior to entering Route 67. After entering Route 67, defendant heard "a horrific scratch." Upon investigation, he saw plaintiff lying in the street and the motorcycle "sliding by." When defendant entered plaintiff's lane of travel, plaintiff took evasive action by laying down his motorcycle. The two vehicles never collided. Plaintiff allegedly sustained serious injuries when he laid down his motorcycle. This motion relates only to liability for the event.

In order to succeed in a summary judgment motion, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment" in its favor, CPLR 3212 (b). To prevail on the motion, the movant must offer evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Manufactures,* 46 NY2d 1065 [1979]. If the movant establishes its right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof the existence of genuine issues of fact. *Zuckerman v City of New York,* 49 NY 2d 557 [1980]. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment. *See Blake v Gardino,* 35 AD2d 1022 [3d Dept 1970].

"Generally, whether a driver acted reasonably in the face of an emergency situation is a question to be decided by the trier of fact. Summary resolution is possible, however, when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue." *Smith v Brennan*, 245 AD2d 596, 597 [3d Dept 1997]. An emergency situation is considered a sudden and unforeseen occurrence not of one's own making. *See Davis v Pimm*, 228 AD2d 885 [3d Dept 1996].

In support of his motion, plaintiff submits his own deposition transcript, defendant's deposition transcript, and the affidavits of an accident reconstruction expert, Bradford R.T. Silver. The essential facts of the accident are not controverted by these witnesses. Plaintiff stated at his deposition that he was traveling on Route 67 east and was stopped behind numerous cars at a traffic light. His location at that time was several car lengths before the driveway to Stewarts, which was located on the right side of the road in front of him. Upon the light turning green, the vehicle traveling eastbound in front of plaintiff ("turning vehicle") turned right into the Stewart's driveway. Plaintiff continued east on Route 67 at approximately 10-15 m.p.h. when defendant suddenly accelerated his vehicle from the Stewart's driveway into the roadway immediately in front of him, failing to yield to the right-of-way. Vehicle and Traffic Law §1143 states:

> The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.

A driver who has the right-of-way is entitled to anticipate that the other vehicles will obey the traffic law requiring him or her to yield. *Hazelton v Brown*, 248 AD2d 871, 873 [3d Dept 1998]; *Matt v Tricil Inc.*, at 811.

Plaintiff's expert, Mr. Silver, estimated - based upon plaintiff's testimony, the distance he traveled from his stopped position prior to the crash, and the minimal damage to plaintiff's motorcycle - that defendant's vehicle was traveling no more than 10-15 m.p.h. He further estimated that plaintiff was 43 feet away when he first saw defendant enter the roadway. This equates to plaintiff having about 1.9 seconds to cover the 43 feet. This was the amount of time plaintiff had to react and avoid colliding with defendant's vehicle. Mr. Silver further opines that 1.1 seconds of the available time was spent by plaintiff perceiving the danger before his body could physically respond to it. Incorporating this period, often referred to as driver reaction time, left plaintiff with approximately .77 seconds and 17 feet of roadway in which to avoid a collision with defendant. Plaintiff made a decision and took what he believed was the best evasive action. He avoided colliding with the defendant's truck or any other vehicle by laying his motorcycle down.

The above proof demonstrates that plaintiff was faced with an emergency situation caused by defendant's wrongful entry into plaintiff's travel lane. *Jordan v Nazi,* 2010 WL 2802030. In *Jordan v Nazi,* the Court determined a motorcyclist was faced with an emergency situation under similar facts to those here. In that case, defendant wrongfully entered into the plaintiff motorcyclist's travel lane and the motorcyclist - who was traveling within the speed limit, had the right of way, and seconds to react - tipped and skidded in his successful effort to avoid a collision between the two vehicles.

Here, plaintiff also demonstrated that his reaction to the emergency situation was reasonable. Plaintiff testified that just prior to the accident, upon seeing defendant enter the roadway, he unsuccessfully attempted to make eye contact with defendant. Defendant's vehicle proceeded straight out into the 12-foot-wide roadway in front of him, closing off other

avenues of escape. Plaintiff testified he was unable to swerve in either direction to avoid colliding with defendant. There was oncoming traffic to the left of his lane and defendant's extended trailer in Stewart's driveway to the right. Plaintiff applied his front brake and leaned the vehicle to the left, thereby laying his motorcycle down. In plaintiff's opinion, this was the only way to avoid colliding directly with defendant's vehicle. He made a split second decision that applying both brakes and continuing in a forward direction had a greater risk of colliding with defendant, which he avoided by laying his motorcycle down. Mr. Silver determined that plaintiff's response to the emergency situation was reasonable in light of the distances, speeds and driver reaction time involved.

In opposition, defendant offered the affidavits of accident reconstruction expert, Peter Scalia, setting forth the results of his investigation, as well as his conclusion that plaintiff's collision was avoidable. He opines that traveling at 15 m.p.h. plaintiff required a distance of 10 feet and less than a second to stop his motorcycle had he applied both brakes in lieu of laying the motorcycle down. His analysis fails to take into consideration driver reaction time to perceive the danger prior to any physical reaction to it. Mr. Scalia alternatively asserts that plaintiff was traveling at 30 m.p.h., and should have been able to stop in the 43 feet that was estimated between his motorcycle and the defendant's truck. Taking judicial notice that a vehicle traveling at 60 m.p.h. covers 88 feet per second, therefore, at 30 m.p.h. a vehicle covers 44 feet per second. Mr. Scalia's analysis appears flawed. He simply ignores driver reaction time and the nature of the emergency situation faced by the plaintiff and the analysis of time and distance.

Mr. Scalia also speculates - without admissible evidence in support thereof - that defendant did not see plaintiff's motorcycle because plaintiff was traveling too close behind

the turning vehicle and that plaintiff may have attempted to pass the turning vehicle on the left prior to the turning vehicle exiting the eastbound lane. Mr. Scalia speculates further that had plaintiff waited behind the turning vehicle before accelerating forward, defendant would have been able to see him.

An affidavit that is speculative and conclusory in nature and does not constitute evidence in admissible form sufficient to defeat a summary judgment motion. *Roman v Vargas*, 182 AD2d 543 [3d Dept 1992], citing *Zuckerman v City of New York* at 560, 562. "Speculation regarding evasive action that a [plaintiff] 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." *Jordan v Nazi*, 2010 WL 2802030, *citing Cancellaro v Shults*, 68 AD3d 1234 [3d Dept 2009]. A driver with the right-of-way who has only seconds to react to a vehicle that fails to yield is not comparatively negligent for failing to avoid the collision. *See Yelder v Walters*, 64 AD3d 762 [2nd Dept 2009].

On this record, defendant raised no issue of fact regarding the reasonableness of plaintiff's evasive actions. The defendant's expert's credibility is undermined by his failure to acknowledge the defendant's clear violation of plaintiff's right of way and the emergency it creates and ignoring the calculation for driver reaction time. Furthermore, the 10 foot stopping distance opined is without basis in the absence of an analysis of the mass of the motorcycle, the coefficient of friction of the road surface and braking ability of the brakes on plaintiff's motorcycle. These omissions make the defendant's expert's opinion that plaintiff's own actions were the sole proximate cause of the accident unacceptable.

Defendant did not dispute that he failed to yield to plaintiff's right-of-way. Regardless of either expert's opinion, they both agreed that defendant had less than 1.9 seconds to react.

This did not leave adequate time for plaintiff to take successful evasive action. *See Groboski v Godfroy* IV, 74 AD3d 1524 [3d Dept 2010]; Wilke *v. Price*, 221 A.D.2d 846, 847 [3d Dept 1995]. These facts undercut any theory upon which any wrongdoing on plaintiff's part can be found. Defendant's negligence in failing to yield to the right-of-way was the sole proximate cause of the accident, without any comparative negligence on plaintiff's part. *See Matt v Tricil (N.Y.) Inc.*, 260 AD2d 811, 812 [3d Dept 1999].

Based upon the foregoing, the plaintiffs, James H. Lambert and Raydean Lambert, are granted summary judgment on the issue of liability against the defendant, Timothy J. Grennon. Defendant's cross-motion is denied.

Any relief not specifically granted is denied. This decision shall constitute the Order of the Court. No costs are awarded to any party. The original Decision and Order shall be forwarded to the attorney for plaintiff for filing and entry. The underlying papers will be filed by the Court.

Dated: May 13, 2013
Ballston Spa, New York

Ann C. Crowell
ANN C. CROWELL, J.S.C.

Papers Received and Considered:

Notice of Motion for Summary Judgment, dated February 8, 2013

Affirmation of James A. Fauci, Esq., dated February 4, 2013, with Exhibits A-F

Memorandum of Law, dated February 4, 2012

Affidavit of Bradford R. T. Silver, sworn to January 26, 2013

Notice of Cross-Motion, dated February 20, 2013

Affidavit Rodger P. Doyle, Jr., Esq., dated February 20, 2012, with Exhibits A-E

Affidavit of Peter Scalia, sworn to February 19, 2013