SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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SHIRLEY MILLER, by YEHUDA MILLER and MALKA MILLER, Guardians of the Person and Property of SHIRLEY MILLER Pursuant to the Laws of the State of Israel,

Plaintiffs, Decision and order

- against - Index No. 11358/09

HENRY F. LEWIS, DUANE READE SHAREHOLDERS, LLC, DUANE READE INC., & DUANE READE GENERAL PARTNERSHIP,

Defendants, June 12, 2013

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue portions of two prior decisions. Specifically, the plaintiff seeks to reargue a decision which permitted the introduction of evidence that the plaintiff may have been talking on her cell phone at the time of the accident (see, Miller ex rel. Miller v. Lewis, _Misc2d_, 963 NYS2d 837 [2013]). Further, the plaintiff seeks to reargue the portion of a decision which prohibited the introduction of evidence concerning allegations of fabrication on the part of the defendants (see, Miller ex rel. Miller v. Lewis, _Misc2d_, 963 NYS2d 533 [2013]). The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior decisions, on December 19, 2008 the plaintiff Shirley Miller was hit by a truck driven by defendant

Henry Lewis at the intersection of Ninth Avenue and West 48th Street in New York County. The court permitted the introduction of evidence that the plaintiff may have been talking on her cell phone at the time of the collision to allow an inference of negligence. However, the could excluded any evidence offered to demonstrate that Duane Reade employees arrived at the scene and together with Mr. Lewis fabricated how the accident happened. The plaintiff argues that first, the cell phone decision is improper since it requires the jury to impose an inference upon an inference. Thus, the jury must first infer the plaintiff was talking on her cell phone when the accident occurred and then must further infer that such cell phone activity caused her to be inattentive and hence negligent. The plaintiff further argues that the court's allowances of circumstantial evidence to support plaintiff's possible negligence is inconsistent with the refusal to permit circumstantial evidence to prove fabrication, especially since the evidence of such fabrication, it is argued, is far more compelling. The defendants oppose both motions arguing that first successive inferences are permissible, therefore a jury could infer both cell phone use and then negligence. Second, they argue the court was correct in excluding any evidence of fabrication since it is purely speculative and not supported by any evidence at all.

Conclusions of Law

In Justice v. Lang, 52 NY 323, 7 Sickles 323 [1873] the Court of Appeals explained that "presumptive evidence and the presumptions or proofs to which it gives rise are not indebted for their probative force to any rules of positive law; but juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such inferences are presumptions of fact (id). Thus, an inference permits a jury to infer a fact and draw a conclusion from facts already established (Martin v. City of Albany, 42 NY2d 13, 396 NYS2d 612 [1977]).[1] Therefore, if a particular fact has been presented, the jury may draw any reasonable conclusion that flows from the first fact.

In this case, it is undisputed that Ms. Miller was speaking on her cell phone shortly before the accident. That 'fact' based upon the precedents and reasoning elaborated upon in the prior

[1] Notwithstanding the quoted language in Justice v. Lang (supra) in these contexts a presumption is generally defined as a set of facts which compel a further conclusion that may be rebutted by the opposing party. An inference on the other hand is defined as a set of facts which permit a jury to reach a conclusion regarding those facts (Kilburn v. Bush, 223 AD2d 110, 646 NYS2d 429 [4th Dept., 1996]). Indeed, inferences are sometimes referred to as permissive presumptions (see, New York Evidence Handbook 2d Edition, Martin, Capra and Rossi, Section §3.1, Footnote 13).

decision permits the inference that she remained speaking on the cell phone at the moment of impact. The inference is reasonable, close in time to the established 'fact' and a logical application and extension of the established fact. Of course, that inference, in isolation is not probative of any material issue relevant to the case. Rather, a further inference must be employed by the jury to then infer or conclude that such cell phone use was negligent and contributed to the accident. The plaintiff argues the further inference is improper.

It is true that there are older cases that prohibit the introduction of 'inferences on inferences'. For example, in Lamb v. Union Ry. Co. Of New York City, 195 NY 260, 88 NE 371 [1909] an individual, Lamb, was killed when hit by defendant's trolley. There were no witnesses to the accident although a passenger testified she heard the motorman "holler" and apply the brake just before the accident. The question at trial was whether any inferences could be drawn whether or not Lamb was contributorily negligent. The court noted that for the jury to conclude Lamb was not negligent it would be necessary to establish that the decedent was unaware trolleys drove on the tracks where he had obviously been walking, that he had been walking away from the trolley, did not see it coming and did not commit suicide. The court concluded it would be "peculiar, unnatural and inexplicable" to conclude, based on those necessary inferences, that the decedent committed no

negligence. The court explained that inferences cannot be based upon inferences, rather "every inference must stand upon some clear, direct evidence, and not upon some other inference or presumption" (id). The court further explained that the inference decedent did not see the trolley was based upon an inference that he was facing south. However, there was no evidence underlying any of these inferences.

Thus, the oft-cited refrain prohibiting inferences upon inferences is limited to cases where each inference seeks to bolster the other where none of them are grounded in any substantive facts. Again, in McCabe v. Queensboro Farm Products Inc., 21 AD2d 675, 250 NYS2d 91 [2d Dept., 1964] the court addressed the issue. In that case the plaintiff was injured when he was hit by a piece of scrap wood while working on a scaffold near a roof. The plaintiff sued the roofer alleging the roofer had negligently left the scrap wood there and high winds blew it off striking plaintiff who fell off the scaffold. The court dismissed the lawsuit finding there was no evidence the scrap wood originated from the roof and that even if it did there was no evidence it was the responsibility of the roofer who had already left the job site. Further, there was no evidence the winds caused the wood to strike the plaintiff and indeed there was evidence plaintiff fell off the scaffold because he lost his balance. Thus, liability could only attach to the roofer if each inference, based upon every other

inference, interlocked to form a coherent set of facts. However, that is precisely the impermissible "rationalization of inference upon inference" (id) which cannot be countenanced.

However, where the underlying groundwork from which further inferences flow is an established fact then there is no impediment to permitting inferences upon inferences. As stated by Wigmore: "it was once suggested that an inference upon an inference will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, and this suggestion has been repeated by several courts and sometimes actually has been enforced. There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder the defendant's gun is found discharged. From this we infer that he discharged it, and from this we infer that it was his bullet that struck and killed the deceased. Or the defendant is shown to have been sharpening a knife. From this we argue that he had a design to use it upon the deceased, and from this we argue that the fatal stab was the result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials proceed upon such data" (John Henry Wigmore, Evidence in Trials at Common Law §41 at 1106-11 (Peter Tillers rev. ed., 1983).

Therefore, since it is undisputed that Ms. Miller had been talking on her cell phone prior to the accident, the further inferences that she continued to do so and was possibly negligent as a result are reasonable conclusions that may be drawn.

The above analysis is precisely the reason any evidence of fabrication cannot be admitted as evidence. There is no underlying established fact from which any reasonable inferences may be drawn. It is true that the driver Henry Lewis continued to drive down the block after the accident, did not call 911 and managed to call Duane Reade, however, there are no facts presented that form a starting point where further inferences may follow. The plaintiff argues the fact Duane Reade personnel arrived at the scene and spoke with Lewis before the police and now present a version of the accident that materially differs from Lewis demonstrates circumstantial evidence of fabrication. First, as noted in the prior decision, there is no evidence that Lewis ever engaged in any fabrication. Lewis has always maintained the accident took place in the way he first told the police shortly after the accident. Thus, his persistent consistency surely does not demonstrate any evidence of fabrication. The plaintiff argues that Lewis only presented that version to the police after speaking with Duane Reade supervisors and therefore "had an opportunity to come up with a version of the accident that favored Duane Reade" (Plaintiff's Motion to reargue, page 7). However, that argument is undermined

by the very fact Duane Reade no longer adopts that version of the happening of the accident. It is pure speculation to argue that Duane Reade first influenced Lewis to fabricate how the accident happened only to abandon it later, leaving Lewis to remain stuck with such fabrication. The trial strategy of defendants concerning these inconsistent positions has already been addressed in the prior decisions. In any event, it is clear that there are no facts from which any inferences concerning fabrication may be presented. Consequently, based on the foregoing, the motions seeking reargument are denied.

A few remaining issues must now be addressed. The court held that there was no direct evidence that Ms. Miller was talking on her cell phone at the time of the accident. Thus, the argument contained in defendant's opposition papers (page 11) that "all of these pieces of direct...evidence provide...the conclusion that Ms. Miller was on her phone" can only refer to the undisputed facts such as the size of the truck and the location of the accident. Further, the defendant noted that a 'human factors expert' will be expected to testify "that Ms. Miller was engrossed in something-using her cell phone-that prevented her from paying attention..." (id). The court invites the parties to present arguments, in briefs and orally, concerning the appropriateness of calling an expert witness to bolster what has been deemed circumstantial evidence. The parties may contact chambers to discuss a briefing

schedule and/or a conference to further explore the matter. In addition, at any conference or in conjunction with oral arguments mentioned above, the court seeks a witness list from both parties with a brief explanation concerning the nature of the expected testimony of each witness. Lastly, the remaining motions concerning the introduction of photographs of the plaintiff and the motion regarding cumulative testimony (and the motion to preclude testimony of Malka Miller, if relevant) will be addressed.

So ordered.

ENTER:

DATED: June 12, 2013
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC