Iacone v Passanisi
2013 NY Slip Op 34156(U)
September 11, 2013
Supreme Court, Nassau County
Docket Number: 1993/09
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

NICOLLETTE ANN IACONE, by her Co-Guardians NICHOLAS J. IACONE and LORIANN IACONE and NICHOLAS J. IACONE and LORIANN IACONE, Individually,

Plaintiff(s),

-against-

SAL PASSANISI, JR., COUNTY OF NASSAU, MICHAEL PICCOLI, THOMAS PICCOLI, ANTHONY GRASSI, GERALYN GRASSI and GRACE KOTTER,

Defendant(s).

Index No. 1993/09

Motion Submitted: 7/12/13
Motion Sequence: 009

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....XXX
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Plaintiff moves this Court by motion *in limine* for an Order precluding the defendants from offering into evidence any testimony or evidence related to an alcoholic substance being found in plaintiff's purse, beer bottles found in the rear of plaintiff's vehicle, observations by members of the Nassau County Police Department or other witnesses related to alcohol on plaintiff's breath, and redacting entries indicating "a 'positive alcohol level'" contained in plaintiff's medical records. Defendants oppose the requested relief.

The accident giving rise to this action occurred on September 8, 2007, at approximately 9:16 p.m. Mr. Passanisi was operating his vehicle on Oceanside Road, and

Ms. Iacone was operating her vehicle on Erwin Place. When the two vehicles entered the T-intersection of those two roads, Mr. Passanisi's vehicle came into contact with Ms. Iacone's vehicle. As a result of this accident, plaintiff Nicollette Ann Iacone sustained numerous and severe bodily injuries, including to her brain.

Passanisi ultimately pled guilty to driving while under the influence of alcohol and to vehicular assault in the 2nd degree, a class E felony, for which crimes he has been sentenced.

Based upon plaintiff's submissions, it is undisputed that, approximately 9:19 p.m., Nassau County Police (NCPD) officers responded to the scene of the subject accident. Among other things, one of the officers observed that plaintiff was unconscious behind the wheel of the car she had been operating, and he detected a strong odor of an alcoholic beverage on plaintiffs's breath. It is apparently further undisputed that another officer recovered a bottle of alcohol from plaintiff's purse, and that Budweiser beer bottles were observed on the floor and rear seat of plaintiff's vehicle. Plaintiff was transported by ambulance to South Nassau Communities Hospital, and her blood was drawn at approximately 10:40 p.m. by hospital personnel. The NCPD performed its own blood draw at approximately 11:35 p.m.

The hospital records submitted by plaintiff reveal a "3* MG/DL" result for an "E-ALCO-Plasma" test. Other test results contained in the same exhibit (F) are not followed by an asterisk, but there is no explanation key provided for the asterisk following the numeral 3.

The NCPD blood results taken more than two hours after the accident failed to reveal the presence of ethanol. Plaintiff had been charged on the date of the accident with driving while intoxicated, but that charge was later dismissed on December 10, 2007, and the records were sealed.

Although not specifically addressed by the parties, it is well recognized that "the mere fact of arrest has no probative value and is inadmissible in a civil action involving the same facts" (***Franco v. Zingarelli***, 72 AD2d 211, 216 [1st Dept 1980]), especially in view of the fact that, in this case, the criminal proceeding against plaintiff was dismissed and the records were sealed. Accordingly, defendants are precluded from offering any evidence or testimony about the fact that plaintiff was arrested and charged with driving while intoxicated as a result of the subject accident.

Defendants' answers assert defenses of comparative negligence on the part of

plaintiff, and the County's bill of particulars alleges, in sum and substance, that plaintiff was under the influence of alcohol at the time of the accident, which impaired her judgment and ability to perceive her environment and/or make necessary observations that would have avoided the accident and alleged injury.

Aside from the portion of the medical records supplied by plaintiff, which are discussed above, plaintiff relies in large part upon the report of Susan M. Corcoran, M.D. dated February 11, 2008. It appears that Dr. Corcoran performed a review of the medical file concerning plaintiff, including a "police accident report dated September 8, 2007," and an "emergency department record from South Nassau Community Hospital dated September 8, 2007." The Court does not know whether Exhibit K also submitted by plaintiff is the same police report reviewed by Dr. Corcoran, and clearly, the Court has not been supplied with the entirety of the hospital records listed as having been reviewed by Dr. Corcoran.

Dr. Corcoran's report reiterates that the E-alco level drawn at 10:40 p.m. on September 8, 2007 is reported as 3 mg/dL. Dr. Corcoran states that she was "being asked to comment on whether the [plaintiff] was intoxicated at the time of the accident and whether she was over the legal limit."

Were this the issue presented, Dr. Corcoran's report would be relevant to the determination of this instant motion *in limine*; however, it has already been established by the dismissal of the criminal proceeding that plaintiff was not "intoxicated" or "over the legal limit" within the meaning of the Vehicle and Traffic Law.

Moreover, Dr. Corcoran's conclusion that the 3 mg/dL result "is *essentially* a negative alcohol level," and that "[a]nything less than 10 is really *more or less* a negative value" (emphasis added) is equivocal. Dr. Corcoran appears to summarize some "reference material at North Shore/LIJ" in an attempt to support the aforementioned statements, but it is not known to what Dr. Corcoran is referring specifically. Furthermore, Dr. Corcoran discusses, without setting forth any basis in fact or experience, her opinion concerning the general rate at which alcohol levels drop over time, and the difference between the "Police Department" alcohol level measurement system versus various hospital reporting systems. Dr. Corcoran does not specifically state in her report the meaning of the 3 ml/dL result obtained in the context of plaintiff's height, weight, body mass, and age at the time of the accident. Dr. Corcoran also fails to address the meaning, if any, of the asterisk marking accompanying the 3 ml/dL result.

For the aforementioned reasons, Dr. Corcoran's report is not determinative of the instant motion. In the end, plaintiff's submissions upon this motion alone establish that a

bottle of alcohol was found in plaintiff's purse, that beer bottles were found in her car, that she was observed by a NCPD officer to have a strong odor of an alcoholic beverage upon her breath, and that there were 3 mg/dL of alcohol in her blood approximately one and one-half (1 ½) hours after the happening of the accident.

Plaintiff's counsel's statements as to what evidence there is, or is not, with respect to alcohol consumption by plaintiff prior to the accident are not evidence. Moreover, plaintiff's reliance on ***Burkhard v. Sunset Cruises, Inc***. (191 AD2d 669 [2d Dept 1993]) is misplaced. In the context of a summary judgment motion, the Burkhard Court held that a factual determination of intoxication cannot be made solely on the basis of the odor of alcohol on someone's breath, and evidence as to how much alcohol a person has consumed.

Clearly, observations such as were made in this case by the responding police officers are often admissible at trial (*see generally* ***Fusco v Hobbes***, 16 AD3d 1031 [4th Dept 2005]; ***Ciserano v Sforza***, 130 AD2d 618 [2d Dept 1987]).

Without the benefit of any other evidence before this Court at this juncture, the instant motion *in limine*, is denied without prejudice to renewal before the trial court.

The foregoing constitutes the Order of this Court..

Dated: September 11, 2013
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
SEP 17 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE