

**Castelli v Olweiler**

2021 NY Slip Op 33232(U)

February 19, 2021

Supreme Court, Orange County

Docket Number: Index No. EF003798-2017

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
**ANA CASTELLI, SR. and ANA CASTELLI, JR.,**  
Plaintiff,

**DECISION AND ORDER**

**INDEX NO.: EF003798-2017**  
**Motion Date: 12/23/2020**  
Sequence No. 1

-against-

**RONALD H. OLWEILER and**  
**MERIT TRUCKING COMPANY, INC.,**  
Defendants.

-----X  
**SCIORTINO, J.**

The following papers numbered 1 to 15 were considered in connection with the application of plaintiffs for summary judgment on the issue of liability only:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Thonus)/Exhibits 1 - 11	1 - 13
Affirmation in Opposition(Cramer)	14
Affirmation in Reply (Thonus)	15

**Background and Procedural History**

This personal injury action arises out of a motor vehicle accident that took place on December 15, 2016, on Route 9 near its intersection with Church Street, Town of Fishkill, County of Dutchess. Plaintiff Anna Castelli, Sr. (Senior) was operating a vehicle which was struck by a tractor trailer owned by Penske Truck Leasing Company and operated by defendant Olweiler while in the course of his employment with defendant Merit Trucking Company, Inc. Plaintiff Ana Castelli, Jr. (Junior) was a passenger in the vehicle. Plaintiff commenced this action by filing a Summons and Complaint (Exhibit 1) on or about May 22, 2017. Defendants



interposed an answer on August 22, 2017. An Amended Answer with Counterclaims was filed on September 8, 2017. A reply to the Counterclaim was filed on September 15, 2017.

The Examination before Trial of plaintiff Ana Castell, Sr. was held on July 11, 2018. The Examination before Trial of plaintiff Ana Castelli Jr. was held on July 11, 2018. The Examination before Trial of defendant Ronald Olweiler was held on July 11, 2018. Note of Issue was filed on March 11, 2020.

Deposition of Ana Castelli, Sr. (Exhibit 9)

On December 15, 2016, at approximately 6:00 p.m., plaintiff Senior was traveling south on Route 9, a four lane highway, near an intersection with Church Street. Senior's vehicle approached a red light in the far right lane. Senior observed defendant's truck approaching in the lane to her left as she brought her vehicle to a stop in response to the red light. Senior's vehicle was stopped at the red light; defendant was to her left. The traffic light turned green and Senior observed the truck accelerate. Before she was able to proceed, her vehicle was struck by defendant's vehicle in the driver's side of her vehicle. Junior struck her head on the passenger window and lost consciousness. When the vehicles came to rest, a significant portion of defendant's vehicle came to rest in the plaintiffs' lane of travel.

Deposition of Ana Castelli, Jr. (Exhibit 10)

Plaintiff Junior was a passenger in the vehicle operated by her mother. While she remembered seeing the truck prior to the impact, she had no memory of the impact or the events immediately before the impact. She had no memory of whether the truck had activated turn signal prior to the impact.



Deposition of Ronald Olweiler (Exhibit 11)

Defendant Olweiler testified that, prior to the accident, he was traveling in the second from the right lane. There were vehicles in all lanes of travel; all came to a stop in response to a red light at the intersection. Olweiler, while in the process of slowing his vehicle for the red light, attempted to change lanes to when his vehicle struck plaintiffs' vehicle. Olweiler did not feel the impact, but heard a noise. Prior to the impact, Olweiler activated his turn signal and checked his mirrors before merging. However, he did not see plaintiffs' vehicle.

**Plaintiffs' Motion for Partial Summary Judgment**

By Notice of Motion filed on November 23,, 2020, plaintiffs move for summary judgment on the issue of liability. Plaintiffs claim entitlement to summary judgment on liability as their vehicle was stopped at a red light within their lane of travel, when defendant Olweiler changed lanes in violation of Vehicle & Traffic Law §1128. (McKinney's Veh. & Traffic Law §1128) Such actions, plaintiffs argue, constitute negligence *per se*. Plaintiffs argue that defendant Olweiler's testimony that he did not see plaintiff's vehicle is supported by defendant's statements contained in the certified Police Accident Report (Exhibit 8). Plaintiffs argue that they have demonstrated entitlement to summary judgment on the issue of liability, and defendant is unable to offer any a non-negligent explanation for the accident.

**Opposition**

In opposition to plaintiffs' motion, defendants argue that there are questions of fact with respect to whether Senior's operation of the motor vehicle caused or contributed to the subject accident. Olweiler testified that he was slowing down and had his turn signal on when merging into the right lane at the time the accident. Senior testified that she did not notice whether the



truck had its turn signal on. Junior testified that she had no memory as to whether their vehicle was stopped at the time of the accident, or whether the truck had her turn signal on.

Based on this testimony, defendants argue there are issues of fact as to whether plaintiffs' vehicle was stopped at the time of the accident, where plaintiffs' vehicle was prior to impact, and whether defendants had their turn signal on prior to impact.

### **Plaintiff's Reply**

In reply, plaintiffs argue that defendants have failed to raise a triable issue of fact precluding summary judgment on the issue of liability. With respect to the cause of the accident, plaintiffs' testimony is clear as to defendant's truck striking and dragging plaintiff's vehicle. The position of plaintiffs' vehicle is not in dispute. Whether plaintiffs' vehicle was stopped or moving immediately before impact is irrelevant. Defendant's speculation as to whether Olweiler's turn signal was activated immediately prior to the accident is similarly irrelevant.

### **Discussion**

For the reasons which follow, plaintiffs' motion is granted.

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court is obliged to draw all reasonable inferences in favor of the non-moving party.



(*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

A driver has a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid colliding with another vehicle. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield. (*Beres v. Terranera*, 153 Ad3d 483, 485 [2d Dept 2017]) Vehicle and Traffic Law §1128(a) provides, “A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.” (McKinney’s Veh. & Traffic Law §1128[a])

Plaintiffs established their entitlement to summary judgment on liability. The parties’ deposition testimony demonstrates that plaintiffs were in the right hand lane of travel at all times before the collision and were not engaged in any distracting behavior. Olweiler testified that, as he moved from his lane to the right hand lane, he collided with plaintiffs’ vehicle. Defendant Olweiler “had a duty not to enter a lane of moving traffic until it was safe to do so,” and his failure to do so constitutes negligence *per se*. (*Sanchez v. Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]; *see* Vehicle and Traffic law §1128[a])

Defendants’ opposition to plaintiffs’ motion fails to raise a triable issue of fact as to the comparative negligence on the part of plaintiffs. (*Guerrero v. Milla*, 135 AD3d 634 [1s Dept 2016])

### Conclusion

On the basis of the foregoing, it is

ORDERED that plaintiffs’ application for partial summary judgment on liability is

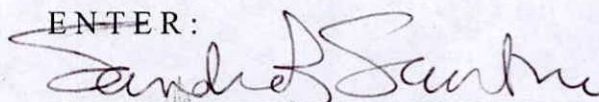


granted.

The parties shall appear for a virtual conference on May, 12 2021 at 9:15 a.m. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: February 19, 2021  
Goshen, New York

ENTER:  
  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*